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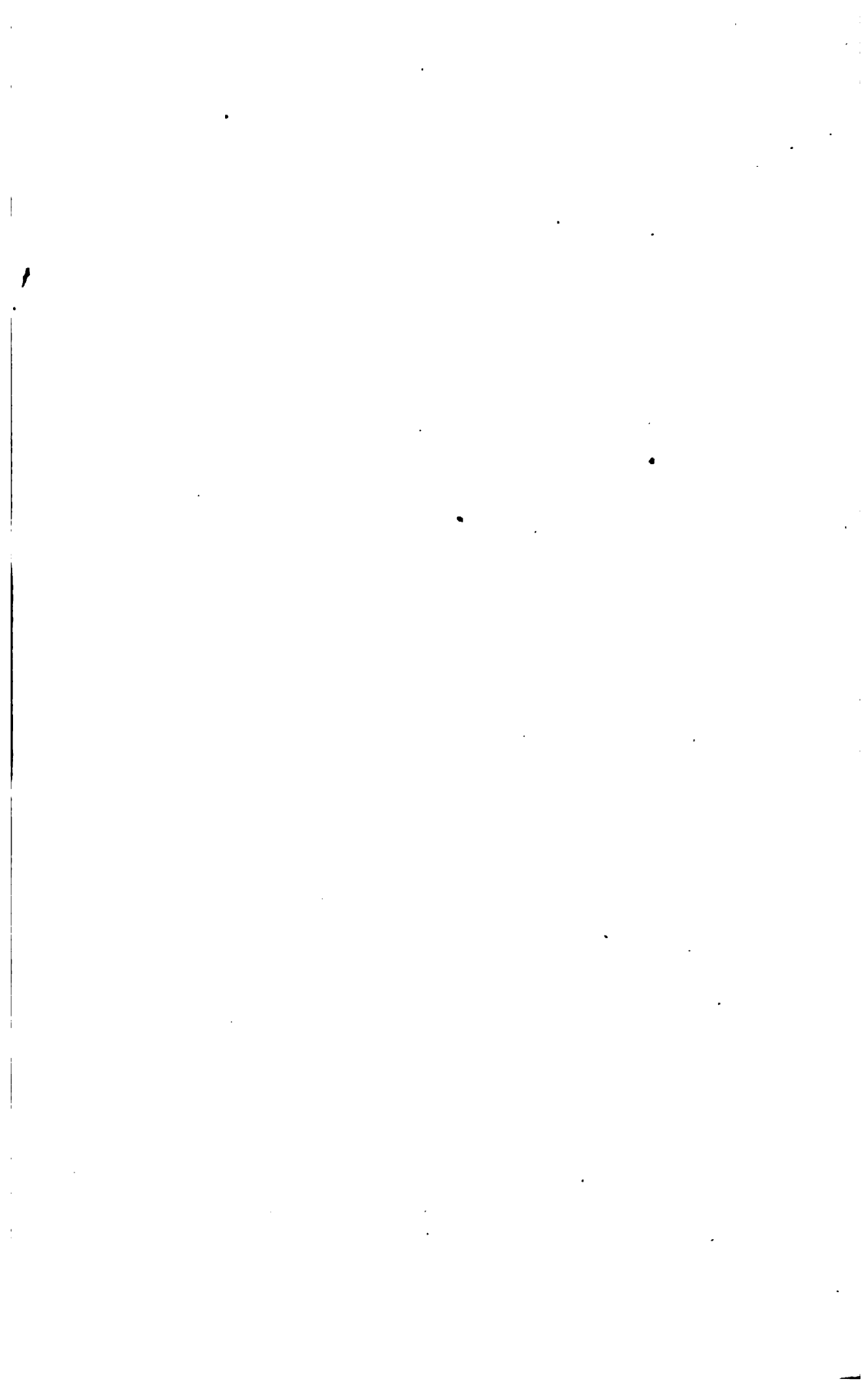


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LAWYERS'
REPORTS,
ANNOTATED.

BOOK XIII.

ALL CURRENT CASES

OF

GENERAL VALUE AND IMPORTANCE

DECIDED IN

THE UNITED STATES, STATE AND TERRITORIAL COURTS

WITH FULL ANNOTATION

BY

ROBERT DESTY, EDITOR.

BURDETT A. RICH AND HENRY P. FARNHAM,

REPORTERS,

**THE PUBLISHER'S EDITORIAL STAFF, AND THE SEVERAL REPORTERS
AND JUDGES OF EACH COURT, ASSISTING IN SELECTION.**

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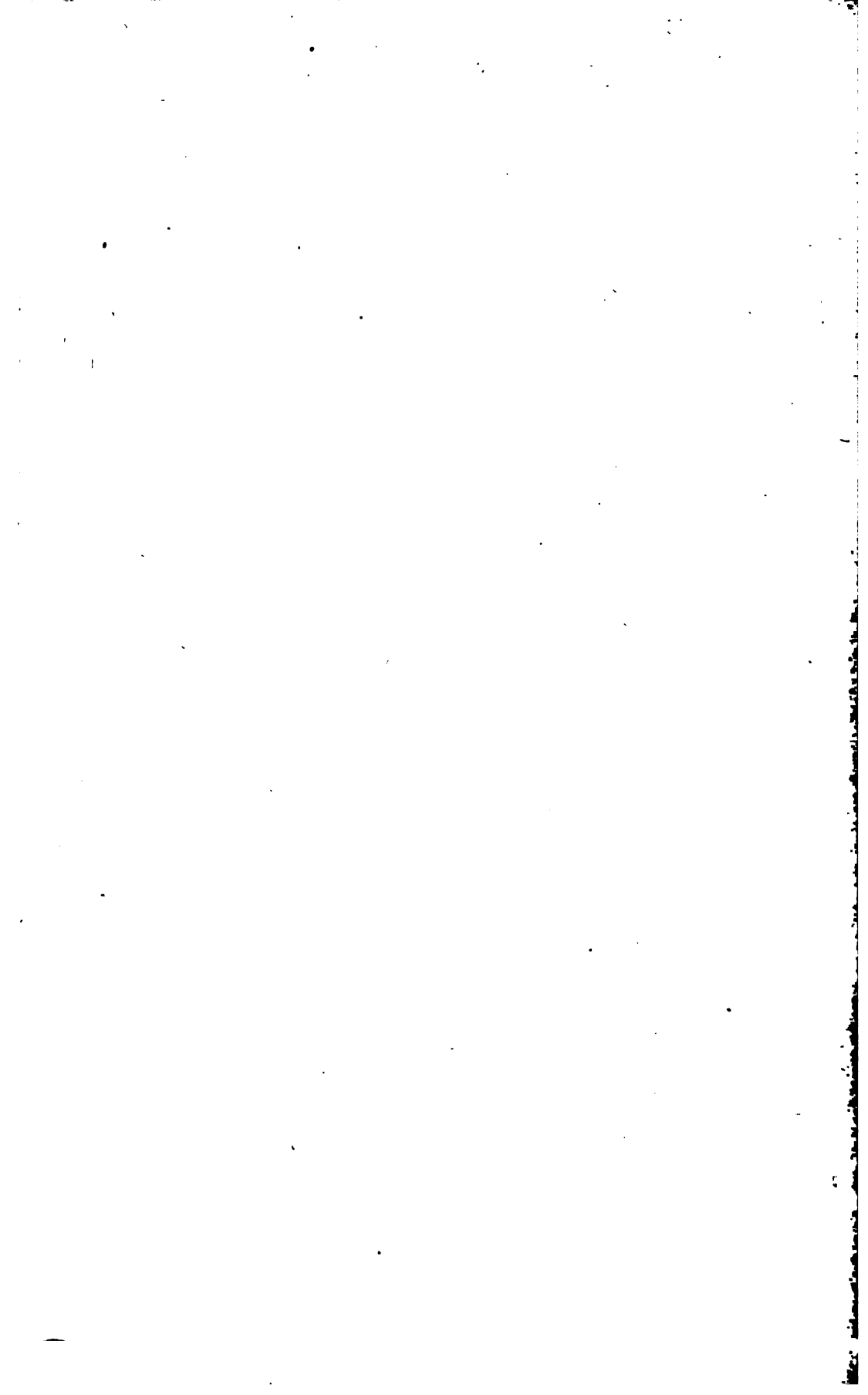
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LAWYERS' REPORTS,

ANNOTATED.

MAINE SUPREME JUDICIAL COURT.

George W. BENNETT

AMERICAN EXPRESS CO.

(...Me....)

1. **Seizure of property in the course of transportation** by an officer without any warrant or other legal process does not exonerate the carrier for non-delivery.
2. **Common carriers are not included** in the provision of Rev. Stat., chap. 30, § 12, imposing a penalty on "whoever . . . has in possession" between October 1 and January 1, more than the number therein specified of the carcasses of certain wild animals.
3. **A shipper's knowledge of directions to the carrier's agent** not to receive certain articles for transportation will not relieve the carrier from liability for their loss if their transportation is actually undertaken.

4. **The game laws of a State can give no authority to take carcasses of animals, or parts thereof, while in the course of interstate transportation, away from a common carrier on the ground that the animals have been killed in violation of such laws.**

(March 24, 1891.)

RESERVATION by the Supreme Judicial Court for Penobscot County for the opinion of the full court of an action brought to recover the value of the saddles of three deer alleged to have been lost while in defendant's possession for transportation. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. F. J. Whiting for plaintiff.

Messrs. Barker, Vose & Barker, for defendant:

NOTE.—Liability of the carrier for goods in transit.

If the goods are delivered at the usual place of receiving goods for shipment, and the fact of their delivery is brought home to the carrier or his duly authorized agents, there can be no question as to the responsibility accruing to the carrier as far as the end of his route, for he is bound to keep the goods safely after delivery to him for transportation, as well as to carry them safely. *Dale v. Hall*, 1 Wils. 281; *Clarke v. Needles*, 25 Pa. 388; *Southern Exp. Co. v. Newby*, 36 Ga. 635.

But if the property is received upon the premises of the carrier, to wait further instructions before transportation, his liability is that of a houseman only, until the instructions are received. *O'Neill v. New York Cent. & H. R. R. Co.* 60 N. Y. 138; *Baron v. Eldredge*, 100 Mass. 455; *Rogers v. Wheeler*, 52 N. Y. 232. And see *Gilbert v. New York Cent. & H. R. R. Co.* 4 Hun, 373, 6 Thomp. & C. 662.

If the deposit of the goods on the premises of the carrier is a mere accessory to the carriage, that is, if they are deposited solely for the purpose of being forwarded to their destination without further orders, the responsibility of the carrier begins from the time they were so received; but when the property is deposited subject to the further orders of the consignor, the rule is otherwise, as just stated. *Wade v. Wheeler*, 3 Lans. 201, affirmed, 47 N. Y. 668; *Ladue v. Griffith*, 25 N. Y. 364; *Chase v. Washburn*, 1 Ohio St. 244; *Maving v. Todd*, 1 Stark. 72; *Michigan, S. & N. J. R. Co. v. Shurtz*, 7 Mich. 515; *Blossom v. Griffin*, 13 N. Y. 509; *Hickox v. Naugatuck R. Co.* 31 Conn. 281; *Watts v. Boston & L. R. Corp.* 106 Mass. 466. See *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58.

Inquiry as to value.

It is the duty of the carrier to make inquiry as to the value of the goods delivered to him, and

the consignor must answer at his peril; and if such inquiry is not made, and the goods are received at such valuation for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is liable for the loss, irrespective of its value. *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90, 8 Jones & S. 434.

Fraud, imposition or unfair concealment as to the contents or value of the goods will relieve the carrier of responsibility. *Phillips v. Earle*, 8 Pick. 182; *Orange County Bank v. Brown*, 9 Wend. 118; *Warner v. Western Transp. Co.* 5 Robt. 490; *Relf v. Rapp*, 3 Watts & S. 21.

Burden of proof.

If property has been delivered to the carrier or his duly authorized agents, and it has not been delivered by him to the consignee, this is prima facie evidence of negligence and liability. *Whitesides v. Russell*, 8 Watts & S. 44; *Van Winkle v. South Carolina R. Co.* 38 Ga. 32; *Davidson v. Graham*, 2 Ohio St. 141; *Peck v. Weeks*, 34 Conn. 152; *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Hastings v. Pepper*, 11 Pick. 41.

It is frequently difficult to show the loss or damage done in order to fix the liability of the carrier (see *Ringgold v. Haven*, 1 Cal. 108; *Midland R. Co. v. Bromley*, 17 C. B. 378; *Woodbury v. Frink*, 14 Ill. 279), and the burden of proof is cast upon him to show that the loss resulted from such causes as will exempt him from responsibility. *Chapman v. New Orleans, J. & G. N. Co.* 21 La. Ann. 224; *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88; *Turney v. Wilson*, 7 Yerg. 340; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 283; *Ewart v. Street*, 2 Bail. L. 161; *King v. Shepherd*, 3 Story, C. C. 356; *Winne v. Illinois Cent. R. Co.* 31 Iowa, 563; *Hall v. Cheney*, 36 N. H. 27; *Agnew v. Steamer Contra Costa*, 27 Cal. 425; *Tarbox v. Eastern Steam.*

Animals *feræ naturæ* when legally killed by a person, are absolutely his own.

2 Bl. Com. p. 403.

The saddles of deer were sufficiently delivered to the American Express Company at Newport, for immediate transportation.

Angell, Carr. §§ 129-147; *Booth v. Driscoll*, 20 Conn. 584; *Spade v. Hudson River R. Co.* 16 Barb. 383; Redf. Carr. § 96, p. 80. See also § 100, p. 82, as to the delivery at an unusual place.

A delivery is always sufficient if the proper servant of the company accept the goods to carry, whether any bill or entry in the books of the company is made or not.

Redf. Carr. § 101, p. 82, and cases cited.

Common carriers are insurers of all property intrusted to them, except against an act of God or an enemy of the government.

Plaisted v. Boston & R. Steam Nav. Co. 27 Me. 132; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462.

The American Express Company did not restrict its liability, as no notice was brought home to the plaintiff, or was assented to by him.

Fillebrown v. Grand Trunk R. Co. supra; *Buckland v. Adams Exp. Co.* 97 Mass. 125.

Carriers are compelled to solve claimant's right at their peril.

Redf. Carr. § 244, p. 197.

Allen had no right or authority to seize the deer saddles as he had no warrant or other legal process.

Me. Const. art. 1, § 5; U. S. Const. art. 14, § 1; *Allen v. Jay*, 60 Me. 188; *State v. Doherty*, Id. 509.

The saddles were not in the possession of the American Express Company within the meaning of section 12, chap. 30, Rev. Stat.

Redf. Carr. § 308, p. 226, and cases cited.

Also such could not be the fact because it would be in violation of the Interstate Commerce Law.

U. S. Const. § 8, spec. 3.

Common carriers cannot select what they may carry or what they may refuse, but are bound to take all which offer.

Redf. Carr. § 100, p. 82; *Dwight v. Brewster*, 1 Pick. 50; *Pomeroy v. Donaldson*, 5 Mo. 36; *Hale v. New Jersey S. N. Co.* 15 Conn. 539; *Avinger v. South Carolina R. Co.* 29 S. C. 265.

When the box of deer saddles was taken by the defendant Company for transportation out of the State, and transportation began, they became subjects of commerce, and were governed by the laws of the United States.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715; *The "Daniel Ball"*, 77 U. S. 10 Wall. 557-565, 19 L. ed. 999-1002; *Pacific Coast S. Co. v. Board of Railroad Comrs.* 18 Fed. Rep. 10; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

Foster, J., delivered the opinion of the court:

It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which were legally killed under the laws of this State; that the same were closely boxed in good condition for shipment, and delivered by the plaintiff onto the platform of the Maine Central Railroad Company at Newport Station, plainly marked to the consignees in Boston. The defendant's agent was notified that the box was left for transportation, and thereupon he delivered it into the defendant's car, on the

boat Co. 50 Me. 339; *Cameron v. Rich*, 4 Strobb. L. 163; *Bazin v. Steamship Co.* 3 Wall. Jr. 229.

If it is satisfactorily shown that the loss arose from one of the excepted causes, such as flood or fire, the carrier is relieved of liability without proving affirmatively that he was guilty of no negligence. *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

The proof of such negligence, if the negligence is alleged to exist, rests on the party asserting it. *Farnham v. Camden & A. R. Co.* 55 Pa. 59; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Patterson v. Clyde*, 67 Pa. 500; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Childs v. Little Miami R. Co.* 1 Cin. S. C. (Ohio) 480; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Lamb v. Camden & A. R. & T. Co.* 46 N. Y. 271, reversing 2 Daly. 454. See *Westcott v. Fargo*, 63 Barb. 349, 6 Lans. 319, affirmed, 61 N. Y. 542; *Lewis v. Smith*, 107 Mass. 334.

The principle established.

It is conclusively established as a principle of law in this country that a carrier, in the absence of a special contract, express or implied, for the safe carriage of goods to their destination, is only bound to carry safely to the end of his line, and there duly deliver to the next carrier in his route. *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325; *Knight v. Providence & W. R. Co.* 13 R. I. 572; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 358; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Harris v. Grand Trunk R. Co.* 15 R. I. 371; *Clyde v. Hubbard*, 88 Pa. 353; 13 L. R. A.

Goldsmith v. Chicago & A. R. Co. 12 Mo. App. 479; *Crawford v. Southern R. Asso.* 51 Miss. 222.

The question of the first carrier's liability beyond his own line depends upon the inquiry whether he in any form assumed or held himself out to the public as assuming any responsibility beyond the terminus of his own route. *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679.

They are only answerable for the ordinary and proximate consequences of neglect, and not for those that are remote and extraordinary. *Morrison v. Davis*, 30 Pa. 171.

This is also decided by the Supreme Judicial Court of Massachusetts. Owing to defective machinery, goods did not arrive for six days after they were due, and then were destroyed by a flood. The court said: "The negligence of the carrier was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried beyond Syracuse, and therefore cannot subject the carrier to a responsibility for an injury to the property resulting from a subsequent inevitable accident, which was the proximate cause by which it was produced." *Denny v. New York Cent. R. Co.* 13 Gray, 487.

In a case decided by the supreme court of New York, where the liability of the carrier was maintained and the damage was occasioned by a flood, the decision was placed expressly upon the gross neglect of the company. *Michaels v. New York Cent. R. Co.* 30 N. Y. 575.

Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to use care and diligence. Yet no greater foresight

arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendant's car, without any search-warrant or other legal process, and without objections from the defendant Company or its agents, and have never since been delivered either to the consignees or the Express Company.

Upon the facts thus stated, the defendant's liability is fully established. The plaintiff's ownership of the property, its delivery to the defendant for transportation, and its acceptance for that purpose, and its non-delivery to the consignees, are prima facie evidence of negligence. The burden is therefore upon the defendant to show facts exempting it from liability. *Little v. Boston & M. R. Co.* 66 Me. 241.

The property of the plaintiff, while in the hands of the defendant as common carrier, *in transitu*, was seized by an officer without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was therefore a mere trespasser, and the defendant was liable, under the rule of the common law, in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Edwards v. White Line Transit Co.* 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as

such carrier, any more than if the loss had occurred from fire, theft, robbery or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft or any kind of unlawful disposition of the property intrusted to him to carry, excepting only such as arise by the act of God or public enemies. *Adams v. Scott*, 104 Mass. 166; *Kiff v. Old Colony & N. W. R. Co.* 117 Mass. 593; *Fillebroen v. Grand Trunk R. Co.* 55 Me. 462.

In the case of *Edwards v. White Line Transit Co.*, *supra*, it was held that, while the carrier was not liable in trover for conversion of the property, he was nevertheless liable on his contract or obligations as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," says the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

But the defendant claims exemption from liability in this action on the ground that the property was put into its possession fraudulently; that having had in its possession, and transported during the year, after the first day of October, and before the time when this property was delivered to it, three deer from Newport Station, to places beyond the limits of the State, it directed its agents not to receive for transportation any deer or parts thereof, and that this fact was known

of extraordinary perils is expected of him than of other men, and no greater penalty visited for his failure. When he discovers himself in peril the law requires of him ordinary care, skill and foresight. This is defined to be the common prudence which men of prudence and heads of families usually exhibit in matters that are interesting to them. It means, as difficulties increase in great danger, great care is the ordinary care of a prudent man. *Morrison v. Davis*, 20 Pa. 171.

If one uses the precautions which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided. *Shearn & Redf. Neg. 7.*

A common carrier is bound safely to carry the goods to their destination, unless prevented by some cause arising from irresistible force, over which he has no control and which cannot be guarded against by the watchful exertion of human skill and prudence. *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 46; *Gordon v. Buchanan*, 5 Yerg. 71; *Oakley v. Port of Portsmouth & R. U. S. Packet Co.* 34 Eng. L. & Eq. 530.

No matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled, or the force by which it is overcome is inevitable, yet, if it be the result of human means, the carrier is responsible. *McArthur v. Sears*, 21 Wend. 193; *Proprietors of Trent Nav. Co. v. Wood*, 8 Esp. 127; *Campbell v. Morse*, 1 Harp. 466; *Charleston & C. S. B. Co. v. Bacon*, Id. 222; *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 46. See *Read v. Spaulding*, 30 N. Y. 630.

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Denny v. New York Cent. R. Co., 13 Gray, 481, is not against these cases, because the court there held that when the damages by flood occurred, the defendants no longer held the goods as common carriers.

It is for the carrier to show any modification of the responsibility. See also *Chamberlain v. Western Transp. Co.* 45 Barb. 218; *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 47; *Elliott v. Rosell*, 10 Johns. 7; *Richards v. London & S. C. R. Co.* 7 C. B. 839.

The moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary. *Davis v. Garrett*, 6 Bing. 716; *Bell v. Reed*, 4 Binn. 127; *Hart v. Allen*, 2 Watts, 114; *Williams v. Grant*, 1 Conn. 492; *Crosby v. Fitch*, 12 Conn. 410.

Of seizure by judicial process.

In a case decided in England at *not prius*, by Lord Ellenborough, in 1806 (*Gosling v. Higgins*, 1 Campb. 451), a vessel had been detained and condemned in Jamaica for a breach of Revenue Laws; but on appeal the condemnation was reversed. It was held that the master was liable for a loss caused by the delay, the court saying: "You have an action against the officers. The shipper can only look to the owner or master of a ship." This last proposition is clearly wrong. We do not find the case cited in any late English work on Carriers, and it is no doubt regarded as bad law. But in a late case in Massachusetts it was held that, in a suit against a common carrier for non-delivery of goods, it is no defense to say that they were taken from the carrier by an officer under an attachment against anyone who was not their owner. *Edwards v. White*

by report to the plaintiff before he delivered the box to the defendant's agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The Statute invoked by the defendant (Rev. Stat. chap. 80, § 12) is as follows: "Whoever kills, destroys, or has in possession between the first days of October and January more than one moose, two caribou, or three deer, forfeits one hundred dollars for every moose, and forty dollars for every caribou or deer, killed, destroyed, or in possession in excess of said number; and all such moose, caribou or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of law."

The defendant claims that under this Statute it could not lawfully take any more deer, or parts thereof, into its possession for transportation before the following January.

But we cannot adopt such a construction of this Statute as would make it apply to common carriers. Such construction as claimed by the defendant would make it unlawful for the carrier to transport, between the first days of October and January, the carcasses of moose, caribou or deer lawfully killed before the first day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate commerce, it is sufficient to say that it was not the intention of the Legislature so to apply it. The Statute, like many others, may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction

must be such as was evidently intended by the Legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration. *Allen v. Young*, 76 Me. 80. In that case it was held that the transportation of the hide or the carcass of a deer from place to place in this State is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the Statute in express terms provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of \$40. Certainly that language is as broad, comprehensive, and imperative as that of the Statute invoked in this case. Yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in *State v. Beal*, 75 Me. 289. "The meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed." *United States v. Freeman*, 44 U. S. 8 How. 557, 565, 11 L. ed. 724, 728; *Holmes v. Paris*, 75 Me. 559, and authorities there cited.

The box was delivered to and received by the Company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendant, that its agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the Company's responsibility by

Line Transit Co. 104 Mass. 159. See Lawson, Carr. § 18.

Seizure by judicial process, of property in transportation, not brought about by any laches or connivance of the carrier, and of which prompt notice is given, is one of the implied exceptions in the carrier's contract as to liability for non-delivery. *The M. M. Chase*, 37 Fed. Rep. 708.

It is settled that the bailee may defend against the claim of the bailor, by showing that the goods have been taken from him by legal process. And in a note he adds: "If this defense were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do." 2 Redf. Railroads, 158.

In New York, where the property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said: "But my associates not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking. . . . The judgment of the supreme court should therefore be affirmed. All affirm on the ground that when the property is taken from the carrier by legal process, and he gives notice thereof, he is discharged." *Bliven v. Hudson River R. Co.* 36 N. Y. 403.

In this same case, the supreme court, it was held that "the bailee must assure himself, and show the court that the proceedings are regular and valid, but holds not bound to litigate for his bailor, or to

show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers." *Bliven v. Hudson River R. Co.* 35 Barb. 191.

In a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper, for a non-delivery." *Van Winkle v. United States Mail S. S. Co.* 37 Barb. 122.

In Vermont, where goods in the hands of a wharfinger were seized under legal process, the court held that if they were taken from the wharfinger or warehouseman, by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. *Burton v. Wilkinson*, 18 Vt. 186.

In order, however, that such seizure may be a legal excuse for the non-delivery of the goods, it must be shown that the proceedings or process under which it was made by the officer was legal and valid, and that it empowered him to make it; for if it was void because issuing from a court having no jurisdiction, or for any other reason, and conferred no such authority, he would be a mere trespasser, and the carrier would be no more obliged to submit to his acts under it than to those of any other wrong-doer. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Bliven v. Hudson River R. Co.* 36 N. Y. 403; *Edwards v. White Line Transit Co.* 104 Mass. 159. See Hutchinson, Carr. § 400.

special contract, or such knowledge brought home to this plaintiff and assented to by him, as would be necessary to limit such responsibility. *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462. "A carrier may limit his responsibility for property intrusted to him," says Bigelow, *Ch. J.*, in *Buckland v. Adams Exp. Co.* 97 Mass. 125, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value; and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant Company for transportation to a point beyond the limits of this State. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this State, but to a point outside of its limits in another State. It had lawfully commenced to move as an article of commerce from one State to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the State. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States. The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold, or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of Congress. *The "Daniel Ball,"* 77 U. S. 10 Wall. 557, 565, 19 L. ed. 999, 1002; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 485, 31 L. ed. 700, 707; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

Defendant to be defaulted, damages to be assessed at nisi prius.

Peters, Ch. J., and Libbey, Emery, Haskell and Whitehouse, JJ., concur.
13 L. R. A.

John S. ELLIOT, Exr. etc., of Sarah H. Jenks, Deceased,

v.
Mary T. FESSENDEN *et al.*

(....Me....)

A "relative" is one connected with the testator by blood and not by marriage, only within the meaning of Rev. Stat., chap. 74, § 10 giving lineal descendants the share of a relative of the testator, who is a devisee if he dies before the testator.

(March 12, 1891.)

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the Law Court of a suit brought by the executor of the last will of Sarah H. Jenks, deceased, to obtain a construction of such will and instructions as to the disposition of funds in his hands. The will gave, *inter alia*, a legacy of \$1,000 to Marcia G. Lord, and the residue of the estate to "John Patten, of Bath, his heirs and assigns, to his and their own use forever." The will was dated November 28, 1885, and testatrix died July 20, 1887.

Marcia G. Lord was a sister of Caleb S. Jenks, husband of the testatrix. She died before testatrix, leaving as her only heir a daughter, Annie Louise Lord, one of the defendants to this suit.

John Patten, the residuary legatee, after the death of his first wife, married a sister of testatrix, who also died March 30, 1862, leaving no issue. Patten died February 24, 1887, leaving as his only heirs John O. Patten and Clara Patten Goodwin, children of a son by his first wife.

Neither Patten nor his grandchildren were blood relatives of testatrix. The grandchildren were made parties defendant.

The answer stated that testatrix was for over fifty years a member of John Patten's family

NOTE.—The term "relation" defined.

It has long been settled that, in the construction of wills, the word "relation" or "relatives" includes those who are entitled as next of kin under the Statute of Distributions. Bouvier, *Law Dict.* 15th ed. title *Relations*, and the case there cited.

"A gift to one's relations does not, *prima facie*, refer to husband, wife, or marriage connections, but to those only of one's blood." Schouler, *Wills*, § 537, and cases.

A grandson's widow is not entitled under a devise to grandchildren, nor does a gift to children extend to children by affinity. 2 Jarman, *Wills*, 5th ed. 121, 151, and Bigelow's *notes*.

These rules may be varied by the context of a will showing different intention. It has been held in the State of Maine that a husband could be regarded as an heir to his wife, but that doctrine was overruled in *Lord v. Bourne*, 63 Me. 368.

The more common use of the term expresses kindred of blood or affinity, though properly only the former is embraced. Hence, in strict technical sense, it does not include husband and wife, but may include any and every relation that exists in social life, if literally taken; but it has long been settled that a bequest to "relations" applies to those who, by virtue of the Statute of Distributions, would take the property as next of kin. *Esty v. Clark*, 101 Mass. 38; *Handley v. Wrightson*, 60 Md. 206; *Anderson's Law Dict.* title *Relation*.

and never made any compensation for the services so obtained; that testatrix always insisted on the mutual use between herself and the members of John Patten's family of the appropriate address of blood relationship; that the property left by testatrix was received by her by gift from John Patten or his son, Gilbert E. R. Patten, father of John O. and Clara Patten, and that testatrix fully intended that said John O. and Clara should succeed their grandfather John in the title to her residuary estate.

Messrs. Baker, Baker & Cornish for defendants John O. Patten and Clara Patten Goodwin.

Messrs. Nathan Cleaves, Henry B. Cleaves and Stephen C. Perry, for the defendants, next of kin and heirs-at-law:

It is the general rule of law that a devise or legacy to one who dies before the testator becomes void.

Ballard v. Ballard, 18 Pick. 48; American Law of Administration, p. 934, § 435, and cases cited.

The only exception to this general rule of law is created by statute.

Rev. Stat. chap. 74, § 10.

The word "relative" in that Statute applies to persons in the line of consanguinity, and not to those connected by marriage.

2 Wins. Exrs. 1004; 2 Jarman, Wills, 666; American Law of Administration, 936; *Ennis v. Pentz*, 3 Bradf. 885. See also *Maitland v. Adair*, 5 Ves. Jr. 231; *Worsley v. Johnson*, 3 Atk. 761; *Moses v. Allen*, 81 Me. 268; *Estate of Pfueth*, 48 Cal. 643; *Esty v. Clark*, 101 Mass. 38; *Prather v. Prather*, 58 Ind. 141; *Cleaver v. Cleaver*, 39 Wis. 96; *Keniston v. Adams*, 6 New Eng. Rep. 547, 80 Me. 294.

The insertion in the bequest to John Patten of the words "his heirs and assigns, to his and their use forever," does not enlarge the rights of the descendants of John Patten. These words do not indicate that it was the intention of testatrix that they should take by substitution, and in case of the legatee's death before the testatrix, those taking by representation are not entitled to what the person they represent never had.

Kimball v. Story, 108 Mass. 384; *Dickinson v. Purvis*, 8 Serg. & R. 71; *Barnet's App.* 104 Pa.

342; *Marcell v. Featherston*, 88 Ind. 339; American Law of Administration, § 434, p. 936, and cases there cited.

Walton, J., delivered the opinion of the court:

This is a suit in equity, instituted by the executor of the last will and testament of Sarah H. Jenks, asking the court to determine the construction of the will, and whether certain legacies therein mentioned lapse, or go to the lineal descendants of the legatees, the legatees themselves having died before the testatrix. Generally, if a legatee dies before the testator, the legacy lapses. But to this rule there is an exception in favor of relatives. "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he survived." Rev. Stat. chap. 74, § 10.

The word "relative," in this section of the Statute, has already been defined by the court. It means one connected with the testator by blood,—a blood relation. It does not include within its meaning one connected with the testator by marriage only. So held in *Keniston v. Adams*, 80 Me. 290, 6 New Eng. Rep. 547. And such is generally held to be its meaning, when used in similar statutes, although it may sometimes be used in a more extended sense. *Esty v. Clark*, 101 Mass. 36.

Such being the law, the conclusion is inevitable that the bequests to John Patten and Marcia G. Lord, mentioned in the will of Sarah H. Jenks, are void. They both died before the testatrix. And, being connections of hers by marriage only, they were not relatives within the meaning of the law, and their legacies lapsed; and the residuum of the estate, after paying all other legacies and the expenses of administration, must be paid to the heirs-at-law of the testatrix. Costs, including reasonable counsel fees, are allowed to all the parties to this suit, to be paid by the executor out of the assets of the estate, and charged in his administration account.

Decree accordingly.

Peters, Ch. J., and **Virgin, Libbey, Haskell and Whitehouse, JJ.**, concur.

MISSISSIPPI SUPREME COURT.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO., *Appt.*,

v.

Sabie RILEY.

(...Miss....)

For refusing to accept the remaining part of return ticket on the return trip where the return coupon was taken through mistake by the conductor on the first trip, and ejecting the passenger for refusal to furnish any

other ticket or fare, the carrier may be compelled to pay damages.

(June 1, 1901.)

A PPEAL by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

The facts are stated in opinion.

Messrs. Wallace Pratt and J. W. Buchanan, for appellant:

If it was the rule of the Railroad Company for its conductors not to recognize tickets of this character, then, unless this court holds that such a rule was unreasonable, the Rail-

NOTE.—See notes to *McGowen v. Morgan's L. T. R. & S. Co. (La.)* 5 L. R. A. 817; *McKay v. Ohio River R. Co. (W. Va.)* 9 L. R. A. 132; *Peabody v. Oregon R. & Nav. Co. (Or.)* 12 L. R. A. 823, 13 L. R. A.

road Company is not guilty of any wrong by the action of the second conductor.

McKay v. Ohio River R. Co. (W. Va.) 9 L. R. A. 182, citing *Rose v. Wilmington & W. R. Co.* 106 N. C. 168; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342; *Townsend v. New York Cent. & H. R. R. Co.* 58 N. Y. 497; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Downs v. New York & N. H. R. Co.* 36 Conn. 287; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234; *Bradshaw v. South Boston R. Co.* 135 Mass. 407; *Hall v. Memphis & C. R. Co.* 9 Fed. Rep. 585.

Messrs. Blair & Stribling for appellee.

Cooper, J., delivered the opinion of the court:

On or about the 3d of September, 1889, the plaintiff with her husband purchased from the agent of appellant at Myrtle two tickets for transportation over appellant's road to Blue Springs and return, Myrtle and Blue Springs being stations on appellant's road. These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passenger the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the passenger. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs, and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, but not from Blue Springs to Myrtle. The plaintiff had not before noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was traveling how it had occurred, and insisted upon her right to be carried on the ticket. But this he declined, and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train at that point. The plaintiff and conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point the conductor stated that plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner, and took her by the arm to put her off the train. At all events, the plaintiff left the train at Blue Springs with her husband, and there remained until the following day, and brings this suit for damages against the appellant. The jury awarded her damages in the sum of \$300, and from a judgment for that sum the defendant appeals.

18 L. R. A.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts and North Carolina, it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor; and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed; and that he may not insist upon his right to travel on the wrong ticket, or without it, where it has been taken up, and recover damages for the refusal of the carrier to permit him to do so; and that the carrier may lawfully eject him from its train, using no more force than is necessary for that purpose. The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket, or in taking up a proper one held by the passenger, is caused by the negligence of the servants of the carrier.

In a more recent case in Michigan than those cited by appellant's counsel,—*Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 681,—the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been canceled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous, the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures or other marks." The most remarkable thing about this decision is that it was made in the same case, upon the same facts, and between the same parties as that reported in 53 Mich. 118, in which in an opinion delivered by Judge Cooley, it was held that, as between the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel." There is a class of cases somewhat analogous to the present one, in which, by a uniform course of decisions, so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon

the train. It is held that as a condition precedent to the exercise of this right to charge higher train rates, and to expel one refusing to pay them, a reasonable opportunity should be given by the carrier to the passenger to procure the ticket required, and that one to whom no such opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor. *Hutchinson, Carr. § 571*, and authorities in *note 2; Forsee v. Alabama G. S. R. Co.* 63 Miss. 66.

Without determining more upon this disputed question than is necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse at the peril of inviting an action for damages against his principal if the statement

be true. We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle; but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is that a passenger holding and attempting to use such ticket, under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket, read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger, and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger.

We find no error in the record for which the judgment should be reversed, and it is affirmed.

INDIANA SUPREME COURT.

Joseph W. ENGLISH, *Appt.*,

v.

George S. DICKEY.

(...Ind....)

- 1. The twenty days' limitation** of the time "to adjourn or continue the trial" of an election contest under Rev. Stat. 1881, § 4761, begins when the board has first convened and organized to enter upon the investigation, although the trial does not begin at that time.
- 2. Intervening Sundays cannot be excluded** from the twenty days limited for an election contest where the rule for computation of time is fixed by a statute requiring the first day to be excluded and the last included, unless it is Sunday.
- 3. The adjournment of an election contest** at the request of the contestor to a day beyond the time limited by statute for the investigation absolutely discontinues the proceeding, and even the consent of the parties cannot keep it alive longer.
- 4. Discontinuance and dismissal** are synonymous terms.

(April 28, 1891.)

NOTE.—Election contests, trial, practice in Indiana.

The law vests the county board with jurisdiction over election contests, and their decision that an insufficient affidavit is good will be binding unless appealed from. *Curry v. Miller*, 42 Ind. 320.

The ballots cast, when legally preserved and properly identified, are the primary and original evidence by which the result is to be determined. *Reynolds v. State*, 61 Ind. 392.

Where a witness is called to prove that he cast a ballot for contestor, the ticket if found is the best evidence of the fact; if not found, then he may state for whom he did vote. *Wheat v. Ragsdale*, 27 Ind. 182.

Computation of time, Sunday excluded.

In computing the time for which a notice is to be 18 L. R. A.

A PPEAL by contestant from a judgment of the Circuit Court for Decatur County in favor of contestee in a proceeding instituted to contest the validity of contestee's alleged election to the office of sheriff of Decatur County. *Affirmed.*

The facts are stated in the opinion.

Mr. J. S. Scobey for appellant.

Mr. S. A. Bonner for appellee.

McBride, J., delivered the opinion of the court:

The appellant and the appellee were opposing candidates for the office of sheriff of Decatur County at the general election in November, 1890. The board of canvassers declared the appellee elected, and thereupon the appellant instituted this proceeding to contest the election. The necessary preliminary steps having been taken, the auditor of the county issued and caused to be served on the board of county commissioners a notice convening them in special session on the 4th day of December, 1890, to try such proceeding; and also issued and caused the service on the contestee of notice, as required by section 4760, Rev. Stat. 1881.

At the time fixed the board of commissioners

given, the last day, if Sunday, is excluded. *Gage v. Davis* (Ill.) 11 West. Rep. 612.

In the computation of time upon service of notice of trial, the day of service is excluded, and the first day of the term included. *State v. Weld*, 30 Minn. 426; *Thrower v. Brandon*, 89 Ala. 406.

Sunday is to be excluded in computing the time for a motion for a new trial. *Cattell v. Dispatch Pub. Co.* 3 West. Rep. 843, 88 Mo. 356.

In computing the time for the commencement of a proceeding in error, the first day is to be excluded and the last day included. *Smith County Comrs. v. Labore*, 37 Kan. 480; authorities cited in *Wright v. Manns*, 9 West. Rep. 297, 111 Ind. 422.

Computation of time. See *Seward v. Hayden*, 5 L. R. A. 844, 150 Mass. 158; *Merritt v. Mora*, Ona & Co. (Pa.) 11 L. R. A. 724, 44 Fed. Rep. 389.

convened, the parties, contestor and contestee appeared in person and by counsel and such steps were taken from time to time as carried the cause to the 22d day of December, 1890, which time was set for the commencement of the trial proper. On the 22d day of December, 1890, the parties appeared and the contestor moved for a postponement of the cause to Friday, December 26, 1890, which motion was sustained.

The record entry of this motion and of the order postponing the cause, is as follows: "Comes now the contestor by his attorney and in person, and asks that the hearing of the cause at issue be postponed until Friday, December 26, 1890, to which the contestee interposes no objections, and which was accordingly done."

On the 26th day of December, 1890, the board again convened, the parties appeared, and the contestee moved the court to discontinue the cause, for the reason that more than twenty days had elapsed since the board of commissioners were called to try and determine the same. The board sustained the motion. The contestor thereupon appealed to the circuit court. In the circuit court the motion to discontinue was renewed and sustained by the court. The court thereupon rendered judgment confirming the contestee in his office, and against the contestor for costs.

The contestor in his appeal to this court assails the action of the court below upon two grounds: (1) that the court erred in sustaining the motion to discontinue; (2) that the court erred in rendering judgment against the appellant for costs.

Whether the motion to discontinue the cause was rightly sustained or not depends upon the construction to be given to sections 4760 and 4761, Rev. Stat. 1881. The two sections in question are as follows:

"4760. When such statement is filed with the auditor, he shall issue a notice to the board of county commissioners to meet at the courthouse at a designated time, not less than ten, nor more than twenty, days thereafter, to try such contested election, and shall issue a notice to the contestee to appear at the time and place specified in the notice to the commissioners; which, with a copy of such statement, shall be delivered to the sheriff of the county, who shall, within five days thereafter, serve the same on the contestee, by delivering to him a copy of such notice and statement, or leaving a copy thereof at his last usual place of residence.

"4761. The auditor, at the request of either party, shall issue subpoenas, which shall be served by the sheriff. Such board of commissioners shall try and determine such contest, and shall have power to compel the attendance of witnesses, to swear and examine the same, to punish contempts as other courts, to adjourn or continue the trial from time to time, not exceeding twenty days altogether; to make the necessary orders for the payment of costs, and to coerce the payment of the same, and shall be governed in such trial by the rules of law obtaining in circuit courts. And if it be proven that any other person than the contestee has the highest number of legal votes, such board shall declare such person elected, and certify the same to the proper officer."

13 L. R. A.

The controversy between the parties is over the twenty days' limitation contained in section 4761. Appellant's position is that it is not an absolute limitation, but is merely directory, and applies solely to the trial proper, after the cause has been submitted and the parties have commenced the introduction of testimony; while the appellee contends that it is mandatory, is an absolute limitation and embraces the entire proceeding, beginning with the day when the board is convened and organized to enter upon the investigation, and that when twenty days have elapsed the board has no longer jurisdiction to proceed. But little authority has been cited bearing upon this question, and we are inclined to think the authorities are somewhat meager. Indeed, we not only know of no case wherein the precise question has been decided, but no authority has come to our attention wherein the questions decided have sufficient analogy to make them of much value as authority, except as they serve to indicate the rule by which to construe the statute. The policy of the law seems to be to compel prompt action in hearing and disposing of contested elections.

The learned author of McCrary on Elections places much emphasis on this. He says: "A statutory provision, requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like is peremptory; and the time cannot be enlarged. . . . And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceeding is of the utmost importance; to the end that a decision may be reached before the term has wholly or in great part expired." § 392.

Again: "The courts should require the parties to speed the cause, so that the official term which is in dispute may not expire, either in whole or in large part, before the final decision is reached." § 390.

Again: "There is, however, a very strong reason for requiring any such amendment to be made instantaneously, and for bringing an election case to a prompt and speedy trial and determination, and it is this: The subject matter of the controversy is daily growing less and of less importance and value. The office is usually for a short term of one or perhaps several years only, and if the 'law's delays' are to be allowed in those as in other cases, the term would often expire before a decision could be reached." § 407.

Again: "As we have already seen, there are strong reasons for requiring the parties to an election contest to use great diligence in preparing for an early trial." § 408.

Of similar tenor is § 421.

The case of *Bull v. Southwick*, 2 N. M. 321, was an election contest. The Statute limited the time within which answers should be filed. Answers were filed within the time limited; but afterward, and after the expiration of the time limited, the contestee asked leave to file additional answers. The court said: "It is also my opinion that the very object of the Statute in regard to the pleading and practice in contested election cases is to afford, and at the same time compel, the observance of a

speedy mode for conducting and terminating such cases. . . . These statutory provisions as to the time of filing and serving the notice of contest, answer and reply, are in effect Statutes of Limitation, taking from the judge all discretion as to extending the time. In my opinion this is one of the most salutary of our statutory laws. Experience has demonstrated that without some such compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire."

This case is followed and its interpretation of the statute is approved in *Vigil v. Pradt* (N. M.) 20 Pac. Rep. 795.

These authorities may aid us in determining the legislative intent, as it will be presumed the law-making power, in the enactment of a given statute, had in view settled rules of construction and intended that it should be construed in the light and line of the settled and uniform policy of the law, as relating to the subject matter of the Statute in question. Sutherland, Stat. Const. §§ 287-289, 838 *et seq.*

We conclude, therefore, that the Legislature intended by the limitation to compel a speedy determination of cases of this character.

It is a part of the common experience of those connected with courts, of which we must take notice, that the delays of litigation as a rule precede the trial proper of causes, and that after a cause is submitted and the hearing of testimony commenced it usually proceeds without interruption. It is before that time that the party desirous of delay employs his arts. If, therefore, the Legislature intended by this provision of the Statute to prevent delay, it is improbable that they would enact a time limitation applying only to that part of the procedure least liable to abuse by delay. If it was intended that the limitation should apply to only a portion of the procedure, we think it would probably have been applied to the steps preceding that time. In our opinion, it was the intention of the Legislature that the entire time given to the consideration of a contested election case by the board of county commissioners should be twenty days altogether. They are notified by the auditor to meet in special session for that purpose, and the limitation is intended to indicate the entire length of the special session which they may thus hold. The notice issued to them is that they meet at a designated time "to try such contested election."

Convened and organized in obedience to such notice, they constitute a special tribunal, having no authority except to try and decide that particular case; and, within the meaning of the Statute, the trial commences as soon as they are convened and organized and the parties appear before them. If the limitation applies only to the actual hearing of testimony, almost the last act in the drama, their session may be protracted indefinitely. This may be done, not necessarily by reason of any indifference or desire for delay on the part of the board; but the skill and ingenuity of counsel, by the use of dilatory practices, may find it possible to secure such delays as would indefinitely pro-

long the proceeding. If the limitation does not apply to the entire proceeding, there is no limit fixed by the Statute for the length of the session of such tribunal. This would be of itself so unusual and exceptional that, unless forced to it, we could not adopt such a construction of the Statute. The board of county commissioners, convened for any other purpose, have the limit of their sessions clearly fixed. Even the courts of record of the State, courts having general jurisdiction, all have fixed terms; and the circumstances under which they may continue in session beyond the time fixed are clearly specified.

Section 284, Elliott's Supplement, provides as follows: "That if, at the expiration of the time fixed by law for the continuance of the term of any court, the trial of any cause shall be progressing, said court may continue its sitting beyond such time and require the attendance of the jury and witnesses, and transact and enforce all other matters which shall be necessary for the determination of such cause; and in such case the term of said court shall not be deemed to have ended until the cause shall have been fully disposed of by the court."

While not deciding the question, because not necessary to a decision of this case, it is possible that if the trial of a contested election case was progressing at the expiration of the twenty days, this Statute might apply and operate to extend the term until it could be finally disposed of. Such a continuance, however, which may be called a continuance or extension of the term by necessity, would be a very different thing from that which was attempted in this case. Here a special tribunal, created and convened for a special purpose, with the period of its duration limited to twenty days, was convened and entered upon the discharge of its duties on the 4th day of December. On the 22d day of December, two days before its existence must terminate by operation of law, the party at whose instance it was convened, who invoked its creation that it might adjudicate upon his rights, asks that the cause may be continued two days beyond the legal limit of the existence of the tribunal. His request is granted and an order of that character is made, continuing the cause to the 26th day of December. When that time arrives, the court no longer exists. It had ceased to exist two days before, and the law had made no provision for its resuscitation. It was no longer in the power of the parties, even by agreement, to give it life and again clothe it with jurisdiction. When the board again assumed to meet on the 26th day of December, it had no legal existence as a court for the hearing of that cause; and no motion to discontinue the cause was necessary. There was nothing to discontinue, as the cause died with the court. What the effect of an order continuing the cause to a day beyond the term would be if made by the court, over the objection of the contestor, we need not consider, as no such question is before us. What we do decide, however, is that when the contestor himself, before the expiration of the term, without assigning any reason therefor, voluntarily asks and obtains a postponement which carries the cause two days beyond the

time when the term would end by operation of law, he thereby discontinues his contest.

Appellant insists, however, that if the limitation of twenty days is to apply to the entire term, in the computation of the time Sundays are to be excluded. He cites no authority in support of this proposition, and we know of none. The rule for the computation of time in such cases is fixed by section 1280, Rev. Stat. 1881, and is that the time shall be computed by excluding the first day and including the last, and if the last day be Sunday it shall be excluded. This of course includes intervening Sundays.

Appellant also argues that the court had no power to order a discontinuance of the cause, as there is no such thing as a discontinuance known to our practice. Discontinuance and dismissal are synonymous terms. *Thurman v. James*, 48 Mo. 235.

It is, however, not at all material what term was used. The case was at an end.

The judgment of the Circuit Court for costs was in accordance with § 4765, Rev. Stat. 1881, and was right.

Judgment affirmed, with costs.

NEW YORK COURT OF APPEALS.

Croft C. CARROLL, *Respt.*,

v.

Clayton E. SWEET, *Appt.*

(...N. Y....)

1. **A check taken for an antecedent debt** is conditional payment only in the absence of an agreement to the contrary.
2. **The holder of a check is under obligation** to an indorser thereon to present it for payment not later than the next day after its date.
3. **Delay in presenting a check at the drawer's request**, whereby its collection becomes impossible because of his insolvency, ope-

rates as payment up to the amount of the check in favor of an indorser who has transferred it to the holder on account of an antecedent debt.

4. **Lack of money of the drawer in a bank to meet a check**, where he would have provided for it or paid it if payment had been insisted upon, does not relieve the holder, who has taken it from an indorser on an antecedent debt, from his obligation to present it, or prevent his failure to do so until collection becomes impossible from operating as payment to the amount of the check.

(June 2, 1891.)

APPEAL by defendant from a judgment of the General Term of the Superior Court

NOTE.—*Within what time check should be presented.*

It is well settled that presentment of a check or draft on a bank the day after it is drawn is in season (*Merchants Bank v. Spicer*, 6 Wend. 443), and the same case holds checks and drafts to be subject to the same rule (*Mohawk Bank v. Broderick*, 13 Wend. 133; and where the facts are not disputed, the use of due diligence is a question of law for the court. *Bryden v. Bryden*, 11 Johns. 187; *Kelty v. Second Nat. Bank of Erie*, 52 Barb. 323).

Where a draft sent to a bank for collection is presented by it and the drawee's check taken in payment thereof, and the draft surrendered, it is the duty of the bank to present such check for payment on the same day, if it can be so presented by the exercise of reasonable diligence; and if the check would have been paid if presented on that day, but is not good on the next, through the failure of the maker, the drawers of the draft are discharged, and the bank is liable to its depositors for its failure to collect it. *Meadville First Nat. Bank v. Fourth Nat. Bank*, 16 Hun. 332; 1 Wait, Law and Pr. 773; and see *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690, 62 N. Y. 545; *Burkhalter v. Second Nat. Bank of Erie*, 42 N. Y. 538, 40 How. Pr. 324.

In the absence of agreement or special controlling circumstances, it is the right of the drawer of a check to expect its presentment for payment at latest within banking hours on the day following the day of its delivery to the payee, provided the bank on which it is drawn be in the same place where the payee resides or does business; if the bank be not in such place, then the check must be put in due course for presentment, either by being duly mailed to the drawee or by being deposited for collection with a bank, according to the ordinary custom for such business in that place. *Bodington v. Schlencker*, 1 Nov. & M. 540, 4 Barn. & Ad. 752; *O'Brien v. Smith*, 66 U. S. 1 Black, 99, 17 13 L. R. A.

L. ed. 64; Taylor v. Sip, 30 N. J. L. 264; *Ritchie v. Bradshaw*, 5 Cal. 228; *Wear v. Lee*, 2 West. Rep. 450, 87 Mo. 352; *Schoonfield v. Moon*, 9 Helsk. 171; *Syracuse, B. & N. Y. R. Co. v. Collins*, 57 N. Y. 641; *Kelty v. Second Nat. Bank of Erie*, 52 Barb. 323; *Himmelmänn v. Hotaling*, 40 Cal. 111; *Cawein v. Brownski*, 6 Bush. 457; *Strong v. Kink*, 35 Ill. 9; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238; *Smith v. Miller*, 43 N. Y. 171; *Smith v. Jones*, 20 Wend. 192; *Moule v. Brown*, 4 Bing. N. C. 236; *Veazie Bank v. Winn*, 40 Me. 62; *Cromwell v. Lovett*, 1 Hall. 56; *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 139.

But the holder does not obtain extra time for presentment by depositing the check in his bank for collection. If the payee of the check receive it on Monday and deposit it in his bank, presentment must still be made in the same place, or the check forwarded to any other place where the drawee's bank is, by the payee's bank, during banking hours on Tuesday. *Alexander v. Burohfield*. 1 Car. & M. 75, 7 Man. & G. 1061.

What is an ordinary mode of presentment.

When the defendant, instead of sending the note to an agent or correspondent at the drawee's bank for presentment, sent it by mail directly to the bank where it was payable, it will be considered an ordinary method of transacting such business, and the defendant is bound only to adopt the ordinary mode. This method is sanctioned in England, in the cases of *Heywood v. Pickering*, L. R. 9 Q. B. 423; *Prideaux v. Criddle*, L. R. 4 Q. B. 461; *Bailey v. Bodenham*, 16 C. B. N. S. 295; *Hare v. Hentley*, 10 C. B. N. S. 65; and in this country in *Shipey v. Bowery Nat. Bank*, 50 N. Y. 435. See *Indig v. Brooklyn Nat. City Bank*, 30 N. Y. 100.

A check or draft must be presented within a reasonable time. *Werk v. Mad River Valley Bank*,

for the City of New York affirming a judgment of the Trial Term in favor of plaintiff in an action to recover the amount alleged to be due on account, in defense of which defendant pleaded the delivery of the indorsed check of a third person. *Reversed.*

The facts are stated in the opinion.

Mr. H. E. Losey, with **Mr. John W. Bartram**, for appellant:

The plaintiff was guilty of laches in dealing with the Woodruff check. When he accepted the check he assumed the duty of causing proper demand of payment to be made, and notice of non-payment to be duly given to the defendant as indorser.

Even as against the maker of the check, it was the duty of the payee or holder to cause demand to be made at the bank on the day of its date or the following day.

Cromwell v. Lovett, 1 Hall, 56; *Murray v. Judah*, 6 Cow. 484; *Smith v. Miller*, 43 N. Y. 171; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 588.

As against the defendant as indorser, the plaintiff owed a still stronger duty to cause immediate presentment to be made and notice of dishonor given, even though the maker of the check never had funds in the bank to meet it.

Mohawk Bank v. Broderick, 13 Wend. 194, 10 Wend. 804; *Little v. Phenix Bank*, 2 Hill, 425; *Murray v. Judah*, *supra*; *Darnall v. Morehouse*, 45 N. Y. 64; *Harbeck v. Craft*, 4 Duer, 122; *Dan. Neg. Inst.* § 1590; *Morse, Banks &*

Banking, p. 280; *Alexander v. Burchfield*, 7 Man. & G. 1061.

By reason of the plaintiff's neglect to make due demand and give due notice of the dishonor of the check in question, he discharged the defendant from all liability, either upon the check or upon the indebtedness for which it was transferred to the plaintiff.

See *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 545; *Dan. Neg. Inst.* § 1587; *Commercial Bank of Albany v. Hughes*, 17 Wend. 98.

The mere insolvency of the drawee or acceptor of a draft is no excuse for neglecting to present it for payment.

Jackson v. Richards, 2 Cal. 343; *Meadville First Nat. Bank v. Fourth Nat. Bank*, 24 Hun, 241; *Clift v. Rodger*, 25 Hun, 39; *People v. Cromwell*, 102 N. Y. 477, 484; *Copper v. Powell*, Anth. N. P. 68, 71, 74, and notes.

Mr. Charles E. Hughes for respondent.

Andrews, J., delivered the opinion of the court:

The indorsement and transfer by the defendant to the plaintiff of the check of Woodruff operated as provisional payment only of so much of the antecedent debt owing by the defendant to the plaintiff. There was no agreement that it should be taken in absolute satisfaction of the debt, and in the absence of such an agreement the intentment of law is that it was conditional payment only. *Hill v. Beebe*, 18 N. Y. 566; *Bradford v. Fox*, 38 N. Y. 289.

The debt remained until discharged by pay-

8 Ohio St. 301; *Veazie Bank v. Winn*, 40 Me. 60; *Woodin v. Frazee*, 6 Jones & S. 180.

What is a reasonable time depends upon the circumstances of each particular case. *Knott v. Venable*, 42 Ala. 186; *Walsh v. Dart*, 23 Wis. 384; 1 *Wait, Law & Pr.* 773.

When a check is considered stale or overdue.

A check is considered stale or overdue, so as to allow of equitable defenses, whenever the delay in presentment has been so long that, in the light of the surrounding circumstances, it is sufficient to arouse the suspicions of a reasonably prudent man and put him upon inquiry. This may be taken as a reliable statement of the present law, notwithstanding it is claimed by one authority (*Thompson, Bills*, 118) that a check is "never overdue."

It is impossible to state the precise period of time at which a check is said to be "overdue." The conclusion in each case is determined by due consideration of the special circumstances surrounding the parties. Thus, in the light of some circumstances, a check is overdue when there was a delay in presentment of two and a half years (*Skillman v. Titus*, 32 N. J. L. 96); one year (*Lancaster Bank v. Woodward*, 18 Pa. 367); fourteen months (*Cowing v. Altman*, 71 N. Y. 436); five months (*First Nat. Bank of Newton v. Needham*, 29 Iowa, 249); five days. *Down v. Halling*, 4 Barn. & C. 380, 6 Dow. & R. 445, 2 Car. & P. 11.

On the contrary, it has been held that a check is not overdue, and may still be negotiated free from equitable defenses, where there has been a delay of one month (*Lester v. Given*, 8 Bush, 367); ten days (*Ames v. Meriam*, 98 Mass. 294); eight days (*London & County Bkg. Co. v. Groome*, L. R. 8 Q. B. Div. 238); six days (*Rothschild v. Corney*, 9 Barn. & C. 388); four days (*First Nat. Bank of Rochester v. Harris*, 108 Mass. 514); one day. *Himmelmann v. Hotelling*, 40 Cal. 111. See *Tiedeman, Com. Paper*, § 446.

13 L. R. A.

Reasonable time on checks.

The rule of what is a reasonable time in presenting checks for payment is regulated largely by the rules that obtain in cases of bills and notes. Thus, it has been held that presentment is timely if made on the second day after its date (*Prideaux v. Criddle*, L. R. 4 Q. B. 455); or on the fourth day, when it was received at a distance in the country, too late to reach the bank on that day, and subsequent delay was occasioned by the holder's inability to leave his business in order to make a deposit in the local bank (*Frelberg v. Cody*, 55 Mich. 108); so a delay of four days in remitting and returning a check, according to the original understanding of the parties, was excusable (*Woodruff v. Plant*, 41 Conn. 344); or a delay of five days (*Werk v. Mad River Valley Bank*, 8 Ohio St. 301); or, in case of a check payable at the drawee's bank, situate in another State, a delay of six days (*Bridgeport Bank v. Dyer*, 19 Conn. 136; *Taylor v. Wilson*, 11 Met. 44); or even a delay of forty days, under peculiar circumstances of distance, bad weather, roads, etc. *Brown v. Olmsted*, 50 Cal. 162.

In general, the time required to send a check to a distant place for payment must be reasonable (*Stephens v. McNeill*, 26 Barb. 651); and it is sometimes held that, as against the drawer of a check, any time for presentment is reasonable if the drawer is not injured by the delay. *Elting v. Brinkerhoff*, 2 Hall, 459; *Purcell v. Allemon*, 22 Gratt. 739; *Planter's Bank v. Merritt*, 177; *Smith v. Jones*, 2 Bush, 108; *Howes v. Austin*, 35 Ill. 896.

So if the bank on which a check is drawn suspends payment the next day before the close of banking hours, it would be a sufficient excuse for not presenting the check, although the holder resides in the vicinity. *Syracuse, B. & N. Y. R. Co. v. Collins*, 3 Lans. 23. See *Randolph, Com. Paper*, § 1104.

ment of the check or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Ausbury Park National Bank, and was, on the same day, indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. The plaintiff, on accepting the check, assumed as between himself and the defendant an obligation to present the same to the bank for payment within the time prescribed by the law-merchant, that is to say, not later than the next day after its date, and if refused to protest the same and give notice of non-payment. *Smith v. Jones*, 20 Wend. 192. It was not presented until the 31st of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law-merchant, was a condition, upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. *Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 18 Wend. 549.

A different rule obtains as between the holder and drawer of a check. As between them, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss to him has resulted. *Little v. Phenix Bank*, 2 Hill, 425.

The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must on that ground be reversed. In *Hamilton v. Cunningham*, 2 Brock. 350, Chief Justice Marshall considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged, upon the liability of a debtor for the debt for which the bill was drawn. After showing that the authorities in which the debtor had been held discharged proceeded upon the theory that he had sustained an actual loss, he reached the conclusion that the true principle is "that if a bill be received as provisional payment, the omission to give due notice of its dishonor deprives the creditor of his action on that bill, but does not compel him to take it in absolute payment, or deprive him of his action on the original debt further than damage has been sustained actually or in legal supposition by the debtor." See also *Gallagher v. Roberts*, 2 Wash. C. C. 191; *Flieg v. Sleet*, 43 Ohio St. 53.

I am not sure that this doctrine is reconcilable with expressions in the opinion of this court in *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 545. That was an action to recover a debt for which the defendant had drawn his draft on J. K. Place & Co., and forwarded it to the plaintiff, the creditor. It was presented on the same day it was received to the drawees, and the plaintiffs received therefor the drawees' check on a bank and surrendered the draft. The check was not presented to the bank until the next day, when payment was refused, the

drawer, meanwhile, having failed. The check would have been paid if it had been presented on the day it was given, which might have been done. The plaintiffs did not demand a return of the draft, and it was not protested, nor was any notice of non-payment given to the drawees. The court rendered judgment for the defendant on two grounds: *first*, that in the absence of proof of demand and refusal and notice to the drawees, according to the usual course, there could be no recovery upon the draft or upon the indebtedness upon which it was given; and, *second*, on the ground of negligence in failing to present the check on the day on which it was given. The last ground stated was, upon the facts, a satisfactory basis for the judgment, and the same principle was applied upon similar facts in *Meadville First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.

In the view we take of the present case, it is unnecessary to inquire whether the cases cited from this and other courts are in conflict, or, if so, which class of cases stands upon the better reason. The court, in this case, directed a verdict for the plaintiff, and in this, we think, there was error. It cannot be doubted that if there was evidence tending to show that the delay in presenting the check to the Asbury Park Bank prevented its collection, or from which the jury might find that the whole or any part of the debt owing by the drawer of the check to the defendant, for which the check was given, was lost by reason of the delay in the presentment or by dealings between the plaintiff and the drawer, in respect to the check, without the assent of the defendant, the case should have been submitted to the jury. To the extent of the injury the law would treat the omission to make due presentment as tantamount to payment.

The facts most favorable to the defendant need to be stated. Woodruff, the maker of the check, was, when the check was given, conducting a hotel at Asbury Park, and the parties to the action were guests at his house. The defendant was indebted to the plaintiff for dentistry work, and the former, who resided in New York, had loaned money to Woodruff for which the check was given, and on the same day the defendant received the check he delivered it to the plaintiff on his debt. Woodruff had an account with the Asbury Park National Bank. On the day of the date of the check the bank charged to his account a demand note held by the bank against him for \$500, but, so far as appears, without any notice to Woodruff, and this rendered his bank account overdrawn. Woodruff was in embarrassed circumstances, but was in the daily receipt of about \$600 from his business. He used part of the receipts for current expenses, without depositing them, and between the 22d and 31st of August he deposited about \$900 in the bank to the credit of his account, and the inference is that it was applied in part to pay the \$500 note and in part to pay current checks drawn by Woodruff.

On the 22d of August, the day on which Woodruff's check to the defendant is dated, and after it had been indorsed to the plaintiff by the defendant, Woodruff, who had been informed of the transfer, requested the plaintiff to accommodate him by holding the check a

few days, stating as a reason that he was pressed in the payment of his accounts, to which request the plaintiff assented. He asked the plaintiff to let him know when he wished to use the check, as he would then proffer it. Woodruff testified that he had money in his office sufficient to pay the check, and would have paid it at any moment had payment been insisted upon; that he was in the receipt of about \$600 a day, and that he redeemed a number of other checks which went to protest at this time; that two or three days after the conversation of the 22d of August, he spoke to the plaintiff again, and the plaintiff informed him that he had sent the check west. Woodruff said to him that he regretted it very much, as he wished to make provision for the check.

The cashier of the bank testified that there were no funds to meet the check, and that it would not have been paid if it had been presented any time after the 22d of August.

On August 31, Woodruff, who was behind in his rent, was dispossessed from the hotel premises and his business was closed, and he then was and now is insolvent. It may be conceded that the only obligation upon the plaintiff as between him and the defendant, was to present the check at the bank for payment within the time prescribed by law, and if payment was refused to have the same protested and notice of non-payment to the defendant. If he had performed this duty the defendant would have been apprised of the default, and he would have had an opportunity to take such measures as he could to secure payment from Woodruff.

One of the objects of requiring prompt notice to be given to indorsers and other parties secondarily liable on commercial paper in case of default, is that they may have an opportunity to secure themselves. Checks are supposed to be drawn against funds of the drawer, and prima facie where it is shown that the drawer's account was not good the inference of injury from non-presentment would be rebutted.

But where, as in this case, it is shown that the maker of the check was solicitous that it should be paid, that he had the means of payment at command, and would have provided for or paid the check if payment had been insisted upon, that the holder was apprised of the facts, and for the accommodation of the maker refrained from presenting the check, and presentation was delayed until open insolvency of the maker occurred, and he became, by the change of circumstances, unable to provide for the check, it cannot be said, we think, that there was no legal evidence of injury to be submitted to the jury.

The plaintiff, instead of taking the usual course, undertook to deal with the maker of the check, in disregard of his primary obligation to the defendant. It was for the jury to pass upon the circumstances, and to find whether the conduct of the plaintiff imposed a pecuniary injury upon the defendant. To the extent of such injury the law adjudges that the debt of the plaintiff has been paid.

The judgment below should be reversed, and a new trial granted, with costs to abide the event.
All concur.

NEW YORK COURT OF APPEALS (2d Div.).

Anson HEATH, *Respt.*,

v.

Jefferson S. HEWITT, *Appt.*

(.....N. Y.....)

A conveyance to the "heirs" of the grantor's son, who has children then living, reserving to him a life estate after life estates in the grantor and another, is a present grant of the fee to the children.

(June 2, 1891.)

NOTE.—Who are "heirs."

The primary meaning in the law of the word "heirs" is the persons related to one by blood, who would take his real estate if he died intestate, and the word embraces no one not thus related. It is not strictly proper to designate persons who succeed to the personal estate of an intestate. The proper primary signification of the words "next of kin" is those related by blood, who take personal estate of one who dies intestate, and they bear the same relation to personal estate as the word "heirs" does to real estate. The word "heirs" and "next of kin" would not ordinarily be used by any testator to designate persons who were not related to him by blood. *Tillman v. Davis*, 95 N. Y. 17.

The word "heirs" at common law is required to be used in limiting a fee simple, where the estate is acquired by conveyance *inter vivos*. And no equivalent words, which indicate the intention of the grantor to convey an absolute right to the property, will suffice. If the conveyance be not made to one and his heirs, the grantee will take only an estate for his life, notwithstanding the estate is limited L. R. A.

A PPEAL by defendant from an order of the General Term of the Supreme Court, Fifth Department, reversing a judgment in favor of defendant entered in the Cayuga County clerk's office upon the report of a referee in an action brought to recover real estate. *Affirmed.*

Statement by **Parker, J.:**

Appeal from an order of the General Term of the Supreme Court, Fifth Department, reversing a judgment entered upon the report of a referee dismissing plaintiffs' complaint. This action was brought to recover one equal undi-

vided by such phrases as, "to A forever," or, "to A and his successors," or to his children or issue or assigns, and the like. An express direction that the grantee is to have a fee-simple estate will not supply the place of the word "heirs."—*Co. Lit. 8 b; 2 Prest. Est. 3, 8; 4 Kent, Com. 6, note; 1 Spence, Eq. Jur. 139; Sedgwick v. Ladin, 10 Allen, 430; King v. Barns, 18 Pick. 24; Adams v. Ross, 30 N. J. L. 511; Clearwater v. Rose, 1 Blackf. 137; Foster v. Joice, 3 Wash. C. C. 498; 1 Washb. Real Prop. 88.*

But if the estate be acquired by devise or by legislative grant the technical word "heirs" is not necessary. The intention to create a fee-simple estate may in such cases be manifested by any other words or forms of expression. *Rutherford v. Greene, 15 U. S. 2 Wheat. 199, 4 L. ed. 218; Bridgewater v. Bolton, 6 Mod. 109; Newkerk v. Newkerk, 2 Cal. 345; Jackson v. Housel, 17 Johns. 281; Godfrey v. Humphrey, 13 Pick. 537; Baker v. Bridge, 12 Pick. 27; 2 Bl. Com. 108; 1 Washb. Real Prop. 85.*

On the other hand, if the word "heirs" appears from the context of the will to have been used by the testator as a word of purchase, it will be give

vided eleventh part of certain lands described in the complaint. The plaintiff asserted title by virtue of the following instrument:

"This indenture, made this twenty-eighth day of April, one thousand eight hundred and forty-six, between Benjamin Heath, of Locke, Cayuga County, N. Y., of the first part, and the heirs of Warren Heath, of the same place, to be equally divided among them, of the second part, witnesseth, that the said party of the first part, for and in consideration of two hundred and fifty dollars, does grant, bargain, sell, confirm, unto the said party of the second part, and to their heirs and assigns forever, all that certain piece or parcel of land situate on lot No. thirty-three, in the Township of Locke, bounded as follows. On the north and west by lands owned by the heirs of Salmon Heath, deceased, on the south and southwest by the center of the highway, and on the east by lands owned by the said Benjamin Heath, containing about thirteen acres of land, being the same premises deeded to the said party of the first part by Harvey Heath and wife, as by reference to said deed (book 77, p. 619) will more fully appear, excepting and reserving to myself the whole use and absolute control of the said premises during my natural life; and in case, my wife, Naamah, should outlive me, to her during her natural life, and after her decease to my son, Warren, during his natural life. And further, this conveyance is made subject to a certain judgment rendered in favor of Jonas Rude, of two hundred and fifty dollars, the amount of which judgment the said Warren hereby agrees to pay, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, excepting the reserves above men-

tioned, to have and to hold the said premises above described to the said party of the second part, their heirs and assigns forever; and the said party of the first part for his heirs does covenant, grant, promise, and agree to and with the said party of the second part, his heirs and assigns, the above-bargained premises against all and every person or persons whatsoever lawfully and equitably claiming or to claim the whole or any part thereof forever to warrant and defend. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written. *Nota Bene*, 2d space from top, the words 'the heirs,' interlined before signing; also, 5th space from bottom the words, 'excepting the reserves above mentioned.'

his
"Benjamin X Heath, [L. s.]"
mark.

Warren Heath was a son of Benjamin Heath, the grantor, and at the date of the instrument had eight children, among whom was the plaintiff. Thereafter three children were born to him, and at the time of the commencement of this action all of his children were living. After the death of Benjamin Heath and his widow, Warren Heath entered into possession of the land described in the deed, and so continued until January 22, 1868, under claim of title as life tenant under the instrument granted. On the day last named Warren Heath and his wife, for a valuable consideration, quitclaimed all their right, title and interest in and to such premises to Harvey Heath. March 1, 1871, Harvey Heath and wife, by a warranty deed, conveyed said lands to Jefferson S. Hewitt, the defendant in this action, who subsequently went into possession

that construction, and the devisee will take only a life estate, while his heirs will take a contingent remainder, notwithstanding that ordinarily the rule in *Shelley's Case* would make it a fee-simple estate in the first devisee. *Ulrich's App.* 86 Pa. 386, 27 Am. Rep. 707; *Tiedeman, Real Prop.* § 37.

Where a conveyance was made to one, as trustee for his wife and her "present heirs," the words "present heirs" were words of description as to who were to take under the conveyance, and were equivalent to saying the children she had then; and the wife and such children took as tenants in common. *Cheese-Carley Co. v. Purltell*, 74 Ga. 487.

In the civil law the word "heir" denotes a universal successor in the event of death, he who actively or passively succeeds to the entire property or estate, rights and obligations of a decedent and occupies his place. *Black, Law Dict.* title *Heir*, 665.

The term "heir" has several significations. Sometimes it refers to one who has formally accepted a succession and taken possession thereof; sometimes to one who is called to succeed but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. *Mumford v. Bowman*, 20 La. Ann. 417.

In *Brown v. Lyon*, 6 N. Y. 419, lands were devised to Olive Hall, "to have and to hold to the said Olive during her life, and then to descend to the heirs of her body, and to their heirs and assigns, forever;" and it was held that these words would have, but for the statute, created an estate tail, and by force of the statute the same abolishing all estate tail. Olive Hall, the grantee named, took a fee.

So in the case of *Schoonmaker v. Sheely*, 3 Denio, 13 L. R. A.

490, the words used in the habendum clause defining the estate of the devisee were "to have and to hold," describing the lands, "unto my said son B. during his natural life, and after his decease to his heirs and to their heirs and assigns, forever," and the same conclusions were reached. That it was the intention of the grantor to create an estate tail in his sister Louisa F. is supported by the following cases: *Grout v. Townsend*, 2 Denio, 338; *Vanderheyden v. Crandall*, 2 Denio, 18; *Van Rensselaer v. Poucher*, 5 Denio, 35; *Lott v. Wykoff*, 2 N. Y. 855; *Barlow v. Barlow*, 2 N. Y. 388; *Seaman v. Harvey*, 16 Hun, 75; *Coe v. Dewitt*, 22 Hun, 428.

When a testator uses the word "heirs," as applied to the descendants of a living person, the general rule of the construction is that he intends the children of such person. *Carne v. Rooh*, 4 Moore & P. 862; *Darblison v. Beaumont*, 1 P. Wms. 229, 3 Bro. P. C. 60; *Goodright v. White*, 2 W. Bl. 1010; *Simms v. Garrot*, 1 Dev. & B. Eq. 393; *Bowers v. Porter*, 4 Pick. 197; *Campbell v. Rawdon*, 18 N. Y. 418; *Heard v. Horton*, 1 Denio, 168.

It is well established that when the grantees in a conveyance are mentioned and described as the children of "A.," it is sufficiently certain to make the grant valid, for by the use of that term reference is made to a class of persons in *esse*, and they can be identified by proper proof. The case of *Umfreville v. Keeler*, 1 Thomp. & C. 498, is not hostile to the views which we entertain on this proposition and is an authority in support of them. *Rivard v. Gisenhof*, 35 Hun, 247.

All the works on the law of tenure unite in this proposition, that *prima facie* the word "heir" is to be taken in strict legal sense; but if there be a plain demonstration in the deed that the grantor used it

thereof under said deed, and so continued up to the time of the trial of this action. The referee found, as a conclusion of law, that the deed from Benjamin Heath to "the heirs-at-law of Warren Heath," who was living, was void for uncertainty as to who were the grantees, and directed judgment to be entered dismissing the complaint with costs.

Mr. S. Edwin Day, with Mr. H. Greenfield, for appellant:

The alleged deed was void. Warren Heath was living.

In consequence of the maxim *nemo est heres viventis*, an immediate grant to the heirs of A is void.

4 Cruise, Dig. title xxxii. chap. 8, § 17 (vol. 3, ed. 1808, *87; 1 Devlin. Deeds, p. 162, § 185; *Rivard v. Gisenhof*, 35 Hun, 247; *Morris v. Stephens*, 46 Pa. 200; *Hall v. Leonard*, 1 Pick. 27.

The grant was by its terms "immediate," though the grantor undertook to reserve a life estate in the premises to himself, for his own life, and to others for their lives.

Ives v. Van Auken, 34 Barb. 566; *Hornbeck v. Westbrook*, 9 Johns. 78.

A deed takes effect upon delivery only. Delivery implies acceptance, some act on the part of the recipient.

Jackson v. Phipps, 12 Johns. 418.

There was no proof of its actual delivery, nor was there a presumption of delivery.

Gifford v. Corrigan, 7 Cent. Rep. 277, 105 N. Y. 223; *Fisher v. Hall*, 41 N. Y. 416.

Mr. W. E. Hughitt, with Mr. W. W. Hare, for respondent:

A most liberal construction will be given a deed in order to carry out the intention of the grantor.

Jackson v. Blodgett, 16 Johns. 172; *Kilmer v. Wilson*, 49 Barb. 86; *Trucker v. Meeks*, 52 N. Y. 638.

The surrounding circumstances will be looked into to aid in getting at the grantor's intention.

French v. Carhart, 1 N. Y. 96; *Bennett v. Culver*, 97 N. Y. 256; *Coleman v. Beach*, 97 N. Y. 554.

The deed recognizes Warren Heath as then living, and therefore does not use the term "heirs" in its usual sense, but as meaning his heirs apparent (his children).

Head v. Horton, 1 Denio, 165; *Vannorsdall v. Van Deventer*, 51 Barb. 137.

This is a future estate, within the meaning of the Statute, and it is not now necessary that it follow a preceding estate.

Rev. Stat. chap. 1, title 2, pt. 2, §§ 18, 30; *Moore v. Littel*, 41 N. Y. 75; *Sheridan v. House*, 4 Keyes, 569.

Parker, J., delivered the opinion of the court:

Appellant's contention is that, inasmuch as Warren Heath was living, a grant to his heirs was void for uncertainty, as there were no persons in being who could take under that description. It is essential to the validity of a grant that the parties be named in the deed, or so plainly designated as to distinguish them with certainty; and it is asserted that, as there were no heirs of Warren Heath at the date of the deed, "because no one can be heir during the life of his ancestor" (Broom, Legal Maxims, *522), the grantees were neither named nor designated. Our attention is called to the rule laid down in Cruise's Digest (title 29, chap. 3), where it is said to be "a rule of the common law that no inheritance can vest, nor any person be the actual, complete heir of another, till

in a different sense, such different sense may be assigned to it. 164.

The word "children" in its primary and natural sense is a word of purchase, but the words "heirs," and "heirs of the body" are, in their primary and natural sense, words of limitation and not of purchase. *Schoonmaker v. Sheely*, 3 Denio, 490; *Re Sanders*, 4 Paige, 293, 3 L. ed. 442.

Kent says the term "heirs" must be used as a mere description of one or more individuals, or a new import given to it by superadded or engrafted words of limitation varying its sense and operation, in order to make it a word of purchase. 4 Kent, Com. 222.

A gift, by will, of personal property to the "heirs" of any person in the event of his death is a gift to those who, if such person died intestate, would succeed to his personal property according to law unless the "heirs-at-law" is the person "designated" in the will to take the personal property. *Holloway v. Holloway*, 5 Ves. Jr. 399; *Vaux v. Henderson*, 1 Jac. & W. 388, note; *Glittings v. McDermott*, 2 Myl. & K. 69; *Jacobs v. Jacobs*, 16 Beav. 557; *Low v. Smith*, 2 Jur. (N. S.) pt. 1, p. 344; *Doody v. Higgins*, 2 Kay & J. 729; *Re Porter's Trust*, 4 Kay & J. 188; *Re Philip's Will*, L. R. 7 Eq. Cas. 151; *Finlayson v. Tatlock*, L. R. 9 Eq. Cas. 258; *Re Steven's Trusts*, L. R. 15 Eq. Cas. 110; *Wingfield v. Wingfield*, L. R. 9 Ch. Div. 658; *Croom v. Herring*, 4 Hawks, 393; *Freeman v. Knight*, 2 Ired. Eq. 72; *Eddings v. Long*, 10 Ala. 203; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Scudder v. Van Arsdale*, 13 N. J. Eq. 109; *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Re Rootes*, 1 Drew & S. 223; *Clark v. Cordis*, 4 Allen, 466. See 13 L. R. A.

note to *Johnson v. Supreme Lodge K. of H.* 8 L. R. A. 732, 53 Ark. 255.

A recent authority on the subject thus states the law: The fact that a grantee is not described by name will not affect the validity of a deed, if the designation or description be sufficient to distinguish the person intended from the rest of the world. Thus, where a conveyance was made to Margaret W. Pitcher and her children, and to their heirs and assigns forever, it was declared that the number of children *in esse* could be ascertained, and the maxim would apply, *id certum est quod certum reddi potest*. The court held that she and her children *in esse* took as tenants in common. *Hamilton v. Pitcher*, 53 Mo. 334.

A deed to "P or her heirs" was held good. *Hogan v. Page*, 69 U. S. 2 Wall. 607, 17 L. ed. 354; *Ready v. Kearsley*, 14 Mich. 225.

A deed is valid which is made to the heirs-at-law of a person deceased. *Boone v. Moore*, 14 Mo. 420; *Shaw v. Loud*, 12 Mass. 447. And see *Thomas v. Marshfield*, 10 Pick. 364.

But a deed made to the living heirs of a person, without specifying the names of the heirs so called, is void, because it is left in uncertainty who are to have the benefit of the conveyance. *Morris v. Stephens*, 46 Pa. 200; *Winslow v. Winslow*, 52 Ind. 8; *Hall v. Leonard*, 1 Pick. 27.

A deed conveying property is not void for uncertainty if it can be shown who were intended, and that they were in life, and capable of taking at the time the deed was executed. *Hogg v. Odum*, *Dudley* (Ga.) 185.

In that case the conveyance was to the children of Nancy Jones. Devlin, Deeds, § 184.

the ancestor is previously dead,—*nemo est hæres viventis*." In *Hall v. Leonard*, 1 Pick. 27, a grant of land to the heirs of A. B. was held to be void, and in a discussion of the question the court said: "No case has been found to support a grant to a man's heirs, he being living at the time of the grant." So in *Morris v. Stephens*, 46 Pa. 200, a conveyance by a grantor to "the heirs of his son Andrew," who was then living, was held to be void for uncertainty. In *Huss v. Stephens*, 51 Pa. 282, the grantor of the deed under consideration was also the grantor in the instrument before the court in *Morris v. Stephens*, *supra*. In the *Morris Case* the deed described the grantees as heirs of Andrew Lautz, Jr., and the consideration expressed was one dollar in money and "the natural love and affection which the grantor hath for said heirs;" while in the *Huss Case* the grantees were described in the same manner, but the consideration expressed was one dollar and "the natural love and affection he hath for his grandchildren;" the difference in the two cases being that in the latter the word "grand-children" in the consideration clause appears in the place of the word "heirs" in the former. In the first case the deed was held to be void for uncertainty. But the second was declared to constitute a valid grant, because the word "grandchildren" defined what he meant by the use of the word "heirs" in describing the grantees. It enabled the court to ascertain that the word "heirs" was not used in its technical sense, but that by it the grantor intended to describe the children of Andrew Lautz, Jr. In *Rivard v. Gisenhof*, 35 Hun, 247, the court asserted the general rule that a grant "to the heirs" of a living person is void for uncertainty. And in *Umfreville v. Keeler*, 1 Thomp. & C. 486, the court recognizes the doctrine of the cases cited, but held that a deed to "E. U., wife of A. U., and her heirs, the children of said A. U.," was valid, and operated to pass title to the children, because it was manifestly the intention of the grantor to confine the interest conveyed to the children of the parties named, notwithstanding the use of the word "heirs." The legal and well-understood meaning of the word "heir" is, the one upon whom is cast an estate of inheritance, upon the death of the owner; and it follows that this person is uncertain until death occurs, for until that event it can never be known to whom the estate will fall. Hence the doctrine of the cases referred to, and which, so far as we have observed, stand unquestioned. If, then, the word "heirs" in this instrument be held to have been employed in its technical sense, it would follow that the deed should be declared void for uncertainty. The courts of this State do not appear to have been called upon in the case of a deed to determine whether, in the light of other facts appearing in the deed, and the circumstances surrounding its execution, the word "heirs" may not be construed as meaning children of such living person, if it appears that such was manifestly the intention of the grantor. But in the construction of wills the question has been considered. In *Heard v. Horton*, 1 Denio, 165, the testator, after making sundry bequests and devises, and, among others, to his son J. B. H., devised the residue of his real

estate without words of perpetuity to his son J. H., on condition that he should pay his debts; and added that, if J. H. should die without issue, at his decease the real estate should be equally divided among the heirs of his son J. B. H. It was held that the words "heirs of J. B. H.," he having children living at the time of making the will, sufficiently designated these children as the executory devisees, though J. B. H. was himself then living, he being referred to in the will as a living person. Judge Beardsley, in delivering the opinion of the court, said: "Where the will recognizes the ancestor as living, and makes a devise to his heir, *eo nomine*, this shows that the term was not used in the strictest sense, but as meaning the heir apparent of the ancestor named." Now, in this case, Warren Heath was living at the time of the making of the deed, which fact sufficiently appears in the deed, because the grantor reserved to him a life-estate in the lands sought to be conveyed; and he had children living, among whom was the plaintiff in this action. In *Van-norsdall v. Van Decenter*, 51 Barb. 187, the devise was to the legal heirs of his (testator's) brother A., deceased, and to the legal heirs of his sister M., deceased, and to the heirs of his brother-in-law W. V. At testator's death, W. V. was still living. It was held that the word "heirs," in so far as it related to the heirs of his brother-in-law W. V., was used as synonymous with the word "children," for the will assumes that he was then living; that the children of W. V. were entitled to take, and that the estate became vested in them immediately upon the death of the testator. These cases were cited with approval in *Cushman v. Horton*, 59 N. Y. 149, in which the rule is laid down that to the word "heirs" must be given the ordinary legal meaning, unless it appears that the testator used the word in other than the primary legal sense, in which event courts should give effect to the intention of the testator. If it be said that both in England and in this country the courts have more generally supported indefinite forms of transmissions by will than by grant, because in the case of wills they are intended to go into effect at a future time, and to provide for future and uncertain events, not only for individuals named, but also for described classes of donees, to be ascertained by evidence at the death of the testator or afterwards, while in the case of the present conveyance the very nature of the act excludes the necessity of indefiniteness, it may be answered that this difference is not of moment in determining whether the particular rule of construction adopted in the cases cited is applicable here. The determination made was that, if from the whole will it was manifest that in using the word "heirs" the testator meant "children" the court should so construe it, and thus give effect to the intention of the testator. But the Statute also requires the court to give effect to the intent of the grantor in making the conveyance before us, if it may be done consistently with the rules of law. It provides that, "in the construction of every instrument creating or conveying or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the in-

tent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." 1 Rev. Stat. Edmond's ed. p. 699, § 2. As the intent of the parties is to govern in grants as well as wills, there seems to be no basis on which to found a distinction between them as to the interpretation to be given to the word "heirs," if in the one case as in the other it appears that it was not the intention of the grantor or testator to use it in its ordinary legal sense. We are then to ascertain whether the grantor intended by the words "the heirs of Warren Heath" to designate and describe the children of Warren Heath as his grantees. It has been determined in many cases that the word "heirs," notwithstanding its primary and well-understood meaning, is susceptible of more than one interpretation. *Heard v. Horton*, *Vannorsdall v. Van Deventer*, *Cushman v. Horton*, *supra*. And in determining which must be here given we may look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the instrument. *French v. Carhart*, 1 N. Y. 96; *Coleman v. Beach*, 97 N. Y. 545-553. At the date of the instrument Warren Heath had eight children, who were also the grand-children of Benjamin Heath, the grantor. Warren Heath was not only living, but the deed distinctly recognizes that fact, in that: *first*, it recites that the "conveyance is made subject to a certain judgment rendered in favor of Jonas Rude of \$250, the amount of which

judgment the said Warren hereby agrees to pay;" and, *second*, the instrument undertakes to reserve "the whole use and absolute control of the said premises . . . to my son Warren during his life."

These facts bring the question before us within the rule laid down in *Heard v. Horton* and other cases cited *supra*, that when a will recognizes the ancestor as living, and makes a devise to his heir in that name, it shows that the term was used as meaning the heir apparent of the ancestor named; or, as stated in the *Vannorsdall Case*, that the word "heirs" was used as synonymous with the word "children." That he intended to describe the children of his son Warren as his grantees is further supported by the fact that the grant is by its terms immediate, the grantor undertaking to reserve a life estate in the premises to himself and to others for their lives. The conveyance was not to Warren Heath for life, and, after his death, to his heirs, but it constituted a present grant to persons whom the grantor designated as the heirs of Warren Heath, with an attempted reservation for the benefit of Warren, and the only persons answering that description in any sense in which the word is employed, whether technically or popularly, would be the children of Warren.

The order should be affirmed, and judgment absolute rendered against the appellant, with costs.

All concur, except **Bradley and Haight, JJ.**, not sitting.

TEXAS SUPREME COURT.

Joseph NALLE, *Appt.*,

v.

M. PAGGI.

(....Tex.....)

The sale of a lot on which half of a party-wall is standing is a use of the wall by the owner within the meaning of his contract to pay half its value when he used the wall.

(May 26, 1891.)

A PPEAL by defendant from a judgment of the District Court of Travis County in favor of plaintiff in an action brought to recover defendant's proportion of the cost of a party-wall. *Affirmed*.

The facts sufficiently appear in the commissioner's opinion.

Messrs. Walton, Hill & Walton, for appellant:

The petition does not allege a breach of the contract, which it sets out as the foundation of the suit; there being no allegation of an express or implied contract on the part of Nalle to use the wall, his act in parting with it was not a breach of the contract set up, and the court erred in not sustaining his exceptions to the petition.

As to construction of the contract, see opinion on former appeal.

Hamilton v. Glascock (Tex.) 1888.

As to conditional contracts or promises upon contingency, see—

Rowlett v. Lane, 48 Tex. 274; *Carlisle v. Hooks*, 58 Tex. 421; *Oliphant v. Woodburn Coal & Min. Co.* 63 Iowa, 332; *Hall v. Los Angeles County* (Cal.) May 18, 1887; *Lorillard v. Silver*, 36 N. Y. 578, 35 Barb. 132; *Ray v. Hodge*, 15 Or. 20; 1 Pothier, Obl. pp. 127 (marg. p. 48) 201, Evans, note d.

As to party-wall contract, see—

Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 613.

Whether any implied contract arises in case of party-wall built without agreement, see—

Tiedeman, Real Prop. § 620, note 3; 3 Wait, Act. & Def. 710.

The court not having found that defendant Nalle agreed either expressly or impliedly to build or otherwise use the wall, and not having found that said Nalle was bound under the agreement not to sell his lot, the fact of sale and consequent inability on the part of Nalle to use the wall constitutes no breach of the contract found by the court as the basis of its judgment.

Messrs. Sheeks & Sheeks for appellee.

Marr, J., filed the following opinion:

The statement of the case is taken from the brief of appellant: "Appellee brought this

NOTE.—See note to *Harbor v. Evans* (Mo.) 10 L. R. A. 41. Also *Fowler v. Saks* (D. C.) 7 L. R. A. 649, and *Nalle v. Paggi* (Tex.) 1 L. R. A. 33.
13 L. R. A.

action originally against appellant and George Schuworth for the recovery of half the value of a party-wall. He recovered judgment against both, which judgment, on appeal, was reversed by this court. The case having been referred to and decided by commissioners of appeals on agreement of parties (*Nalle v. Paggi* (Tex.) 1 L. R. A. 83), appellee dismissed as to Schuworth, and amended his petition so as to charge Nalle alone on alleged contract to pay for half the party-wall. Trial by the court resulted in judgment, March 15, 1889, against appellant for \$627.80, half the value of the wall and interest. The court filed findings of fact and conclusions of law. Appellant had exceptions noted, and gave notice of, and perfected appeal."

That portion of plaintiff's petition challenged by the exceptions interposed by appellant, and overruled in the court below, is as follows:

"That on or about the said 4th day of August, 1875, the defendant and the petitioner made and entered into a parol contract by which it was agreed that petitioner might build a wall, to be a partition wall, on the line between their two tracts of land so owned by them as aforesaid; that in so doing he might extend the foundation thereof one foot upon the land of defendant, and should extend one foot upon the land of petitioner, so as to have one half of the foundation and wall upon the land of defendant, and one half thereof on the land of petitioner, and that as soon as defendant desired to use said wall he would pay one half of the value thereof to the petitioner."

The objection to the petition, as made by the defendant, is that Nalle was only to become liable in the event that "he desired to use said wall;" and the petition fails to show the happening of this contingency. The petition, however, further alleges elsewhere "that afterwards, to wit, in October, 1883, the defendant sold and conveyed his part of the lot to one George Schuworth, who has improved the same, and who began to use said partition wall at that time, has been ever since, and still is, using the same as the vendee of defendant, and thereby rendered it out of his (defendant's) power to use said wall himself, though he and his said vendee derived the full benefit thereof."

There is no need of considering the several assignments of error separately, or the action of the court upon the demurrers apart from the conclusions of law. There is but one question presented, and to be determined, in our estimate of the record. Do the facts as alleged and proven show the liability of the appellant to pay for one half of the cost or value of the partition wall erected by the appellee? The findings of the court are as follows: "(1) In 1875, plaintiff and defendant, Nalle, owned adjoining lots on Pecan Street, in the City of Austin, and in that year plaintiff built a partition wall upon the division line between said lots, as alleged in his petition, one half on his, and the other half on Nalle's lot, which wall was and is worth \$1,000. (2) The wall was placed over on Nalle's lot by plaintiff on an understanding or agreement had between them that when Nalle used the wall he would do what was right about it in the way of compensating plaintiff; he (Nalle) then expecting to build a house on his lot. This understand-

ing was had before the foundation was finished. (3) In October, 1884, Nalle sold his lot to one Schuworth, who knew the wall was over on his lot, and, while he was still owing Nalle \$1,500 on the lot, Paggi made known to him his claim for building half of the wall, and he refused to pay for it, and Nalle has also refused to pay for it. In 1884, after his purchase, Schuworth built a house upon the lot, using about thirty feet of the partition wall as one side of his house. Conclusions of law: On appeal from a former judgment in this case, it was held, on the same state of facts as above found, that Schuworth was not liable, and plaintiff had dismissed as to him. As to the liability of defendant, Nalle, this court holds, upon the facts, that as the plaintiff erected the partition wall upon the understanding that Nalle would do what was right about it when he used it, and as Nalle, after the completion of the wall, sold the lot, and put it out of his power to use it, and in the power of another to get the benefit of said wall without paying plaintiff for it, therefore Nalle is bound to pay plaintiff one half of its value, or the sum of \$500, and, as his liability rose when he sold the lot in 1884, this sum should draw interest at eight per cent from January 1, 1885."

Appellant contends that, upon the facts found by the court below, it should have rendered judgment in his favor, because, he says, as it was optional with him to use the wall, and as he never builded on the lot, nor used the wall as contemplated by the agreement, the contingency in which he would become liable to make compensation for one half of the wall has not yet arisen. To this we cannot accede, but, on the contrary, concur in the conclusions of the district court. When the wall was erected, or rather being erected, Nalle agreed with Paggi to "do what was right about it in the way of compensating him" whenever the former should use the wall; and we think a use of the wall by appellant at some time was undoubtedly contemplated. Here, then, is an express agreement or promise to pay, conditional only upon the use of the wall by Nalle in any way. The wall was erected with his consent, and for at least his prospective benefit, and was placed as much on his land as on that of the appellee. His liability did not necessarily, as we think, depend upon the erection of a building by him on his own lot, connected with the wall, although that undoubtedly would have been a use thereof. His vendee, however, has made such use of a part of the wall. By selling his lot to another, carrying with it the right to use the wall, or at least depriving himself of such right, the appellant effectually put it out of his power to build to the wall, or use it in any other mode. By his own voluntary act he thus put it out of his power to make any direct use of the wall as originally contemplated, and therefore prevented the happening of the contingency in which he was to make compensation even if we suppose that the sale of the lot was not a use of the wall. Where a party thus renders impossible the performance of the contract upon his own part, to the detriment of the other contracting party, there can be no doubt of his liability under the contract, and that a right of action against him immediately ac-

crues. *Phillips v. Herndon*, 78 Tex. 378; *Dugan v. Anderson*, 86 Md. 567, 11 Am. Rep. 509. It would be unconscionable to allow one of the parties to a contract to receive the benefits thereof, and then repudiate it with impunity. But we are further of the opinion that the sale of the lot by the appellant to Schuworth, carrying with it one half of the wall erected by the appellee at his own expense for the joint benefit of both lots, was a use of the wall by Nalle, within the meaning of the contract, and thereby fixed his liability. It must be supposed that he was paid for his interest in the wall, or took that into consideration, when he conveyed to Schuworth. He had agreed to do "what was right" when he should use the wall. The right thing to do was to pay one half of the value thereof to Paggi. This he did not do, though he has used the wall, and reaped some of the benefits, as we must presume, of its erection. The wall having been built partly on Nalle's land with his consent, and thus made a part thereof, to his benefit, with an expectation upon the part of Paggi that he would be compensated proportionally, a promise to do so upon the part of Nalle might be implied under the circumstances, were there no express agreement to that effect,

particularly as he not only got the benefit of the wall himself, as we have seen, but, by the sale of the lot, authorized Schuworth to use the wall, and the latter has made the very use thereof which appellant contends was originally contemplated. *Qui facit per alium facit per se*, quoted by the appellee, might well be applied. We have carefully examined the facts, and read with interest the brief and argument for appellant, but have been unable to discover any principle of law applicable to the case that would justify the conclusion that his liability to make compensation has never arisen. We are of the opinion that upon the plainest principles of justice, and according to the authorities, appellant would be liable to the appellee to the extent determined by the district court, either upon his express agreement or promise, or, if necessary to support the judgment below, upon such promise to pay as might be legally implied from the acts and understanding of the parties under the circumstances of the case. *Vide Richardson v. Tobey*, 121 Mass. 457; *Huck v. Flentye*, 80 Ill. 258; *Day v. Caton*, 119 Mass. 514.

We conclude that the judgment ought to be affirmed.

Adopted by Supreme Court, May 29, 1891.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BAXTER NATIONAL BANK

v.

Peter S. J. TALBOT.

(....Mass....)

The right to show that the obligation growing out of an indorsement of a promissory note is not absolute, but depends

upon a collateral oral agreement, relates to the nature and validity of the contract and not to the remedy, and is governed by the *lex loci contractus*.

(June 27, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County

NOTE.—Parol evidence as affecting indorsement.

While it is elementary law that parol evidence is incompetent to vary the terms of a written instrument, still it is equally well settled that, as between the original parties to commercial paper, such proof is admissible as will have a tendency to establish the character in which an indorser intended that he should be bound; and proof of this intention will countervail the prima facie presumptions which the law indulges with reference to the paper. *Riley v. Gerrish*, 9 Cush. 104; *Sylvester v. Downer*, 20 Vt. 355; *Owings v. Baker*, 54 Md. 82; *Nurre v. Chittenden*, 56 Ind. 465; *Pierse v. Irvine*, 1 Minn. 369; *Strong v. Riker*, 16 Vt. 556; *Quin v. Sterne*, 26 Ga. 224; *Good v. Martin*, 95 U. S. 96, 24 L. ed. 348.

Note takes effect from delivery.

Like a deed or other written contract, a promissory note takes effect from delivery, and, as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol evidence is therefore admissible to show when that took place, as it cannot appear in the terms of the note. 2 Taylor, Ev. 6th ed. 1001; *Hull v. Cazenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mees. & W. 694.

Presumptions are seldom, if ever, conclusive, at least when applied to commercial paper, except in favor of subsequent bona fide holders for value, before maturity and without notice. As between 13 L. R. A.

the original parties to the paper, parol evidence is competent to explain the contractual relation and the equities it involves. *Smith v. Morrill*, 54 Me. 48; *Mendenhall v. Davis*, 72 N. C. 150; *Ross v. Espy*, 66 Pa. 481; *Maxwell v. Van Sant*, 46 Ill. 58.

The principle above cited obtains in cases of blank indorsement of a non-negotiable note. *Jacques v. McKnight*, 26 N. J. L. 92, note.

By statutory provision, in Georgia, all blank indorsements are subject to explanation by oral evidence as between the immediate parties to the paper. Code, § 3808.

But there is a formidable array of authority to the effect that blank indorsements of commercial paper are perfected contracts in writing, and cannot be varied or altered by the interposition of parol proof. *Stack v. Beach*, 74 Ind. 511; *Day v. Thompson*, 65 Ala. 269; *Charles v. Denis*, 42 Wis. 56; *Schnell v. North Side P. Mill Co.*, 89 Ill. 581; *Barnard v. Gaslin*, 23 Minn. 192; *Barry v. Morse*, 3 N. H. 132; *Bank of Albion v. Smith*, 27 Barb. 489.

The principle is that all previous and contemporaneous negotiations and undertakings are merged in the writing and its legal import. The undertaking of an indorser may be either limited or enlarged at the time it is entered into, by express terms, at the pleasure of the indorsers. But if no such terms are expressed in the indorsement, the law fixes the character of the undertaking, and it cannot be varied by parol. *Bank of Albion v. Smith*, *supra*.

made during the trial of an action brought to enforce defendant's alleged liability as indorser of certain promissory notes, which resulted in a verdict in favor of plaintiff. *Sustained.*

The facts sufficiently appear in the opinion.

Messrs. Gaston & Whitney, for respondent:

There was no objection to the evidence by which the oral agreement was sought to be proved except so far as the oral agreement itself was claimed to be inadmissible. The ruling was as to the materiality of the thing sought to be proved, and not as to the manner in which the respondent sought to prove it.

See *The Gotano and Maria*, L. R. 7 Prob. Div. 137, 144, 149.

The indorsement of the respondent was made and took effect and was to be performed in the State of Vermont. The obligation, interpretation and effect of said contract and the liability of the respondent under it, were therefore to be determined by the law of Vermont.

Williams v. Wade, 1 Met. 82; *Bank of Illinois v. Brady*, 3 McLean, 268; *Powers v. Lynch*, 3 Mass. 77; *Trimby v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 783; *Shoe & Leather Nat. Bank v. Wood*, 3 New Eng. Rep. 118, 142 Mass. 563.

What may and may not be shown.

The entire contract is the writing as understood, delivered and received, and it is to be gathered from the language, usages, course of business and relation of the parties. *Byles*, Bills, 155.

So, one who indorses commercial paper in blank is precluded from showing, even in a suit by his indorsee, that the indorsement was *sans* recourse. *Mason v. Burton*, 54 Ill. 349; *Skinner v. Church*, 36 Iowa, 91; *Campbell v. Robbins*, 29 Ind. 271; *Charles v. Dennis*, 42 Wis. 55.

On the other hand, it is competent to show a contemporaneous written agreement as evidence to the fact that the indorsement was intended to be without recourse. *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204.

So an indorser cannot show, in an action against his immediate indorsee, that his indorsement was made merely for the purpose of transfer. *Dunn v. Ghost*, 5 Colo. 134.

Generally speaking, an indorser may prove, as against his immediate indorsee, that a blank indorsement was made for the purpose of collection. *Downer v. Chesebrough*, 36 Conn. 39; *McWhirt v. McKee*, 6 Kan. 412.

Some of the authorities maintain that parol evidence is inadmissible to control the construction of an irregular indorsement as against bona fide purchasers for value; that such evidence is only admissible as between immediate parties to the transaction. *Houston v. Bruner*, 39 Ind. 383; *Browning v. Merritt*, 61 Ind. 425; *Schneider v. Schiffman*, 20 Mo. 571.

In Missouri, it is also held to be admissible against an indorsee after maturity. *Seymour v. Farrell*, 51 Mo. 95.

But the better opinion is that, in every case where the signature on the back is in an ambiguous position, and the meaning can only be definitely ascertained by parol evidence, then parol evidence is admissible to prove its true character, even against a purchaser for value, for he can reasonably be charged with notice of this ambiguity. *Greenough v. Smead*, 2 Ohio St. 415; *Thacher v. Stevens*, 46 Conn. 551. See *Rey v. Simpson*, 68 U. S. 22 How. 341, 13 L. R. A.

It is inconceivable that the respondent is to be subjected to loss and to be held liable on a different contract from that which he actually made, because the plaintiff bank has brought suit in a jurisdiction where the law governing blank indorsements is different from that where the present contract was made.

See *Williams v. Wade*, 1 Met. 82. See also *Vermont State Bank v. Porter*, 5 Day, 316; *Koster v. Merritt*, 32 Conn. 246; *Denny v. Williams*, 5 Allen, 1; *Van Cleef v. Therasson*, 3 Pick. 12; *Dunn v. Welsh*, 62 Ga. 241.

Mr. Melvin O. Adams, for plaintiff:

The ruling of the court, that the *lex fori* must govern the case; that as all the evidence of the alleged agreement between plaintiff and defendant tended to prove that the same was oral, evidence of such oral agreement was inadmissible and immaterial upon any of the issues, was correct.

As to the *lex fori*, see—

Hoadley v. Northern Transp. Co. 115 Mass. 304-307; *Downer v. Chesebrough*, 36 Conn. 39; *Bain v. Whitehaven & F. J. R. Co.* 3 H. L. Cas. 1; *Leroux v. Brown*, 12 C. B. 801.

As to the evidence of such oral agreement, see—

Adams v. Wilson, 12 Met. 138; *Hanchet v. Birge*, Id. 545; *Underwood v. Simonds*, Id. 275, 277; *Wright v. Morse*, 9 Gray, 337.

16 L. ed. 280; *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343; *Cavazos v. Trevino*, 73 U. S. 6 Wall. 773, 18 L. ed. 813; *Frank v. Lillienfeld*, 38 Gratt. 377; *Denton v. Peters*, L. R. 5 Q. B. 475.

Exceptions to the general rule.

There are a few exceptions to the general rule. The exceptions are principally of three classes:

First, it is always competent to show by parol evidence that the indorsement was made without consideration, as, for example, that it was made for the accommodation of the indorsee. *Breneman v. Furnies*, 90 Pa. 186; *Hamburger v. Miller*, 48 Md. 325; *Morris v. Faurot*, 21 Ohio St. 155; *Cole v. Smith*, 29 La. Ann. 551; *Davis v. Morgan*, 64 N. C. 570; *Lovejoy v. Citizens Bank*, 23 Kan. 331; *Kirkham v. Boston*, 67 Ill. 599; *McCoon v. Biggs*, 2 Hill, 121; *Denniston v. Bacon*, 10 Johns. 193; *Foster v. Jolly*, 1 Crompt. M. & R. 703.

Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. *Smith v. Carter*, 25 Wis. 233.

So can partial failure or want of consideration be proved by parol evidence. *Cook v. Cockrill*, 1 Stew. (Ala.) 475.

It can also be shown that the consideration was certain payments to be made by the indorsee, the liability upon the indorsement being conditional upon making these payments. *Scammon v. Adams*, 11 Ill. 575; *Wood v. Matthews*, 73 Mo. 477.

Secondly, it may be shown that the indorsement was made in trust to the indorsee for the purpose of carrying out some purpose of the indorser, as his agent, or as a trustee. Thus, for example, it can be shown that the indorsement was made "for collection" only. *Lawrence v. Stonington Bank*, 6 Conn. 521; *Dale v. Gear*, 38 Conn. 15, 39 Conn. 59; *Lewis v. Dunlap*, 72 Mo. 173; *Smith v. Childress*, 27 Ark. 323; *Ricketts v. Pendleton*, 14 Md. 320; *Hamburger v. Miller*, 48 Md. 325; *Hill v. Ely*, 5 Serg. & R. 363; *Manley v. Boycot*, 2 El. & Bl. 46; *Martin v. Cole*, 3 Colo. 114; *Downer v. Chesebrough*, 36 Conn. 39. But see *Chaddock v. Vanness*, 35 N. J. L. 521; *Johnson v. Ramsey*, 43 N. J. L. 279.

But it is not possible, on the other hand, to show

Morton, J., delivered the opinion of the court:

The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, and were indorsed in blank by it and the defendant and two other parties, and were all made payable at what we assume to be the plaintiff Bank in Rutland, Vt. This suit is against the defendant alone. The respondent in his answer claims that his indorsement was made and took effect as a contract in the State of Vermont and that by the law of that State his obligation depended, as between the plaintiff and himself or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself in regard to said indorsement, and that his indorsement was in fact made subject to an oral agreement with the plaintiff set out in his answer, which he has fully performed. At the time the respondent offered testimony tending to prove the alleged oral agreement. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori*, and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial and could not be considered

by the jury. The respondent excepted to this ruling and the question before us is as to its correctness.

The testimony introduced by the plaintiff tended to show the following, among other facts in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff Bank had over-due notes which it had discounted for the Esperanza Marble Company of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by respondent. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection and requested the respondent to attend to it in its behalf, and it was orally agreed between the respondent and the plaintiff that the mortgage should be assigned to the respondent and that he should collect the same and pay over the proceeds to the Bank. It was also orally agreed that the notes held by the Bank against the marble company should be surrendered to it and new notes given by it therefor, which should be indorsed by the respondent and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the respondent to the plaintiff Bank. It was further orally

by parol evidence that an indorsement, expressed to be "for collection," was intended to pass title (*White v. Miners Nat. Bank of Georgetown*, 102 U. S. 658, 26 L. ed. 250; *Leary v. Blanchard*, 48 Me. 268; *Canton First Nat. Bank v. McCann*, 4 Ill. App. 250; *Armour Bros. Bkg. Co. v. Riley County Bank*, 30 Kan. 168; *Rock County Nat. Bank v. Hollister*, 21 Minn. 385; *Third Nat. Bank v. Clark*, 23 Minn. 268); as an escrow upon an express condition not yet performed (*Chaddock v. Vanness*, *supra*; *Bell v. Ingestre*, 12 Q. B. 817; *Goggerley v. Cuthbert*, 2 Bos. & P. 170; *Wallis v. Littell*, 11 C. B. N. S. 369; *Ricketts v. Pendleton*, 14 Md. 320), or to enable a transfer for any other special purpose. *Pollock v. Bradbury*, 8 Moore, P. C. 227; *Bell v. Ingestre*, 12 Q. B. 817; *Adams v. Jones*, 12 Ad. & El. 455; *Dale v. Gear*, 38 Conn. 15; *Hamburger v. Miller*, 48 Md. 325; *Scammon v. Adams*, 11 Ill. 578; *Chaddock v. Vanness*, 35 N. J. L. 520; *Mendenhall v. Davis*, 72 N. C. 150; *Iredell County Comrs. v. Wasson*, 82 N. C. 308; *Girard Bank v. Comley*, 2 Miles, 405; *Patterson v. Todd*, 18 Pa. 428; *Patten v. Pearson*, 57 Me. 428; *Lynch v. Goldsmith*, 64 Ga. 42; *Hardy v. White*, 60 Ga. 455. But see, *contra*, *Lee v. Pile*, 37 Ind. 107; *Dunn v. Ghost*, 5 Colo. 124.

Parol evidence is not admissible to show this fact in a suit by a bona fide holder. *Lewis v. Dunlap*, 72 Mo. 174; *Stapler v. Burns*, 43 Ga. 382; *Meador v. Dollar Sav. Bank*, 56 Ga. 605.

Thirdly, it may always be shown by parol evidence that the indorsement was procured by fraud, accident or mistake. *Kirkham v. Boston*, 67 Ill. 596; *Lewis v. Dunlap*, 72 Mo. 178; *Hamburger v. Miller*, 48 Md. 325; *Hill v. Ely*, 5 Serg. & R. 363; *Breneman v. Furniss*, 90 Pa. 186; *Tiedeman*, Com. Paper, § 274. See *note to Kulenkamp v. Groff* (Mich.) 1 L. R. A. 594.

Lex loci contractus.

A promissory note made and signed in another State, and payable there, although sent by mail to the payee in Massachusetts, is executed in and to be governed by the law of the other State. *Shoe* 18 L. R. A.

& *Leather Nat. Bank v. Wood*, 3 New Eng. Rep. 118, 142 Mass. 567.

The principle is also well-settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title where-soever the property may be situated. *Hoyt v. Thompson*, 19 N. Y. 224.

The rule is laid down in *Edgerly v. Bush*, 81 N. Y. 203, by *Folger, Ch. J.*, as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

It may be affirmed, as a general proposition, that the validity of a contract relative to negotiable paper is, in all instances, determined by the law where it is made. *Armour v. McMichael*, 36 N. J. L. 92, 94; *Cothel v. Blydenburgh*, 5 N. J. Eq. 17; *Woodruff v. Hill*, 118 Mass. 310; *McDougald v. Rutherford*, 30 Ala. 253.

Commercial paper is governed by the same rules applicable to other contracts, in so far as it is placed within the law prevailing within the jurisdiction where it is uttered. The law of that jurisdiction governs the contract, provided it is not against the public morals or policy of the particular State where it is to be enforced. See *Byles*, Bills, 402; *Story*, Conf. L. § 242.

Where a written contract is complete, the place of its delivery is, in legal contemplation, the place where it was made. *Freese v. Brownell*, 35 N. J. L. 235; *Campbell v. Nichols*, 38 N. J. L. 81; *Hyde v. Goodnow*, 3 N. Y. 236; *Second Nat. Bank v. Smoot*, 2 MacArth. 371.

The delivery completes the contract, and controls the date, as well as the mere place of drawing the instrument. *Hyde v. Goodnow*, *supra*; *Connor v. Donnell*, 55 Tex. 167; *Findlay v. Hall*, 12 Ohio St. 610.

As to the incompetency of parol evidence to vary the terms of a written contract, see *notes to Diven v. Johnson* (Ind.) 3 L. R. A. 808; *Bulky v. Devine* (Ill.) 3 L. R. A. 330; *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 38.

agreed that the respondent should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The over-due notes of the marble company were surrendered to it and new notes indorsed by the respondent and the other parties taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable to the plaintiff Bank in Rutland and the respondent's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the respondent and he has paid over to the plaintiff Bank all money which he has collected under it.

At the trial the jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that respondent's indorsement was made and took effect as a contract in that State.

It is apparent that if the *lex fori* is to govern the respondent cannot avail himself of the oral agreement entered into between the plaintiff and himself. *Adams v. Wilson*, 12 Met. 138; *Wright v. Morse*, 9 Gray, 337. We do not think, however, that it should govern. It is clear that in all that relates to the contract itself, to its nature and validity and interpretation, the law of the place where it is made governs. *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 3 New Eng. Rep. 118; *Miliken v. Pratt*, 125 Mass. 374; *Carnegie v. Morrison*, 2 Met. 381; *Nichols v. Mase*, 94 N. Y. 160; *Buzzell v. Cummings*, 61 Vt. 213; *Forepaugh v. Delaware, L. & W. R. Co.*, 128 Pa. 218, 5 L. R. A. 508; *Liverpool & Globe W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 453, 32 L. ed. 796; *Fonseca v. Cunard S. S. Co.*, 153 Mass. —, 12 L. R. A. 340.

And the law of the place where the contract is made is without any express assent or agreement of the parties incorporated into and forms a part of the contract. Their contract is presumed to be made with reference to the law of the place where it is entered into, unless it appears that it was entered into with reference to the law of some other State or country. *Washington Cent. Nat. Bank v. Hume*, 128 U. S. 207, 32 L. ed. 376; *Chapin v. Dobson*, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. *Parsons v. Trask*, 7 Gray, 473; *Miliken v. Pratt* and *Forepaugh v. Delaware, L. & W. R. Co. supra*.

On the other hand, it is equally clear that in all that relates to the procedure for enforcing the contract the law of the forum controls. *Shoe & Leather Nat. Bank v. Wood* and *Carnegie v. Morrison, supra*; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

Thus the form in which and the parties by or against whom the action shall be

brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause of action is barred by the Statutes of Limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or a simple contract, with many other similar things, have been held to be matters affecting the remedy and therefore to be governed by the *lex fori*. *Pearsall v. Dwight*, 2 Mass. 84; *Orr v. Amory*, 11 Mass. 25; *Foss v. Nutting*, 14 Gray, 484; *Leach v. Greene*, 116 Mass. 534; *Drake v. Rice*, 130 Mass. 410; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *McClees v. Burt*, 5 Met. 198; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Downer v. Chesebrough*, 36 Conn. 39; *Leroux v. Brown*, 12 C. B. 801; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract or to the remedy upon it. We think in the present instance it relates to the former and not to the latter. The respondent claimed that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended as between the parties upon the oral agreement or understanding, if any, between them at the time when he placed his name upon the notes. The respondent further claimed that when he placed his name upon the notes he did so under an oral agreement with the plaintiff Bank by the terms of which his indorsement was only to be regarded as security for the payment by him to the Bank of the money that he might collect on the mortgage which was assigned to him. Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the respondent, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the Bank. The respondent could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because under the laws of Vermont the indorsement did not of itself constitute an absolute contract; but in order to determine what the contract was it was necessary to ascertain what agreements or undertakings were entered into at the time of and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and respondent was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy. Back of all questions of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that fact. See *Williams v. Wade*, 1 Met. 82; *Powers v.*

Lynsh, 3 Mass. 77; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Shoe & Leather Nat. Bank v. Wood*, *supra*; *Watson v. Campbell*, 38 N. Y. 153; *Dunn v. Welsh*, 62 Ga. 241; *Forepaugh v. Delaware, L. & W. R. Co. supra*.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides an issue could at any time have been framed in the discretion of the court if satisfied that justice required that it should be done or the court could hear and pass upon the question itself. *Atlanta Mills v. Mason*, 120 Mass. 244.

Exceptions sustained.

BANK OF NORTH AMERICA, *Appt.*,

v.

Frederick H. RINDGE.

(....Mass....)

An action to enforce the liability of a stockholder under the laws of another State, in which the corporation was organized

NOTE.—Effect of statutory enactment.

The liability of stockholders in a corporation of a foreign State, or of one of the United States, must be determined by the laws of that State. *Hutchins v. New England Coal Min. Co.* 4 Allen, 580; *Jones v. Sisson*, 6 Gray, 288; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244; *Blackstone Mfg. Co. v. Blackstone*, 18 Gray, 488.

That the statutes of a State do not operate with extraterritorial force will be conceded. How far they should be enforced, beyond the limits of the State which has enacted them must depend on several considerations, as whether any wrong or injury will be done to the citizens of the State in which they are sought to be enforced, whether its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees. *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349.

Although in *Aultman's Appeal*, 98 Pa. 505, the courts of Pennsylvania apparently took full jurisdiction over an Ohio corporation and its stockholders, to enforce the liability of the stockholders under the Statutes of Ohio, yet the Massachusetts courts have uniformly declined such an exercise of jurisdictional power. See *Erickson v. Nesmith*, 15 Gray, 221; *Halsey v. McLean*, 12 Allen, 488; *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen, 836; *New Haven Horse Shoe Nail Co. v. Linden Spring Co. supra*; *Post v. Toledo, C. & St. L. R. Co.* 4 New Eng. Rep. 221, 144 Mass. 341.

A general statute imposing liability for corporate debts upon stockholders is not considered as imposing a penalty, but as recognizing an obligation arising upon contract. *Norris v. Wrenschall*, 24 Md. 422; *Erickson v. Nesmith*, 46 N. H. 371; *Corning v. McCullough*, 1 N. Y. 47; *Coleman v. White*, 14 Wis. 701.

When a statute confers a right and imposes a liability, without providing a distinct remedy the common law supplies an adequate remedy by giving to a party an appropriate action. But it is equally well settled that when a statute confers a right and prescribes a remedy, that remedy and that only can be pursued. *Knowlton v. Aokley*, 8 Cush. 97; *Pollard v. Bailey*, 37 U. S. 30 Wall. 527, 22 L. ed. 378; *Jessup v. Carnegie*, 80 N. Y. 441. 18 L. R. A.

and judgment has been rendered against it but no proceedings taken against him, cannot be maintained in a State where the corporation has no place of business when the parties, although both nonresidents, do not reside in the same State, and neither of them resides in the State where the corporation was organized.

(June 27, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to enforce defendant's alleged liability as a stockholder of the Haddam State Bank, for unpaid and uncollectible debts of the Bank. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry S. Dewey, for plaintiff:

By the almost unanimous decisions of the courts of the several States, and of the federal courts, this action may be maintained.

Cook, Stock & Stockholders, 2d ed. § 223, and cases cited, especially *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966; *Cuykendall v. Miles*, 10 Fed. Rep. 842; *Andreus v. Bacon*, 38 Fed. Rep. 777; *Lowry v. Inman*, 46 N. Y. 119; *Corning v. McCullough*, 1 N. Y. 47; *Paine v.*

When the liability contended for is in the nature of a penalty imposed by the statute of one State, it cannot be enforced in another. *Halsey v. McLean*, 12 Allen, 488; *Bird v. Hayden*, 1 Robt. 388; *Derrickson v. Smith*, 27 N. J. L. 166; *Plymouth First Nat. Bank v. Price*, 38 Md. 487; *Gale v. Eastman*, 7 Met. 14; *State v. John*, 5 Ohio, 217; *Cable v. McCune*, 26 Mo. 371; *Lawler v. Burt*, 7 Ohio St. 341; *Dane v. Dane Mfg. Co.* 14 Gray, 488; *Merchants Bank v. Bliss*, 1 Robt. 391.

One State will not enforce the penal laws of another.

Mr. Cook, in his late work on Stock and Stockholders, at § 213, says: "It is settled law that one State will not enforce the penal legislation of another State. *Story, Conf. L. §§ 620-621*; *Wharton, Conf. L. § 853 et seq.*; *Rorer, Interstate Laws*, 143, 149.

"Penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the country where they were enacted." *Sooville v. Canfield*, 14 Johns. 388.

Consequently, it is a general rule that the courts of one State will enforce a statutory liability of stockholders created in another State, only when that liability is held to have arisen from contract. If it is penal, it can never be enforced out of the State by which it is created. *Lowry v. Inman*, 46 N. Y. 119; *Patterson v. Baker*, 34 How. Pr. 180; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Howell v. Mangelsdorf*, 33 Kan. 194.

When the Statute of Limitations is relied upon as a defense, it becomes material to settle whether the liability is of a penal nature or whether it arises *ex contractu*. In the former case the statute is generally shorter. A statutory liability when it is a liability in contract and not a penalty may, under the proper limitations, be enforced in an action in the federal courts. *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966.

And, in general, a creditor of a corporation whose shareholders are by statute made personally liable for its debts, may maintain a suit to enforce this liability wherever he can obtain jurisdiction over the necessary parties. The right to bring such an action, provided it does not seek to enforce a penalty, will not, it is believed, be denied in any State to the inhabitants of any other State, if there is jurisdiction of the proper parties defendant. *Ault-*

Stewart, 88 Conn. 516; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Hodgson v. Cheever*, 8 Mo. App. 321; *Woods v. Wicks*, 7 Lea, 40; *Aultman's App.* 97 Pa. 505; *Tinker v. Van Dyke*, 1 Flipp. 532.

In proper cases, the courts of this Commonwealth are open to parties in controversies arising out of the statutory liability of stockholders in foreign corporations.

Post v. Toledo, C. & St. L. R. Co. 4 New Eng. Rep. 221, 144 Mass. 341.

Messrs. Hutchins & Wheeler, for defendant:

No proceeding at law or in equity will lie to enforce the individual liability for corporate debts imposed upon officers and stockholders by the laws of another State in which the corporation is established.

Smith v. Mut. L. Ins. Co. of New York, 14 Allen, 336, 342; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 488; *New Haven Horse Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349; *Post v. Toledo, C. & St. L. R. Co.* 4 New Eng. Rep. 221, 144 Mass. 341.

In the enforcement of the Kansas law there will arise the question of the priorities of the claims of different creditors of the corporation.

In some States the creditor first bringing suit has priority.

Ingalls v. Cole, 47 Me. 530; *Thebus v. Smiley*, 110 Ill. 316.

In Missouri the creditors rank in the order in which they have respectively obtained judgment.

State Sav. Assn. v. Kellogg, 68 Mo. 540.

And it is generally held that a bill in equity will lie on behalf of all the creditors against the corporation and all the stockholders to secure a ratable division of the amounts due from the different stockholders among the creditors, and that in such a suit the creditors will be enjoined from prosecuting independent suits, and no priority among the creditors will be recognized.

Chicago v. Hall, 108 Ill. 342; *Eames v. Dorris*, 102 Ill. 950; *Pfohl v. Simpson*, 74 N. Y. 187; *Wright v. McCormack*, 17 Ohio St. 86. See Thompson, Liability of Stockholders, §§ 420-426; 2 Morawetz, Priv. Corp. 2d ed. § 897.

If such a suit were pending in Kansas, and this defendant had been served with process therein, how could he protect himself from paying more than the statute liability? No injunction by the court in Kansas could affect the plaintiff, a resident of New York.

Cott v. Partridge, 7 Met. 570.

man's App. 98 Pa. 505; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Woods v. Wicks*, 7 Lea, 40; *Plymouth First Nat. Bank v. Price*, 33 Md. 487; *Ex parte Van Riper*, 20 Wend. 614; *McDonough v. Phelps*, 15 How. Pr. 372; *Lowry v. Inman*, *supra*; *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534. See also *Paine v. Stewart*, 38 Conn. 516; *Bond v. Appleton*, 8 Mass. 472; *Healy v. Root*, 11 Pick. 389; *Gale v. Eastman*, 7 Met. 14; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, 46 N. H. 371; *Hutchins v. New England Coal Min. Co.* 4 Allen, 580; *Halsey v. McLean*, 12 Allen, 488; *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen, 336; *Bateman v. Service*, L. R. 6 App. Cas. 386.

When the suit is maintainable, the construction placed upon the statute of the State in which the corporation exists, by the courts of that State, is, as a general rule, controlling, and will be followed by the courts of the State where the suit to enforce is brought. *Jessup v. Carnegie*, 80 N. Y. 441; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038. See also *Hunt v. Hunt*, 72 N. Y. 236; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152, 160, 6 L. ed. 289, 232; *Shelby v. Guy*, 24 U. S. 11 Wheat. 367, 6 L. ed. 496; *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. ed. 154, 157; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Leavenworth County Comrs. v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 309; *Elmwood v. Marcy*, 92 U. S. 290, 23 L. ed. 710.

The extent of that liability and the mode in which it shall be enforced, and the position in which the stockholders are placed, must be determined by the laws of the State creating the corporation, and by a tribunal that can control the conduct and action of the corporation. *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349.

When statute is not penal.

A statute is not penal which provides that all stockholders shall be liable to an amount equal to that of their stock until the whole of the capital stock fixed and limited by the company shall have been paid in, and a certificate thereof shall 13 L. R. A.

have been filed. *Cuykendall v. Miles*, 10 Fed. Rep. 342.

When Statute of Limitations applies.

Suits at law or in equity by creditors of a corporation to enforce the liability of stockholders under a state statute are governed by the Statute of Limitations of the State, and a liability, to be enforceable, must be in compliance with the condition applicable to it under the legislative Acts and judicial decisions of the State which creates the corporation and imposes the liability. *Andrews v. Bacon*, 38 Fed. Rep. 777; *Fourth Nat. Bank of New York v. Franklyn*, 120 U. S. 747, 30 L. ed. 825.

Where the supreme court of the State has construed the statute relating to corporate liability, and held that the remedies which it provides are exclusive, this decision is controlled in the federal courts, as it is not in conflict with the Constitution, laws or treaties of the United States. *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544, and cases cited; *Post v. Kendall County Suprs.* 105 U. S. 667, 26 L. ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Jessup v. Carnegie*, 80 N. Y. 441.

If the right to an independent personal action against the stockholder cannot be maintained in the State of the domicile of the corporation, it cannot be maintained in another State. *Lowry v. Inman*, 46 N. Y. 123; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Patteson v. Baker*, 34 How. Pr. 180; *Thompson, Liability of Stockholders*, § 80, and cases cited.

Comity as applied to the enforcement of a foreign law.

The laws of foreign States do not operate or have force in another State *ex proprio vigore*, but only *ex comitate*. The courts of a State where the laws of a foreign State are sought to be enforced will use a sound discretion as to the extent and mode of exercising this comity. They will not suffer foreign laws or statutes to work injury or injustice upon their own citizens, nor permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the State that enacted the law, and which tend to operate with hardship on their own citizens and subjects. *Erickson v. Nesmith*, 15 Gray, 221.

C. Allen, J., delivered the opinion of the court:

The plaintiff is a corporation of the State of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,348 and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the Bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the Bank, but he being found in Massachusetts, the plaintiff brings this action against him here seeking to charge him personally for the judgment against the Bank to the amount of the par value of his shares therein, namely \$5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows: "And the plaintiff further says, that by the laws of the State of Kansas if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation." The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the Statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us.

The question can hardly be considered as an open one in this Commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other States under statutes of those States. In *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass. 341, 345, 4 New Eng. Rep. 221, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 142 Mass. 849, 358, 2 New Eng. Rep. 580, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plain-

tiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California or in any number of other States where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others; but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult if not impossible to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may therefore, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every State of the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably by the true construction of the Statute the action at law to charge stockholders, which is given as an alternative remedy, would be limited to a like amount as the execution; though according to the averment of the declaration the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the Bank. The liability sought to be enforced is a strictly limited one. It seems to us that a bona fide, or at any rate a compul-

sory, payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge (*Halsey v. McLean*, 12 Allen, 442), though as to this other courts might hold otherwise. *Fowler v. Robinson*, 31 Me. 189; *Groves v. Hill*, 36 Me. 22.

There is no averment in the declaration that the defendant has not thus been discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defense. But in case of several actions in different States, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different States might not be uniform, and thus the defendant might be held liable more than once, and even a compulsory payment might not avail to protect him, as is shown by the cases cited by the defendant. Moreover, the defendant might by way of set-off present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different States.

These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the declaration, in other States than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the State where the corporation is established, to ascertain and determine the amount of

each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined, in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action under the circumstances which appear here, ought not to be entertained in this State. Limiting our decision to the facts now before us, it is this: that a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff under laws of Kansas, such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth, is matter of remedy only, and does not follow the stockholder outside the State, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown v. Eastern State Co.* 134 Mass. 590.

Judgment for the defendant affirmed.

MISSOURI SUPREME COURT.

William H. F. SMITH, *Appt.*,

v.

Charles R. BURRUS, *Respnt.*

(....Mo.....)

1. The malicious prosecution of a civil suit without probable cause is actionable, al-

though defendant is not arrested or his property attached.

2. The voluntary dismissal of a civil suit is not as matter of law *prima facie* evidence of malice in its institution.

3. The doctrine of reasonable doubt as to guilt of the alleged crime has no application in an action for malicious prosecution of a suit

NOTE.—General rules relating to malicious prosecution.

Probable cause which will justify a criminal accusation, is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont*, 3 Wash. C. C. 37; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. 218.

Adjudged cases are found, decided by the American courts, which seem to follow the English rule, and deny the right of action based upon a civil action, which has been maliciously prosecuted without the instance of either arrest or attachment; but recent authorities announce the more reasonable rule and decide that such an action is maintainable. *McCardle v. McGinley*, 36 Ind. 538, 44 Am. Rep. 343; *Whipple v. Fuller*, 11 Conn. 582; *Closson v. Staples*, 42 Vt. 209; *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77; *Vanduzor v. Linderman*, 10 Johns. 108; *Pangburn v. Bull*, 1 Wend. 345; *Cox v. Taylor*, 10 B. Mon. 17; *Woods v. Finnell*, 13 Bush, 623; *Marbourg v. Smith*, 11 Kan. 554; *Payne v. Don-*

egan, 9 Ill. App. 566; *Johnson v. Meyer*, 36 La. Ann. 383; *Hoyt v. Macon*, 2 Colo. 113; *Hall v. Leaming*, 31 N. J. L. 321, 36 Am. Dec. 213.

Where an action has been commenced maliciously without probable cause, and the defendant has been arrested at the instance of the plaintiff, or his property attached, or he has been injured in any special manner, such proceedings, although in the nature of a civil suit, are sufficient to base an action for malicious prosecution. *Mayer v. Walter*, 64 Pa. 283; *Sledge v. McLaren*, 29 Ga. 64; *Bump v. Betts*, 19 Wend. 421; *Watkins v. Baird*, 6 Mass. 506; *Lawrence v. Hagerman*, 56 Ill. 68; *Stewart v. Cole*, 46 Ala. 646; *Henderson v. Jackson*, 9 Abb. Pr. N. S. 238; *Cox v. Taylor*, 10 B. Mon. 17; *Savage v. Brewer*, 16 Pick. 453; *Farley v. Danks*, 4 El. & Bl. 493; *Austin v. Debnam*, 3 Barn. & C. 139; *Hayden v. Shed*, 11 Mass. 500; *Spengler v. Davy*, 15 Gratt. 381; *Closson v. Staples*, 42 Vt. 209.

The *onus* is upon the plaintiff to prove both the want of probable cause for the prosecution instituted against him, and malice on the part of the defendant. If he failed to prove either of these facts, the action necessarily abates. *Besson v.*

for slanderous words charging a crime. A preponderance of evidence is sufficient to make out a case for either party.

4. False statements concerning a candidate for office are not included within the privilege of discussing his character and fitness.

(June 20, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for the alleged malicious prosecution of a civil action brought by defendant against plaintiff. *Reversed.*

Statement by **Sherwood, Ch. J.**:

Action for malicious prosecution. Burrus brought suit against Smith for slander, alleging that the latter had charged him with stealing horses; but, after Smith had been thus put to the trouble and expense of employing counsel to defend the suit, Burrus, as he admitted in his answer, voluntarily dismissed the suit he had brought, and when on the witness stand testified: "I dismissed the suit voluntarily, because I wanted to." It appeared in evidence on the trial that, at the time the charges were made by Smith, Burrus was running for justice of the county court in the Eastern District of Scotland County; and the charges were made by Smith, who himself lived in that district, to other voters; and that affidavits were read by others implicating Burrus as an accomplice with one Mayfield in larcenous operations in regard to horses. Mayfield, shortly be-

fore the election came off, was convicted and sentenced for five years to the penitentiary. There was testimony adduced at the trial which certainly had a strong tendency to show that the charges made by Smith were not unfounded, and there was some testimony of a contrary effect. The instructions, so far as necessary, will be quoted and noticed in the opinion. The jury found for the defendant, hence this appeal.

Messrs. S. W. Birch and Harrison & Mahan, for appellant:

The voluntary discontinuance of his suit against plaintiff Smith is prima facie evidence of the malice of defendant Burrus.

Burhans v. Sanford, 19 Wend. 417, and cases cited; *Garrison v. Pearce*, 8 E. D. Smith, 255.

Plaintiff Smith had the right to discuss the honesty and integrity of Burrus with the voters of the Eastern District of Scotland County, and to give them such information as he possessed as to his qualities and his fitness for the office of county judge. By offering himself as a candidate a man offers his character for discussion and investigation; he should be held and considered as putting his character in issue so far as respects his qualifications for the office.

Cooley, Torts, p. 217; Townshend, Slander & Libel, 3d ed. § 247, p. 473, and § 241; *Com. v. Clap*, 4 Mass. 169; *Com. v. Odell*, 3 Pittsb. 449; Odgers, Libel & Slander, § 236; *State v. Balch*, 31 Kan. 465; *Kimball v. Fernandez*, 41 Wis. 329; *Marks v. Baker*, 28 Minn. 162; *Barr v. Moore*, 87 Pa. 385; *Hunt v. Bennett*, 19 N. Y. 173.

Southard, 10 N. Y. 236; *Foshay v. Ferguson*, 2 Denio, 617.

Proof of malice will not excuse or supply the want of proof of want of probable cause, neither can the want of probable cause be inferred from proof of malice, although malice may be inferred from the want of probable cause. *Sutton v. Johnstone*, 1 T. R. 493, 544; *Wheeler v. Neebitt*, 65 U. S. 24 How. 544, 16 L. ed. 765; *Heyne v. Blair*, 62 N. Y. 19; *Cook v. Walker*, 30 Ga. 519; *Dickinson v. Maynard*, 20 La. Ann. 66; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Glaze v. Whitley*, 5 Or. 164; *Willis v. Knox*, 5 S. C. 474; *Harkrader v. Moore*, 44 Cal. 144; *Dietz v. Langfitt*, 63 Pa. 234.

Action lies in cases of arrest.

Thus an action will lie where a civil suit is maliciously and without probable cause begun by the arrest of the party defendant (*Collins v. Hayte*, 50 Ill. 337, 99 Am. Dec. 521; *Burhans v. Sanford*, 19 Wend. 417; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Plummer v. Dennett*, 6 Me. 421, 20 Am. Dec. 316; *Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329); for maliciously and without cause instituting proceedings in bankruptcy against another (*Chapman v. Pickersgill*, 2 Wils. 145; *Johnson v. Emerson*, 25 L. T. N. S. 337; *Whitworth v. Hall*, 2 Barn. & Ad. 695; *Farley v. Danka*, 4 El. & Bl. 493; *Brown v. Chapman*, 8 Burr. 1418); for maliciously attaching the party's property. *Preston v. Cooper*, 1 Dill. 589; *Williams v. Hunter*, 3 Hawks, 545, 14 Am. Dec. 597; *Wood v. Weir*, 5 B. Mon. 544; *McCullough v. Grishobber*, 4 Watts & S. 201; *Waiser v. Thies*, 56 Mo. 86; *Fullenwider v. McWilliams*, 7 Bush, 389; *Spengler v. Davy*, 15 Gratt. 381; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Pierce v. Thompson*, 6 Pick. 193; *Nelson v. Danielson*, 32 Ill. 545; *Shaver v. White*, 6 Munf. 110, 8 Am. Dec. 780.

Where an attachment is wrongfully sued out on 18 L. R. A.

grounds untrue in fact, actual damages may be recovered, though there was probable cause. *Carothers v. McIlhenny Co.* 63 Tex. 139; *Bear v. Marx*, 63 Tex. 298.

And giving a bond of indemnity as required by statute does not defeat the action. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 874.

The defendant cannot justify or mitigate the wrongful attachment of goods by showing that he offered to return the property on the next day in the same condition. *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337.

And it is no defense that defendant, before taking out the attachment, heard that some other creditor was going to attach (*Carothers v. McIlhenny Co. supra*), even though there was an indebtedness and ground for a suit. *Tomlinson v. Warner*, 9 Ohio, 103; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Fortman v. Rottler*, 8 Ohio St. 543, 72 Am. Dec. 606; *Herman v. Brookerhoff*, 8 Watts, 240.

The question of probable cause, when there is no conflict in the evidence, no disputed facts nor any doubt upon the evidence, or the inferences drawn from it, is one of law for the court and not of fact for the jury. It is said in *Besson v. Southard*, 10 N. Y. 236, that if the facts which are adduced as proof of want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law. In such cases it is a mixed question of law and fact. The rule laid down in *Masten v. Deyo*, 2 Wend. 424, is expressly approved by *Jewett, J.*, in that case. *Heyne v. Blair*, 62 N. Y. 19.

For further discussion of this subject, see *notes* to *Antoliff v. June* (Mich.), 10 L. R. A. 621, and *Pope v. Pollock* (Ohio) 4 L. R. A. 255.

The language or communication used by plaintiff Smith is privileged. "It was upon a proper occasion, from a proper motive, and made in good faith upon reasonable and probable cause."

Briggs v. Garrett, 2 Cent. Rep. 364, 111 Pa. 404, 25 Am. L. Reg. N. S. 498, and note; *Express Printing Co. v. Copeland*, 64 Tex. 354, 24 Am. L. Reg. N. S. 640, and note; *Mott v. Dawson*, 46 Iowa, 533; *Crane v. Waters*, 10 Fed. Rep. 619; *Newell, Defamation, Slander and Libel*, § 138, p. 535.

Smith's communication was only to the voters, and only for the purpose of giving in good faith what plaintiff believed to be truthful information, and only for the purpose of enabling such voters to cast ballots more intelligently. It clearly is a privileged communication.

State v. Balch, *supra*; *Sweeney v. Baker*, 13 W. Va. 160; *White v. Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591; *Brown v. Hathaway*, 95 Mass. 239; *Klinck v. Colby*, 46 N. Y. 427; note to *Munster v. Lamb*, 23 Am. L. Reg. N. S. 22; L. R. 11 Q. B. Div. 588; *Palmer v. Concord*, 48 N. H. 211; *Mott v. Dawson*, *supra*; *Bays v. Hunt*, 60 Iowa, 251.

The court erred in giving the instructions which require the jury to find "beyond a reasonable doubt," and that the "same evidence must be adduced by plaintiff as would be necessary to convict the defendant upon an indictment for horse stealing." This issue should be decided as in other civil cases, according to a preponderance of the evidence, and the reasonable probability of its truth.

Marshall v. Thames Fire Ins. Co. 43 Mo. 586; *Bohachild v. American Cent. Ins. Co.* 63 Mo. 356; *Edwards v. Knapp*, 97 Mo. 432.

Messrs. R. D. Cramer, John C. Moore and McKee & Jayne for respondent.

Sherwood, Ch. J., delivered the opinion of the court:

1. At the outset of the examination of the case at bar we are met by the preliminary question whether the facts stated in the petition constitute a cause of action. This point under our Code of Civil Procedure is always open to examination even in an appellate court, and, like the jurisdiction of the court over the subject matter of the action, is never waived, and may be taken advantage of for the first time on appeal. Rev. Stat. § 2047; *Sweet v. Maupin*, 65 Mo. loc. cit. 72; *McIntire v. McIntire*, 80 Mo. loc. cit. 473; *Walker v. Bradbury*, 57 Mo. 66.

The authorities are in conflict as to whether a petition states a cause of action, which merely alleges that a civil action, brought and prosecuted maliciously and without probable cause, has been terminated in favor of the defendant; many of the authorities maintaining that no cause of action exists unless such civil process be accompanied by arrest of the person or seizure of the property, and that the plaintiff in such original action, in contemplation of law, is sufficiently punished by the payment of costs. This view has received the sanction of *Judge Cooley, Torts*, 2d ed., 217 et seq., and cases cited.

But there are numerous and able decisions 13 L. R. A.

in opposition to this view, and it is difficult to combat the force of the reasoning they employ. It is difficult to see why the right of a plaintiff, who, as defendant, has been sued in a civil action maliciously and without probable cause, and who has been put to great expense in consequence thereof, should be altered or at all affected merely by the incident of his property having been attached or his person seized; for, in either case, the damage, the expense, and costs of defending a suit, whether instituted by *ca. sa.* or attachment, or by civil summons, would be the same, and it is clear that the recovery of costs would not, under our practice, reimburse him for his attorney's fees, something which and other incidental expenses he does recover under the English practice. The cases on both sides of this subject have been extensively collated and exhaustively reviewed by John D. Lawson, in 21 Am. L. Reg. N. S. 281, 353, and the conclusion reached that the better doctrine is that which allows an action to be maintained as well where property etc., has not been seized as where it has. The authorities also are well reviewed in 14 Am. & Eng. Encyclop. Law, title *Malicious Prosecutions*, p. 32 et seq., and notes. Besides, this court in *Brady v. Errin*, 48 Mo. 533, adopted the view that an action for malicious prosecution may be maintained where the original action was begun by civil summons alone.

2. Of its own motion the court gave instruction No. 1: "The court, on plaintiff's behalf, of its own motion, instructs the jury that if they find from the evidence that in the defendant's suit against the plaintiff this defendant's charge of slander was false, and that said suit was instituted with malice, and that said suit was also instituted without probable cause, and that this plaintiff was damaged thereby, the jury will find for the plaintiff in an amount not exceeding the amount claimed in this plaintiff's petition. If the jury find that this defendant's charge of slander was false, then the proof of want of probable cause, being the proof of a negative, may be made out by slight evidence, but malice is not to be necessarily inferred from the want of probable cause. Malice is the intentional doing of a wrongful act without just cause or excuse [and the jury are instructed that, under the pleadings in this case, it is admitted that defendant, Burrus, voluntarily instituted and voluntarily dismissed said slander suit of *Burrus v. Smith*, and the court further instructs the jury that such voluntary dismissal of said slander suit is in this cause prima facie evidence of malice on the part of defendant, Burrus.] Attention will now be directed to that portion of that instruction which is inclosed in brackets. Instruction No. 1, asked by the plaintiff, but refused him, is to the same effect, and as to that portion of the instruction, of course, the plaintiff would have no right to complain. We do not regard either instruction as asserting the law on this point. In the Law of Torts (2d ed. pp. 214, 215), it is said by Judge Cooley: "The burden of proving that the prosecution was malicious is also upon the plaintiff. If a want of prob-

able cause is shown, malice may be inferred; but the deduction is not a necessary one, and the mere discontinuance of a criminal prosecution, or the acquittal of the accused, will establish for the purposes of this suit neither malice nor want of probable cause. But, if an arrest is made in a civil suit which is afterwards voluntarily discontinued, the discontinuance has been held to furnish prima facie evidence of a want of probable cause."

If the discontinuance of a criminal prosecution, instituted by the defendant, and discontinued at his instance, be evidence which establishes neither malice nor want of probable cause, it is difficult to see how the voluntary discontinuance of a civil action instituted by the defendant can cut a wider swath. "Prima facie evidence of a fact," says *Mr. Justice Story*, "is such evidence as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose." *Lilienthal's Tobacco v. United States*, 97 U. S. loc. cit. 268, 24 L. ed. 905, and cases cited. The portion of the instruction heretofore referred to, therefore, in effect told the jury that the voluntary dismissal of the civil action begun by defendant made out a case for the plaintiff, without more; but this was not the law. The instructions, therefore, referred to, were tantamount to saying that the mere discontinuance of the action for slander was sufficient, in and of itself, to make out a case of malice on his part; but, as already seen, this is not the law. As *Judge Cooley* says, the deduction of malice from a want of probable cause is not a necessary one. Of course, malice may be inferred from the want of probable cause, and from the voluntary dismissal of the original civil action; but such inference is one of fact, and one for the jury, under appropriate instructions, to draw.

8. In regard to the words used by plaintiff which gave origin to the suit for slander, the court instructed the jury: "And, to warrant the jury in finding that the said alleged language was true, the same evidence must be adduced by plaintiff as would be necessary to convict the defendant upon an indictment for horse stealing, and if the jury believe from the evidence that plaintiff uttered the said words of and concerning defendant, and entertain a reasonable doubt of defendant's guilt of the crime imputed to him in said words, the jury should find a verdict for defendant. By a 'reasonable doubt' it meant a substantial doubt, based on and arising from the evidence, and not a mere possibility of defendant's innocence." This view of the law, though sustained by the case of *Polston v. See*, 54 Mo. 291, by a divided court, was unanimously overthrown in the case of *Edwards v. Knapp*, 97 Mo. 482; and the now generally prevalent modern doctrine established that, in all civil actions, a preponderance of the evidence is sufficient to make out a case for either litigant. Besides, in actions of this sort, such an instruction is wholly out of place. Whether a party is suing or sued for malicious prosecution, the absolute guilt of the particular individual is not at all a controlling issue. Absence of malice and probable cause are the governing factors,

and constituent elements of the forensic contest.

4. The remaining point to be discussed is whether the court should have given instruction No. 4, asked by plaintiff, but refused by the court, which was the following: "If the jury believe from the evidence that defendant Burrus was a candidate for the public office of county judge in and for the Eastern District of Scotland County, Mo., at the general election of the year 1884; and if the jury further believe from the evidence that the character, honesty and fitness of said Burrus to fill such public office was relevant to the candidacy of said Burrus, and necessary to be known by the voters and constituents of said Burrus at said general election, for their own interest and protection; and if the jury further find from the evidence that the language shown by the testimony in this case to have been used by Smith about Burrus was so used by said Smith to some of the voters and constituents of said Burrus at said general election, and to none other, in a private oral discussion of the character and honesty and fitness of said Burrus to fill such public office; and that said language was so used in good faith, for the purpose of giving such voters and constituents relevant and proper information for their own interest and protection; and that said language was so used by said Smith in said Eastern District of Scotland County, after said Burrus had been nominated for said public office, and before said general election in said eastern district; and that said Smith was a voter at said general election in said eastern district,—then the court instructs the jury that such language so used by said Smith is privileged; that said Smith had the right to so use the same; and that defendant, Burrus, did not have reasonable and probable cause for bringing said suit for slander against plaintiff, Smith."

There is a conflict of authority on the question whether such an instruction should be given in instances like the present; but, as this case is one of first impression in this State, we are free to adopt that rule which we regard as best comporting with the proper preservation of the rights of individuals, good government, social order, justice and sound reason. The correct rule, we take it, is that expressed by the Supreme Court of Massachusetts in *Com. v. Clap*, 4 Mass. 163, where *Chief Justice Parsons*, speaking for the court, said: "When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against the law. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and re-

ject the best citizens, to their great injury, and it may be to the loss of their liberties." This expression of the law was cited approvingly in *Wheaton v. Beecher*, 66 Mich. 307, 9 West. Rep. 890, an action for libel, with plea of privileged communication regarding a candidate for a public office; and *Sherwood, J.*, in delivering the opinion of the court, said: "The libel in this case was not privileged. It is true the plaintiff was a candidate for appointment to the office of comptroller of the City of Detroit, but this did not license the defendant, or any other person, to villify, falsify and calumniate the character of the plaintiff for honesty, integrity and morality. There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished." *Bronson v. Bruce*, 59 Mich. 467, was also an action for libel on a candidate for a public office, and the claim of privilege was also interposed; but *Champlin, J.*, as the organ of the court, said: "The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress; and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast by him. But defamation is not a necessary and indispensable concomitant of an election contest." "To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man, worthy of the position, would consent to stand for an office, and have his reputation tarnished, his good name scandalized, in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated,—one upon the candidate, the other in misleading the voter." At an early day in Tennessee the same question arose, and a similar ruling was made; *Overton, J.*, remarking: "Slander is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people when, in 18 L. R. A.

the exercise of one right, you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed but no falsehoods be propagated." *Brewer v. Weakley*, 2 Overt. (Tenn.) 99. The same view of the law prevails in West Virginia, where *Green, P.*, delivering the opinion of the court, said, in speaking of the degree of freedom with which the character of a candidate for public office may be treated, said: "As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must, of course, be proven. . . . His talents and qualifications, mentally and physically, for the office he asks at the hands of the people, may freely be commented on in publications in a newspaper, and, though such comments be harsh and unjust, no malice will be implied, for these are matters of opinion, of which the voters are the only judges; but no one has a right by a publication to impute to such candidate, falsely, crimes, or publish allegations affecting his character falsely." *Sweeney v. Baker*, 18 W. Va. 183. The same rule prevails as to the conduct of a public officer as that relating to a candidate for office, as the authorities show; and in regard to what are privileged communications respecting the former class, *Folger, Ch. J.*, said: "We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer, and that, to be excused, the critic must show the truth of what he has uttered of that kind." *Hamilton v. Eno*, 81 N. Y. 126. The doctrine here asserted is also prevalent in Illinois. In *Rearick v. Wilcox*, 81 Ill. 77, *Craig, J.*, said: "While the qualifications and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections. . . . The law required appellee, as the publisher of a journal, to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to protection, when a candidate for office, as at any other time." The same doctrine is announced in other States, and we regard it as the better one, especially in this day and age, when in heated political campaigns the "rattling tongue of noisy and audacious" slander, and what *Lord Mansfield*, in *Re v. Wilkes*, 4 Burr. 2562, calls "that mendax infamia from the press," sorely need to have placed upon them some fetter, some check, some curb which shall be able, in some degree at least,

to restrain them within something like legitimate boundaries, and something like a decent regard for private character. Within these bounds of legitimate discussion all that is necessary to say and proper to say respecting the actions and qualifications of candidates

or public officers may legitimately be said, without descending into the sinks and cesspools of vituperation.

For the errors aforesaid *the judgment should be reversed, and the cause remanded.*

All concur, except **Barclay, J.**, absent.

CONNECTICUT SUPREME COURT OF ERRORS.

Nora J. PORTER *et al.*, *Appts.*,

v.

Edward G. WOODHOUSE.

Julia H. ROBERTSON *et al.*, *Appts.*,

v.

SAME.

(59 Conn. 568.)

1. No delivery of a deed, either absolute or conditional, can be made without parting at the time with the possession of it, and with all power and control over it by the grantor for the benefit of the grantees.

2. Warranty deeds made by way of gift, which are in a box with money and bank books, are not delivered by the grantor, when expecting to die, by giving the box to another person saying that "the names of the persons who are going to have the houses are on the deeds, and if I live I will talk further about the contents of the box; but don't you open it until after my funeral."

(December 15, 1890.)

A PPEAL by complainants from a judgment of the Superior Court for Hartford County in favor of defendants in actions brought to compel defendant to deliver to complainants two deeds to real estate, left for delivery after her death by the grantor, Julia A. Hinman, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles E. Perkins, Horace Cornwall and Samuel F. Jones, for appellants:

There is no specific form of words required in such cases to vest the title. The rule of law is, that it must appear from the acts and words of the grantor that she intended that the grantees should have the deeds after the death of the grantor. It is not even necessary that the deeds should be actually delivered to the grantees or to anyone for them; it is enough if they are so placed that they, or some other person for them, can get the deeds after the death of the grantor.

Less evidence is required in cases of gift, and where no rights of creditors or others are affected.

See *Robinson v. Taylor*, 42 Fed. Rep. 810; *Woodward v. Camp*, 22 Conn. 457; *Ward's App.* 35 Conn. 163; *Merrills v. Swift*, 18 Conn. 257; *Fisher v. Hall*, 41 N. Y. 416; *Burkholder v. Casad*, 47 Ind. 422; 1 Devlin, Deeds, § 262; *Stevens v. Hatch*, 6 Minn. 76; *Hinson v. Bailey*, 78 Iowa, 544; *Hill v. Hill*, 119 Ill. 242; *Jones v. Loveless*, 99 Ind. 817; *Owen v. Williams*, 13 West. Rep. 85, 114 Ind. 179; *Staniford v. Staniford*, 3 L. R. A. 299, 97 Mo. 231; *Doe v. Knight*, 5 Barn. & C. 671.

In some cases it has been held that the delivery of the deed must be such as to place it beyond the control or power of the grantor to retake it if he so desired, but such is not the rule in this State.

Belden v. Carter, 4 Day, 66; *Stewart v. Stewart*, 5 Conn. 817.

Messrs. Buck & Eggleston, for appellee: Delivery is as essential to make a deed valid and effectual as the signing.

Co. Litt. 35 b, 36 a, 171 b.

Even a court of equity will not interfere to give effect to a deed not delivered, but considers it as being inchoate or imperfect.

Alsop v. Swathel, 7 Conn. 503.

To constitute a delivery the grantors must part with the possession and legal control of the instrument, with the intent to give effect to the instrument and transfer the title to the estate.

3 Washb. Real Prop. 5th ed. 299, and cases cited.

The act and intent must concur.

Merrills v. Swift, 18 Conn. 261; *Shurtleff v. Francis*, 118 Mass. 165.

There is no doubt that a deed may be delivered to the grantee, to take effect presently, or to a third person as trustee for the use of the grantee, to be delivered to the grantee upon the happening of a future event, such as the death of the grantor.

Belden v. Carter, 4 Day, 79; *Alsop v. Swathel* and *Merrills v. Swift*, *supra*.

It must be delivered for the use of the grantee.

Elzey v. Metcalf, 1 Denio, 323; *Young v. Young*, 80 N. Y. 424; *Woodward v. Camp*, 22 Conn. 459.

NOTE.—*Gifts causa mortis and inter vivos.*

A gift of a savings bank book from husband to wife *causa mortis* is not valid without delivery; although in her possession, that is not sufficient to pass the property. See *Drew v. Hagerty* (Me.) 3 L. R. A. 230.

The validity of gifts *causa mortis*. See notes to *Walsh's App.* (Pa.) 1 L. R. A. 535; *Crawford's Case* (N. Y.) 5 L. R. A. 71; *Beaver v. Beaver* (N. Y.) 8 L. R. A. 403.

A gift by an aunt, to her nephew, of certain

money which was shortly before and perhaps at the time in possession of the donee, as her agent, is a valid and complete gift *inter vivos*. See *Miller v. McMechen* (W. Va.) 6 L. R. A. 515, and note.

Where one confined to his bed by a fatal sickness instructs another to whom he has intrusted keys of a private box in a bank vault to extract certain money therefrom and label it separately as the property of a third person and deliver it to him, it is a valid gift *causa mortis*. See *Devol v. Dye* (Ind.) 7 L. R. A. 499, and note.

Andrews, Ch. J., delivered the opinion of the court:

These are two cases tried together and depending on the same facts. The defendant is the executor of the will of Mrs. Julia Hinman, late of Hartford, deceased. The complaint prays that two deeds now in the possession of the defendant be delivered, one to the said Nora J. Porter, and the other to the said Julia Robertson. The only question in the case is, whether on the facts found these deeds were so delivered as to pass the title. The facts are as follows:

Mrs. Julia Hinman, in her lifetime, and until her death, owned two houses in Hartford, in one of which she lived. She died on the 10th day of June, 1888, aged eighty-two years. Several years before her death she made a deed of one of these houses to Mrs. Porter, and at another time a deed of the other house to Mrs. Robertson. They were warranty deeds in form and were expressed to be for a valuable consideration. They were signed, sealed, witnessed and acknowledged. All the requisites of a formal execution were complete and each was filed on the back with the name of the grantee. Nothing was paid for them; they were in fact deeds of gift. The grantees never knew until after the death of Mrs. Hinman that they had been made. These deeds were placed by Mrs. Hinman in a box in which she kept her will, her bank books, her policies of insurance, and other papers of like kind, and in which she had also a bag containing \$1,000 in gold. The box was concealed in a closet in her bedroom. During the last year of her life a Mrs. Harriet Elliot lived with her and was her only companion and attendant. Previous to the 10th day of April, 1888, Mrs. Hinman had told Mrs. Elliot that she had deeded away the two houses, but had refused to tell her to whom. On that day Mrs. Hinman fell, and was so severely injured that she feared she was going to die. On the morning of the 11th she told Mrs. Elliot where the box was, and requested her to bring it out. Mrs. Elliot did so and placed it on the bed. Mrs. Hinman then said to Mrs. Elliot, "Take that box into your lap. I put it into your possession. My private papers are in that box and a bag of gold containing \$1,000. My will is in there and the deeds of these two houses. I told you before that I have deeded away these houses; on the deeds are the names of the persons who are going to have the houses." She then told Mrs. Elliot to take charge of the box and put it back into the closet, and told her where the key to the box was; and that if she did not live she wished her (Mrs. Elliot) to speak to E. G. Woodhouse, the defendant, and request him to read her will after the funeral. Then, after some further directions about the box, she closed the conversation by saying: "I have said enough, so that you will know what to do with the box in case I should die. If I live I will talk further about the contents of the box. But don't you open it until after my funeral." After this conversation, Mrs. Elliot took charge of the box, but so far as appears never opened it until the day of Mrs. Hinman's funeral. In conversations subsequent to this one, Mrs. Hinman spoke about the bag of gold in the box, and of the provisions of her will, but never

spoke about the deeds. Mrs. Hinman died about midnight of June 10, 1888. From the morning of the preceding day to the time of her death she was in a dying state and in a deep stupor, during which she observed nothing and said nothing, except that at about nine o'clock in the forenoon she suddenly exclaimed, "Call Robinson! Call Robinson! there are those two deeds, one is for Julia Robertson, and one is for Nora Porter." No Robinson was there at the time and no one of that name had been in attendance upon her. Mrs. Elliot and a nurse, Mrs. Wright, were there, but Mrs. Hinman was not conscious of their presence or of what she was saying.

The delivery of a deed implies a parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally; absolutely, if the effect of the deed is to be immediate and the title to pass or the estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed or made dependent on the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person to be kept by him until the happening of the event of which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic and an indispensable feature of every delivery, whether absolute or conditional, that there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of the delivery. *Prutsman v. Baker*, 80 Wis. 644. The delivery of a deed is as essential to the passing of the title to the land described in it as is the signing of it or the acknowledgment. It is the final act without which all other formalities are ineffectual. To constitute a delivery, the grantor must part with the legal possession of the deed and of all right to retain it. The present and future dominion over the deed must pass from the grantor. And all this must happen in the grantor's lifetime. *Younge v. Guilbeau*, 70 U. S. 3 Wall. 686, 18 L. ed. 268; *Cook v. Brown*, 34 N. H. 476; *Fisher v. Hall*, 41 N. Y. 421; *Jackson v. Leek*, 12 Wend. 105; *Fay v. Richardson*, 7 Pick. 91; *Aleop v. Svanthel*, 7 Conn. 508; *Hoboken City Bank v. Phelps*, 34 Conn. 103; 2 Kent, Com. 439; Bouvier, Law Dict. *Delivery*.

Upon the facts above recited, the superior court rendered judgment for the defendant and dismissed the complaint. We think that judgment was clearly right, for the reason that Mrs. Hinman never intended to and never did part with the legal control over the deeds. The box in which the deeds were was in the charge of Mrs. Elliot, as the servant and agent of Mrs. Hinman, and so remained until after Mrs. Hinman's death. The deeds were never taken out of the box till after her funeral. Mrs. Elliot never knew till that time the names of the grantees. She had never received any directions as to the deeds of such, apart from the other contents of the box. It is not and cannot be claimed that Mrs. Hinman parted with the possession of the box itself, or the control over the bag of gold, or of her bank books, or of her will, or of her insurance poli-

cies. Yet these were in the box with the deeds, and she parted with the possession and control of these just as much as she did with the deeds. The deeds were never separated from the other contents of the box. The conversation, on the morning of April 11, clearly shows that Mrs. Hinman did not intend at that time to part with the control of the contents of the box. She intended to give further directions in regard to them. Her closing words were, "If I live I will talk further with you about the contents of the box." That further talk she never had, and so her intent as to the deeds remained undisclosed. Mrs. Elliot was never made the custodian of the deeds for the benefit of the grantees. She at all times held them in the same way that she held the other things in the box, as the agent of Mrs. Hinman.

In reference to the conversation just mentioned, the superior court has found that Mrs. Hinman's sole purpose in the transaction was to give Mrs. Elliot information of the existence and contents of the box. It is claimed by the defendant that by such finding the superior court has left nothing for the examination of this court, for the reason that it excludes all intent on the part of Mrs. Hinman to transfer the title to the grantees named in the deeds. This may be true, but we do not place our decision upon it. The delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. As we are satisfied that Mrs. Hinman never did any act by which she parted with the possession of the deeds for the benefit of the grantees, the question of her intent becomes immaterial.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

Re John M. CLAYTON.

(59 Conn. 510.)

1. Requiring a person convicted of intoxication to make a disclosure under

NOTE.—Refusal to testify, or to answer particular questions.

It may safely be laid down, as a general rule, that the refusal of a witness to testify at all, or to answer particular questions, pertinent to the issue, put to him either in a proceeding before the court itself or before a subordinate officer duly empowered by the court to take his deposition or conduct his examination, is a contempt of such court, provided always the court have jurisdiction of the controversy or proceeding in which the witness is required to give his evidence. *Re Allen*, 18 Blatchf. 271; *Whitcomb's Case*, 120 Mass. 118, 121; *La Fontaine v. Southern Underwriters Asso.* 83 N. C. 132; *Stuart v. Allen*, 45 Wis. 158, 161; *Rex v. Almon*, Wilms. 243, 269; *Ex parte Doll*, 7 Phila. 556. See *Rapalje*, Contempts, § 66.

The right of a witness to answer is a personal privilege; his right to exercise it rests in his own discretion; he uses it at his peril. *Heerd v. Wetmore*, 2 Robt. 697; *Southard v. Rexford*, 6 Cow. 255; *People v. Bodine*, 1 Denio, 281; *People v. Lohman*, 2 Barb. 216.

The supreme court of New York has held that a 18 L.J.R. A.

oath, when, where, how and from whom he procured the intoxicating liquor, does not violate the constitutional provisions as to due process of law, equal protection, or right of trial by jury; nor is it against public policy.

2. Commitment for contempt in refusing to make a disclosure as required by law is not a deprivation of liberty without due process of law.

3. The utility of a disclosure required by statute from one convicted of intoxication, as to when, where, how and from whom he obtained the intoxicating liquor, which disclosure is to be turned over to the State's attorney, cannot be questioned by the convict or the court as an excuse for a refusal to make the disclosure.

(December 15, 1890.)

A PPEAL by petitioner from a judgment of the Superior Court for Hartford County refusing to release him from imprisonment in the Hartford jail, to which he had been committed for contempt of court. *Affirmed.*

The facts are stated in the opinion.

Messrs. George P. McLean and Austin Brainard, for appellant:

If the law is unconstitutional, all proceedings under it are void, and Clayton was unlawfully committed.

Ex parte Siebold, 100 U. S. 871, 25 L. ed. 717; *Herrick v. Smith*, 1 Gray, 49; *Riley's Case*, 2 Pick. 172; *Re Payson*, 28 Kan. 757.

If the law is, in its operation, unreasonable and unjust, it is the duty of the court to declare it void.

Goshen v. Stonington, 4 Conn. 225; *Welch v. Wadsworth*, 30 Conn. 155; *State v. Wordin*, 6 New Eng. Rep. 752, 56 Conn. 226.

This Statute is void: (1) in that it deprives the person committed of the right to trial by jury, as guaranteed by section 21 of article 1 of the Constitution of Connecticut; (2) it deprives the person committed of his liberty without due course of law.

The liberty of the person in custody is at once placed at the discretion or caprice of the presiding judge. The judge determines the truth or falsity of the disclosure offered, the validity and good faith of the reasons assigned for making no disclosure, pure questions of fact, involving in their determination the lib-

witness was not compelled to answer any question, the truthful answer to which would have a tendency to implicate the witness in a criminal charge, or expose him to a penalty. *Burns v. Kempshall*, 24 Wend. 390.

The court is to determine whether the answers he may give could directly or indirectly criminate him, by furnishing evidence of his guilt, by his own admission; even if it only established one fact out of many, which, taken together, would be sufficient to warrant his conviction, his privilege should be allowed. If the court holds that the answer might in any way criminate the witness, the witness is not to be compelled to explain how he would be criminated by such answer. *Re Tappin*, 9 How. Pr. 394; *Curtis v. Knox*, 2 Denio, 341.

And also where answers to a question would have disgraced the witness, the privilege may be pleaded and must be allowed by the court. *People v. Mather*, 4 Wend. 250; *Cowen & Hill's notes to Phil. Ev.* 521; 1 Burr. Ev. 244; 1 Greenl. Ev. 454; *Lohman v. People*, 1 N. Y. 379; affirming 2 Barb. 216.

Refusal to answer a proper question in the examination before a referee is punishable as for a con-

erty of the citizen, and he can have neither formulated charge, nor counsel, nor witnesses, nor appeal, nor adjournment, that he may establish his right to credence and liberty.

If this law is left to operate in a single case, or in any view of its application, no relief can be possible in any case. How can a person secure release on habeas corpus where the record discloses no error and his only hope is to reverse a finding of fact clearly within the discretion of the court below.

Douglass v. Wickwire, 14 Conn. 491; *Fox v. Hoyt*, 12 Conn. 491; *State v. Bloom*, 17 Wis. 521; *Stewart's Case*, 1 Abb. Pr. 210; *Church, Habeas Corpus*, 373, 481.

A legislative enactment is not necessarily "the law of the land," nor is a court in proceeding under such enactment necessarily proceeding according to "due course of law" as those words are used in our Constitution.

See *Cooley, Const. L.* pp. 488-485, and *notes; Camp v. Rogers*, 44 Conn. 291.

Acts interfering with constitutional rights in a way similar to the law in question have been adopted in only one State in the Union, and that Act has been already declared unconstitutional by the Supreme Court of the State.

Ex parte Grace, 12 Iowa, 206.

The Statute is in violation of the 14th Amendment of the United States Constitution in that it deprives the prisoner of the equal protection of the law in subjecting him to inquiries under summary proceedings and penalties to which other citizens who procure liquor are not liable.

San Mateo County v. South Pac. R. Co. 7 Sawy. 517; *Cooley, Const. Lim.* p. 13.

This Statute makes that a contempt which is not a proper subject of contempt.

Rapalje, Contempt, p. 82, and cases there cited.

A police regulation, summary in its nature and directly interfering with the right of personal liberty, must have a definite object clearly attainable, and that object must be undeniably in the interest of public order and safety. If its purpose is in the line of investigation, it must obviously be confined to crimes actually committed, and dangers imminent and well defined.

Tiedeman, Pol. Power, pp. 1-16; *Lakeview v. Rose Hill Cemetery Co.* 70 Ill. 192; *State v. Noyes*, 47 Me. 189.

Messrs. William Hamersley and Francis H. Parker, for appellee:

The Statute in question is a police regulation designed in the words of *Judge Cooley*, "to preserve the public order, and prevent offenses against the State."

Cooley, Const. Lim. p. 706.

Its particular purpose is to prevent violations of the Liquor Laws. It is in aid of and supplementary to the general laws regulating the sale of intoxicating liquors, and is part and parcel of the Liquor Laws of the State.

State v. Brennan's Liquors, 25 Conn. 278; *State v. Wilcox*, 42 Conn. 864; *State v. Thomas*, 47 Conn. 546.

Our statutes authorize the bank commissioners, railroad commissioners and insurance commissioner to make investigations, summon witnesses and examine them, and provide for punishments by commitments for contempt or otherwise, when witnesses refuse to testify.

Gen. Stat. §§ 1827, 2859, 2896, 8430: *Noyes v. Byrbee*, 45 Conn. 832.

The Act in question requires the person who has been convicted of drunkenness to disclose certain facts that are peculiarly within his knowledge, which facts the Legislature has determined should be disclosed for the public good. He stands simply in the place of a wit-

tempt. *Lathrop v. Clapp*, 40 N. Y. 323, affirming 23 How. Pr. 423.

A witness may be punished for refusal to answer a material or competent question, although he attended the examination and was sworn without a subpoena. *People v. Marston*, 18 Abb. Pr. 237.

A witness duly subpoenaed, refusing to testify before a notary public for no other reason than because he is instructed by his attorney not to answer may be committed by the notary for contempt. *Re Merkle*, 40 Kan. 27.

Under the Georgia Code the proprietor or publisher of a newspaper is a competent witness in a criminal prosecution for libel therein; and he may also be punished for contempt of court as any other witness refusing to testify. *Pledger v. State*, 77 Ga. 242.

Refusal of a witness to answer proper questions before the grand jury, and again when brought into court, assigning no reason, is a contempt for which he may be ordered to pay a fine and to stand committed until he shall appear and answer said questions, or until the further order of the court. *Re Harris*, 4 Utah, 5.

But where a judgment debtor was asked as to the amount and value of an incumbrance on his property six months before the examination, it was held that such question was not necessarily within his power to answer, and an answer in substance that he was unable to give the information asked for was not necessarily evasive, or a refusal to comply with the order requiring him to answer the question; for it did not look to a discovery of

property, but to a discovery of incumbrances. *Wicker v. Dresser*, 14 How. Pr. 465.

The refusal of a witness to answer a question not pertinent to the issue is not a contempt. *Ex parte Zeelandelaar*, 71 Cal. 238.

Courts should exercise great care in compelling witnesses to answer questions where the witness claims the privilege, and has brought himself within the rule, as it is a matter exclusively between the court and the witness. The opposite party cannot object. He has no right to insist upon the privilege, and require the court to exclude it on that ground; as the witness has the right to waive his privilege, and if ordered to testify, he may refuse and be committed. *Cloyes v. Thayer*, 3 Hill, 564; *Thomas v. Newton*, 1 Mood. & M. 48, note a; *Treat v. Browning*, 4 Conn. 408; *Southard v. Rexford*, 6 Cow. 239; *Cowen & Hill's notes* to Phil. Ev. 784 b; *Forbes v. Willard*, 54 Barb. 520.

When a witness is directed by a referee before whom he is examined to answer a question, and he refuses to answer, he is guilty of contempt, provided the question is a proper one. *Lathrop v. Clapp*, 40 N. Y. 323, affirming 23 How. Pr. 423.

No appeal lies from a judgment imposing a penalty for contempt of court. *Teller v. People*, 7 Colo. 451.

Power of court to punish.

The power which the court possesses of punishing disobedience of its mandates is one of the safeguards for the due administration of justice. It is a necessary attribute of the court. The Statute

ness before an investigating officer, and is treated as witnesses in like proceedings are lawfully treated. He may be compelled to testify, but not against himself.

Const. art. 1, § 9. U. S. Const. 5th Amend.

Witnesses who refuse to testify are committed for contempt by the courts.

Com. v. Willard, 22 Pick. 476; *People v. Kelly*, 24 N. Y. 74.

Witnesses who refuse to testify in preliminary investigations authorized by statute have always been punishable by commitment for contempt, and were so punishable when our Constitution was adopted.

Goddard v. State, 12 Conn. 448; *Merriman v. Bryant*, 14 Conn. 205; *Seeley v. Bridgeport*, 3 New Eng. Rep. 580, 53 Conn. 1.

Punishment by commitment to jail of persons guilty of contempt, including witnesses refusing to testify, was part of the "law of the land," or the "due course of law," at the time of the adoption of our Constitution.

Gen. Stat. 1808, pp. 231, 372; *Eilenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801; *Cartwright's Case*, 114 Mass. 238; *Middlebrook v. State*, 43 Conn. 257; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

As there can be no trial of the person interrogated, he is not denied a trial by jury by the Statute.

Waldo v. Spencer, 4 Conn. 71, 78.

But if the commitment of the person required to disclose by this Statute can in any sense be said to be a punishment for drunkenness, then the Statute is still constitutional; because the crime of drunkenness is one of those petty offenses always tried by single magistrates in our State before the adoption of the Constitution, and therefore not affected by that instrument.

Gen. Stat. 1808, p. 241; *Coll v. Eves*, 12

Conn. 252; *Goddard v. State*, 12 Conn. 448, 454; *Curtis v. Gill*, 34 Conn. 54; *Beers v. Beers*, 4 Conn. 535; *Weed's App.* 85 Conn. 455; *State v. Worden*, 46 Conn. 369; *Clinton v. Bacon*, 56 Conn. 508; 1 Stevens, History Crim. Law, 122; 8 Stevens, History Crim. Law, 263.

The 14th Amendment to the Constitution of the United States does not restrict or conflict with the police power of the States.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 923, and note; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

All liquor legislation not in regulation of interstate commerce is within the police power of the States.

License Cases, 46 U. S. 5 How. 504, 12 L. ed. 256; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129-141, 31 L. ed. 929-933; *Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 680; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *LaCroix v. Fairfield County Comrs.* 49 Conn. 591.

Carpenter, J., delivered the opinion of the court:

The complainant was convicted of intoxication, and was required to disclose, under the Act of 1889, chap. 167,* "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced." He refused "to make such disclosure." Thereupon the magistrate (the judge of the Police Court of Hartford) before whom the trial was had proceeded "to commit the ac-

*That statute provides that if a person be found guilty of intoxication, and refuses on request of the prosecuting officer to disclose under oath when, where, how and from whom he procured the liquor by which his intoxication was produced, the magistrate before whom the trial was had shall commit him to the county jail for contempt of court. [Rep.]

declares it, and, in so doing, gives no new power, but merely defines and limits an ancient rule of the common law. To allow such offenders immunity for their misconduct would be a practical surrender of a trust which has been confided to the judiciary by the people for their own protection and benefit. *Negus v. Brooklyn*, 1 N. Y. Civ. Proc. 471.

The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support. *Batchelder v. Moore*, 42 Cal. 412.

Power to punish for contempt is a judicial and not a legislative one. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Happy v. Mosher*, 48 N. Y. 313; 2 Bancroft, Hist. U. S. 414; 3 Bancroft, Hist. U. S. 56, 101; 1 Bl. Com. 163-163; 1 Hallam, Const. Hist. 224, 225.

"The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice," the Supreme Judicial Court of Massachusetts well said, in *Cartwright's Case*, 114 Mass. 230, 238, "is inherent in courts of chancery and other superior courts as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of 13 L. R. A.

the land, within the meaning of Magna Charta and of the 12th article of our Declaration of Rights." The Declaration of Rights here referred to was that which formed part of the Constitution of Massachusetts, and contained the prohibition, inserted in most of the American Constitutions, against depriving any person of life, liberty or estate, except by the judgment of his peers or the law of the land. So in *Cooper's Case*, 32 Vt. 253, 257: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." Without such power, it was observed in *Easton v. State*, 30 Ala. 522, the administration of the law would be in continual danger of being thwarted by the lawless. To the same effect are *Watson v. Williams*, 36 Miss. 344; *Johnston v. Com.* 1 Bibb, 598; *Clark v. People*, 1 Ill. 266; *Com. v. Dandridge*, 2 Va. Cas. 408; *Ex parte Hamilton*, 51 Ala. 68; *Rodman v. State*, 28 Ind. 212; *People v. Turner*, 1 Cal. 153; *State v. Morrill*, 16 Ark. 388; and numerous cases cited in note to *Clark v. People*, 1 Ill. 266, in 12 Am. Dec. 178. See also *Queen v. Lefroy*, L. R. 8 Q. B. 134.

Due process of law.

The principles involved in this caption have received extended treatment in the following cases: *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1; *Chauvin v. Valiton*, 3 L. R. A. 194, 8 Mont. 451; *Jensen v. Union Pac. R. Co. (Utah)* 4 L. R. A. 724; *Re Gannon (R. L.)* 5 L. R. A. 359.

cused for contempt of court to the common jail" for ten days. On a writ of habeas corpus he was brought before a judge of the superior court. The sheriff's return set out the proceedings in the police court, and the mittimus issued thereon. The complainant demurred to the return, because, he says, the Statute under which the proceedings were had is obnoxious to constitutional provisions. The judge overruled the demurrer, and the complainant appealed.

Provisions for disclosures by persons found intoxicated or arrested for intoxication first appeared in the Statute of 1854, and have since remained there, with some changes from time to time. Until 1889 disclosures were at the option of the prisoner, and could only be made before conviction; and, upon being fairly made, they contemplated the discharge of the intoxicated person. The Statute of 1889 made a radical change. It provides for disclosures only after conviction, does not discharge the prisoner, and the disclosure is made compulsory. Whether this Act is a substitute for the Statute previously existing, or is in addition thereto, is not now a material question.

The first ground of demurrer is that the Statute "is a deprivation of the right to a trial by jury, as provided by section 21 of article 1 of the Constitution of Connecticut." This objection misconceives the nature and character of the proceeding before the police court. The appellant was not then before the court as a defendant in a criminal prosecution. That had been his position; but upon his conviction that was changed, and he became, so far as this case is concerned, merely a witness. He was in no sense on trial,—no one was,—and therefore was not in jeopardy. The proceeding was not judicial, but ministerial. For more than a century and a half we have had upon the statute-book a law authorizing the grand jurors in the several towns to meet and advise and inquire into the offenses that had been committed, with power to summon and examine witnesses, and, if need be, to punish for contempt. Gen. Stat. § 91. This proceeding is but an extension of the same power to other officers for the same general purpose, namely, the protection of society, by preventing crime through the detection and punishment of offenders. The magistrate acting in an administrative, and not in a judicial, capacity, the witness being in no jeopardy, and exposed to no detriment, provided he testifies fairly, this section of the Constitution is not applicable.

The second ground of demurrer is that "such a commitment on said Statute is a deprivation of liberty without due process of law, as forbidden by section 9 of article 1 of the Constitution of Connecticut." Punishment for contempt by a court or other tribunal duly au-

thorized is "due process of law" within the meaning of the Constitution. The right and duty of the State to protect its jurisdiction and dignity by punishing for contempt, in proper cases, through its officers, is the sacred right of self-defense.

The third ground of demurrer is that "the matter made a contempt of court by the Statute is not a proper contempt, and it is incompetent for the Legislature to suspend or abrogate the prisoner's constitutional prerogatives by making such refusal a contempt, and providing a summary commitment therefor, since the refusal is entirely disconnected with any proceeding pending before the court, and has no relation whatever to the dignity or duty of the court, or to the administration of justice in any present or future case." This objection rests entirely on the assumption that the testimony of the prisoner, when obtained, will be of no use; in effect, that the Statute is a mere wanton exercise of power. But this assumption is not well founded. The Statute provides that the testimony shall be certified and forwarded to the State's attorney. Its utility is a matter for the Legislature to determine, and it has done so. It is not for the appellant or the court to say that the information is of no value, and has no relation "to the administration of justice in any present or future case."

The fourth ground of demurrer is that "the Statute is in violation of the 14th Amendment to the United States Constitution, in that it deprives the prisoner of the equal protection of the law in subjecting him to inquiries under summary proceedings and penalties to which other citizens who procure liquor are not liable." All offenders against law or good morals are liable to be subjected to some inconveniences from which others are exempt. Of those so offending some will be detected and made to suffer such inconveniences, while others may escape. It was not the purpose of this amendment to place all such offenders upon an equal footing.

There is one error assigned that does not seem to be raised by the demurrer, namely, that "the court erred in ruling and holding that the Statute is a valid statute, not contrary to public policy and natural justice." Perhaps we have sufficiently answered this; but we will add that it is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interests; and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice.

We find no error in the judgment appealed from.

In this opinion the other Judges concurred.

VERMONT SUPREME COURT.

George H. FITZGERALD *et al.*

v.

GRAND TRUNK R. CO. of Canada.

(....Vt....)

1. An agreement by a common carrier to give one shipper a favor and advantage over others by a rebate is illegal at common law.
2. Contracts concerning interstate transportation must be regarded as made upon the basis and with the understanding that changes in the law applicable to them may be made by Congress, and there is no vested right in the law as it exists at the time they are made.

(May 5, 1891.)

EXCEPTIONS by plaintiff to a ruling of the Essex County Court in favor of defendant directing a *pro forma* judgment in its favor upon an agreed statement of facts in an action brought to recover rebates alleged to be due to plaintiff under a shipping contract. *Judgment affirmed.*

The statement of facts set out, in 1886 plaintiffs agreed to furnish defendant 170 car-loads of lumber to be freighted, in consideration of which agreement defendant promised to pay plaintiffs \$6 per car-load; that defendant was to receive for transporting such lumber \$38 on each car-load, which was the regular tariff rate between the points to which the contract related; that before the commencement of this suit plaintiffs had furnished to defendant 170 car-loads of lumber and had fully performed their agreement; that relying upon said agreement, and to carry out and fulfill the same, plaintiffs had purchased said 170 car-loads of lumber and hauled the same to Island Pond, the designated place of shipment, prior to January 1, 1887; that 97 car-loads of said lumber were delivered to and carried by defendant subsequently to April 5, 1887, on which the agreed \$6 per car-load had not been paid.

Further facts appear in the opinion.

Mr. Laforrest H. Thompson, with *Mr. Z. M. Mansur*, for plaintiffs:

The Interstate Commerce Act is not retroactive and does not either prohibit or release the defendant from performing its contract.

Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584, 22 L. ed. 178.

Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770; *United States v. Heth*, 7 U. S. 8 Cranch, 399, 2 L. ed. 479; Sedgw. Stat. and Const. L. 2d ed. 160-173; Cooley, Const. Lim. 4th ed. 76; *Sturgis v. Hull*, 48 Vt. 307; *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.* 79 Ill. 121;

Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584, 22 L. ed. 178.

So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257.

Hence parties were free to make such contracts as they chose in matters relating to interstate commerce prior to the Interstate Commerce Act, and if Congress had intended it to cover existing contracts, it would have said so in express terms.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691.

There is nothing in said Act which prohibits a shipper from obtaining the most favorable terms he can make with the carrier; and if the rate for transportation obtained by him is less than that charged by the carrier for the same services to the public generally, the special and favorable contract thus obtained is not void as to the shipper securing the reduced rate, but under said Act every other shipper has a right to have his goods carried upon like favorable terms.

See *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029, 24 Moak, Eng. Rep. 630.

The contract is valid at common law.

Menacho v. Ward, 27 Fed. Rep. 529; *Bazendale v. Eastern Counties R. Co.* 4 C. B. N. S. 61; *Branley v. South Eastern R. Co.* 13 C. B. N. S. 63; *Fitchburg R. Co. v. Gage*, 12 Gray, 398, 399; *Spoifford v. Boston & M. R. Co.* 128 Mass. 323.

Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof.

M'Culloch v. Maryland, 17 U. S. 4 Wheat. 405, 4 L. ed. 601.

The principle that Congress cannot abrogate or impair existing contracts seems to be recognized.

Union Pac. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 501; *Dubuque & S. C. R. Co. v. Richmond*, *supra*.

Mr. George N. Dale, with *Mr. Ossian Ray*, for defendant:

No common-law case approves of different terms or rates of carriage to different shippers under circumstances precisely alike as exist in this case.

Root v. Long Island R. Co. 4 L. R. A. 331, 114 N. Y. 300; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Vincent v. Pennsylvania R. Co.* 36 N. J. L. 407, 18 Am. Rep. 457; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 543; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Shipper v. Pennsylvania R. Co.* 47 Pa. 838.

NOTE.—As to the law regulating unjust and inequitable discrimination on the part of common carriers, as against individual shippers, see *Pensacola & A. R. Co. v. State*, 3 L. R. A. 661, 25 Fla. 310; *Root v. Long Island R. Co.* 4 L. R. A. 331, 114 N. Y. 13 L. R. A.

800, and *Cleveland, C. C. & I. R. Co. v. Closser (Ind.)* 9 L. R. A. 754.

As to the judicial interpretation of the Interstate Commerce Act, see note to *United States v. Tozer (Mo.)* 2 L. R. A. 444.

A carrier has no right to charge a lower rate to one than to another, although his charges to others are reasonable.

Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; *People v. Chicago & A. R. Co.* 55 Ill. 111; *Chicago & N. W. R. Co. v. People*, 56 Ill. 865; *Hays' Case*, 12 Fed. Rep. 309; *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 48 Ohio St. 571; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 581; *Sandford v. Catawissa W. R. Co.* 24 Pa. 378; *Emlen v. Lehigh Coal & Nav. Co.* 47 Pa. 78; *Shipper v. Pennsylvania R. Co. supra*; *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

The prohibition of *ex post facto* laws was aimed at criminal cases.

Cummings v. Missouri, 71 U. S. 4 Wall. 277, 18 L. ed. 356.

This law in this case does not affect the paying or acceptance of rebate on cars shipped before its passage. It relates to facts occurring since, and having no relation whatever to acts done before.

See *Kring v. Missouri*, 107 U. S. 227, 27 L. ed. 509; 2 Bancroft, History of the Constitution, 218.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be "meant rendering contracts fruitless, or partially fruitless."

Legal Tender Cases, 79 U. S. 12 Wall. 547, 20 L. ed. 311. See *Hepburn v. Curtis*, 7 Watts, 300; *Schenley v. Com.* 86 Pa. 57.

Powers, J., delivered the opinion of the court:

The agreed facts, in substance, are that prior to the passage of the Interstate Commerce Act the defendant promised to pay the plaintiffs a rebate of \$6 upon each of the 170 car-loads of lumber which the plaintiffs were to deliver to the defendant for transportation from Island Pond to points in Massachusetts; and that the usual charges made to all shippers for such freight to such designation was \$38 per car-load; that prior to April 5, 1887 (the day on which the Interstate Commerce Act took effect), the plaintiffs had delivered 78 car-loads for transportation as aforesaid, and after that date, had delivered the remaining 97 car-loads, all of which the defendant had carried to its destination; that the defendant has paid the \$6 rebate to the plaintiffs on the 78 car loads, and this suit is brought to recover such rebate on the 97 car-loads. The plaintiffs have in all respects fully performed their contract, and the sole question is, Can they recover the rebate on the lumber delivered for transportation according to the contract, after said April 5? It was suggested in argument that it did not affirmatively appear but that the \$6 rebate was allowed to all other patrons of the defendant shipping lumber to the same points, and so no discrimination was made in the contract in the plaintiffs' favor. But this is not the fair construction of the agreed facts, and the counsel on both sides have argued the case upon the theory that this rebate was a favor and advantage given the plaintiffs, and not enjoyed by other patrons.

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Many sound reasons might be urged in support of the proposition that Congress, upon those principles of justice and equity which underlie all law, cannot pass a law which will destroy or impair the obligation of existing contracts, except in bankruptcy and other instances specially enumerated in the Constitution. The Federal Constitution expressly prohibits the passage of such laws by the States, but is silent respecting the power of Congress so to do. But, whatever may be said upon that question, it is not involved in this case. The agreed case is that, "unless the plaintiffs' right to recover is barred" by the Interstate Commerce Act, the plaintiffs are to recover. That right of recovery is not barred if Congress, in the passage of the Interstate Act, exceeded its power. It exceeded its power if it impaired the obligation of an existing contract. This is the syllogism that the argument upon this branch of the case is reduced to. The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract. The contract in question, as it stood when made and down to April 5, 1887, is to be tested by the principles of the common law. At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their calling is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public. If the plaintiffs could transport their lumber to market for \$6 per car-load less than their neighbors, they would very soon have a monopoly of the business. Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal. *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, is a representative case in which Beasley, Ch. J., states the doctrine of the common law with great clearness and force. See also *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Pierce, Railroads*, 498.

This contract, then, at the common law, had no legal binding force, so long as it was executory,—no obligation which could be enforced, and therefore no obligation which the Interstate Commerce Act could either impair or destroy. The Interstate Act, therefore, did not, in its operation upon this contract, disturb any vested rights, because no legal rights were vested when the contract was made. So long as the parties to the contract executed it, each was safe from any liability to the other by reason of such performance. In such cases the law leaves the parties just where they leave themselves.

In this case it is to be noted that the contract called for a transportation of the lumber through three States. Such carriage, therefore, is commerce between the States, within

the meaning of article 1, § 8, of the Federal Constitution. Such commerce is solely regulated by Congress, and, when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority. *Cooley*, Const. Lim. 284, 574; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 214, 6 L. ed. 606; *State v. Holmes*, 38 N. H. 225. The power to regulate commerce between the States is one given expressly in the Constitution to Congress. The Interstate Act was

called into being by reason of the making of contracts like the one at bar. Unjust discrimination was one of the chief evils in transportation which Congress attempted to end by this Act, and we see no reason why the Act could not as properly put an end to a contract already working the mischief as to prohibit the making of one in the future. The case, then, comes to this. The plaintiffs seek to enforce a contract which is prohibited by law. The doctrine is elementary that, whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he cannot recover. Here the rebate of \$6 is the illegal feature of this contract. This rebate is the precise thing sued for. The plaintiffs are compelled to prove that the defendant made an illegal promise to pay as the gist of their right to recover. Such promise is not enforceable.

Judgment for defendant affirmed.

MINNESOTA SUPREME COURT.

Frank G. PETERSON, *Respt.*,

v.

Joseph H. MAYER, *Appt.*

(...Minn....)

***An employee who was hired from month to month, at a stipulated salary payable at the end of each month, whose duty was to collect and receive the moneys of his employer, habitually, and during all of the several months that he remained in the service, embezzled the moneys of**

*Head note by MITCHELL, J.

his employer which came into his hands in the course of his employment. Held, that he was not entitled to recover anything for his services, the contract for each month being an entire one, to wit, to serve an entire month for an entire sum, and he having failed to perform his contract for any one month because of his breach of the implied condition that he would serve his employer honestly.

(July 1, 1891.)

A PPEAL by defendant from a judgment of the Municipal Court of St. Paul in favor

NOTE.—*Entire contract must be performed before wages can be demanded.*

It has been held, in England, that if a party hired for a certain time so conduct himself as to justify his discharge, he shall forfeit the current salary even for the time for which he has served. *Turner v. Robinson*, 5 Barn. & Ad. 789. See also *Lilley v. Elwin*, 11 Q. B. 742; *Baillie v. Kell*, 4 Bing. N. C. 638; *Amor v. Fearon*, 9 Ad. & El. 551; *Beach v. Mullin*, 34 N. J. L. 343.

To justify a discharge, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, willful disobedience, or habitual neglect. *Callo v. Brouncker*, 4 Car. & P. 518.

But this doctrine has been denied in more recent cases, and it is now held that misconduct may be sufficient to justify a discharge, although it does not include moral turpitude. *Smith v. Thompson*, 8 C. B. 44; 8 Wait, Act. and Def. 600.

A servant who leaves his master's service before the expiration of the month, without excuse and by his own willful fault, can recover nothing for the portion of the month for which he has worked. *Nelchka v. Esterly*, 20 Minn. 146.

Where a servant, whose wages are due and payable periodically, as quarterly, monthly or weekly, refuses to serve in the manner contracted for, or is rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing for that portion of time during which he has served since the last periodical payment of wages. *Beach v. Mullin*, 34 N. J. L. 343.

When a servant is discharged for legal cause, he cannot recover for services rendered under the contract. *Spain v. Arnett*, 2 Stark. 256.

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When a servant, whose wages are due periodically, refuses to perform his part of the contract, and so conducts himself that the master is justified in discharging him, he is not entitled to be paid any wages for that portion of time during which he has served since the last periodical payment of wages; that is to say, if a servant, whose wages are only due yearly, is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such discharge; and the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fail to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing. This is upon the principle that the contract was an entire contract, and the performance of the services for the whole time agreed upon was in the nature of a condition precedent to his right to recover any wages. *Smith, Mast. and Serv.* 118.

The propositions of law thus stated are supported by the following cases: *Turner v. Robinson*, 5 Car. & P. 15; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171; *Lilley v. Elwin*, 11 Q. B. 742, 755, 757; *Turner v. Mason*, 14 Mees. & W. 112; *Libhart v. Wood*, 1 Watts & S. 255; *Singer v. McCormick*, 4 Watts & S. 266.

The principle is stated in similar language in 2 Parsons, Cont. 40, and 2 Smith, Lead. Cas. § 43.

Dishonesty of servant defeats right to wages.

In most cases full and faithful performance by plaintiff of his entire contract is a condition precedent to any recovery. *Wood, Mast. & Serv.* 167,

of plaintiff in an action brought to recover salary alleged to be due plaintiff for services rendered to defendant. *Reversed.*

The facts are stated in the opinion.

Mr. A. E. Bowe for appellant.

Messrs. Henry Johns and R. L. Johns, for respondent:

A servant whose wages are due periodically, even though employed for a definite time, and who is rightfully discharged, may nevertheless recover for the periods of service already completed.

Taylor v. Laird, 1 Hurlst. & N. 267; *Button v. Thompson*, 38 L. J. C. P. 225; *Smith, Mast. and Serv.* p. 195; *White v. Atkins*, 8 Cush. 367; *Newman v. Reagan*, 63 Ga. 755.

A contract for hiring at so much per month is a hiring by the month—if nothing is said as to the term of service.

Beach v. Mullin, 34 N. J. L. 343.

Servant's contracts, though for a specified time, are deemed apportionable, and a servant who has been discharged for cause is still entitled to recover for the work actually done.

14 Am. & Eng. Encyclop. Law, p. 793; *Lawrence v. Gullifer*, 38 Me. 532; *Jones v. Jones*, 2 Swan, 605; *Massey v. Taylor*, 5 Coldw. 447.

Respondent may recover for services performed during the fractional part of a month in which he was discharged, less such damages as appellant sustained by reason of his tortious act.

Taylor v. Peterson, 9 La. Ann. 251; *Green v. Hulst*, 22 Vt. 188; *Murdock v. Phillips Academy*, 12 Pick. 244; *Carroll v. Welch*, 26 Tex. 147; *Jenkins v. Long*, 8 Md. 182; *Robinson v. Sanders*, 24 Miss. 391; *Swift v. Harriman*, 30 Vt. 607.

Mitchell, J., delivered the opinion of the court:

The allegations of the complaint are that

§ 84, 156, § 81, 201, § 108; *Birby v. Parsons*, 49 Conn. 483.

Fidelity is a condition precedent, whenever an agent seeks compensation from his principal. See *Henderson v. Hydraulic Works*, 9 Phila. 100.

There can be no part recovery for part performance. *M'Millan v. Vanderlip*, 12 Johns. 167.

Where the performance of work and labor is a condition precedent, to entitle the party to recover a fulfillment must be shown. *Wolfe v. Howes*, 20 N. Y. 202.

Conditions precedent have always been, and still are, strictly enforced by the courts of New York, and complete performance in precise accord with the contract insisted upon. See *Smith v. Brady*, 17 N. Y. 186-188.

The burden is on the plaintiff to aver and prove a fulfillment of a condition precedent. *Oakley v. Morton*, 11 N. Y. 30.

Flagrant acts of dishonesty or crime which seriously affect the master's interest, continued during he service, might well be regarded as a bar to the recovery of wages, although the amount received and fraudulently appropriated might be far less than the amount fixed by the contract. *Turner v. Kouwenhoven*, 1 Cent. Rep. 267, 100 N. Y. 115.

In *Spotswood v. Barrow*, 5 Exch. 110, it was held that where a servant employed to collect moneys for his master retains a part of the money when it has come into his hands, and does not pay the same over, he has broken his contract, may be discharged by his master, and can recover no wages even for previous services rendered. And the same was held in *Blencarn v. Hodges Distillery Co.* 16 L. T. 13 L. R. A.

the plaintiff performed labor and work for defendant for seven and a fraction months at an agreed sum per month, payable at the end of each month. The answer admits the employment at the sum alleged for each and every month that plaintiff should work for defendant, and that the plaintiff worked the length of time stated, but alleges, by way of defense, that during all the time of his service the plaintiff stole and appropriated to his own use large sums of defendant's money which came into his hands in the course of his employment, and that, as soon as defendant discovered the fact he discharged the plaintiff from his service. Upon the pleadings, therefore, the contract must be taken to have been a hiring by the month or from month to month, the wages being due and payable at the end of the month. Judgment having been ordered for plaintiff on the pleadings, it must be taken as true, as alleged in the answer, that during all of the time of plaintiff's service, viz., during each and every one of the months that he was in defendant's employment, he was constantly engaged in embezzling his employer's money. While the whole services were not performed under one entire contract, yet, as to each and every month by itself, the contract was an entire one, viz., to work an entire month for an entire price. A contract to pay a certain sum for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel. *Beach v. Mullin*, 34 N. J. L. 343. Therefore, to entitle plaintiff to recover the specified wages for any one month, he must have substantially performed the contract of service for that month. According to the settled doctrine of this court, had plaintiff, before the expiration of the month, abandoned the

N. S. 606, although the servant, after using the moneys for himself, made them up afterwards, and although his failure to pay over other moneys was caused by mere carelessness or forgetfulness. And see *Turner v. Robinson*, 6 Car. & P. 15.

It is not the discharge that bars plaintiff's recovery, but plaintiff's misconduct. This is readily and conclusively shown by the familiar principle that, although there be a discharge before the time of service has expired, yet, where the discharge was wrongful, &c., where there was no misconduct by the servant to justify the discharge, the servant can recover. *Perry v. Dickerson*, 35 N. Y. 350.

The following cases sustain the principle that where the contract is an entirety the recovery of damages for its breach is not allowed, unless it appears that the conditions precedent have been duly performed. *Ketchum v. Everton*, 13 Johns. 359; *Stephens v. Beard*, 4 Wend. 604; *Thorpe v. White*, 13 Johns. 53; *Jennings v. Camp*, 13 Johns. 94; *Lantry v. Parks*, 8 Cow. 63; *Marsh v. Ruesson*, 1 Wend. 514; *Paige v. Ott*, 5 Denio, 406; *Champlin v. Rowley*, 18 Wend. 187; *McKnight v. Dunlop*, 4 Barb. 36; *Pratt v. Gulick*, 13 Barb. 297; *White v. Hewitt*, 1 E. D. Smith, 395; *Sickels v. Pattison*, 14 Wend. 257; *Baker v. Higgins*, 21 N. Y. 397; *Cunningham v. Jones*, 20 N. Y. 436; *Bonesteel v. New York*, 22 N. Y. 182; *Smith v. Brady*, 17 N. Y. 173; *Reab v. Moor*, 19 Johns. 387; *Tompkins v. Dudley*, 25 N. Y. 272; *Kettie v. Harvey*, 21 Vt. 301; *Whitley v. Murray*, 34 Ala. 155; *Angle v. Hanna*, 22 Ill. 429; *Olmstead v. Beale*, 19 Pick. 528; *Aaron v. Moore*, 34 Mo. 79; *Miner v. Bradley*, 22 Pick. 457. See also note to *Keedy v. Long* (Md.) 5 L. R. A. 750.

service without excuse, and by his own willful fault, he could have recovered nothing for the portion of the month he worked, because he would not in such case have performed his contract. *Nelichka v. Esterly*, 29 Minn. 146; *Kohn v. Fandel*, 29 Minn. 470. The same result would have followed, and on the same ground, had the defendant during the month, for good and sufficient cause, discharged the plaintiff from his service. But it was an implied condition of the contract that plaintiff should serve the defendant faithfully and honestly. Although only implied, this was as much a part of the contract as was the express condition as to the time of service, and the breach of the one was just as much a failure to perform the contract as would have been a breach of the other, and the consequences in both cases would be the same. Indeed, if there is any case of non-performance of an entire contract which should prevent a recovery, it is where a servant has been habitually embezzling his master's money which came into his hands in the course of his employment; for, in such cases, not only is the breach the result of positive dishonesty, but it goes to the very root of the subject matter of the contract of service. To allow the dishonest servant to recover the value of his services, less what the master can show by direct and positive proof (often impossible) he had stolen, would neither subserve the ends of justice nor tend to promote common honesty. *Libhart v.*

Wood, 1 Watts & S. 265. Of course substantial, and not exact, performance, accompanied with good faith, is all the law requires in the case of any contract to entitle a party to recover on it. Although a plaintiff be not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. *Leeds v. Little*, 42 Minn. 414; *Elliot v. Caldwell*, 48 Minn. 357, 9 L. R. A. 52.

Neither is the rule which we have applied to the present case to be extended so far as to forfeit wages already earned on a contract already fully performed and at an end. For example, in this case, had the plaintiff faithfully and honestly served the defendant during all of the first seven months, his wages for which were fully earned, they would not be forfeited by a breach of the contract for the seventh month. But in the present case, according to the answer, the plaintiff, whose duties included the constant and daily receipt of defendant's moneys, failed to perform his contract for any month, having willfully and dishonestly violated it in a most substantial and essential matter. Hence he never earned his wages for any of the months he was in defendant's service.

Judgment reversed.

MISSOURI SUPREME COURT.

Bernard FATH, by Next Friend, *Respt.*,
v.
TOWER GROVE & LAFAYETTE R.,
Appt.

(....Mo....)

1. An ordinance requiring the conductor and driver of a street-car to keep a

vigilant watch for all vehicles, and persons on foot, especially children, and stop the car in the shortest time and space possible on the first appearance of danger to them, is valid, under a charter which gives power to make ordinances not inconsistent with the general law, and to license and regulate the construction and operation of street railroads.

2. Failure to observe the degree of care in running a street-car which is re-

NOTE.—Scope and effect of municipal ordinances.

A street railway company by accepting a franchise from a municipal authority obligates itself to perform all the conditions precedent required in the grant and to comply strictly with such contractual matters as were stipulated for at the time it received its charter. *Pacific R. Co. v. Leavenworth*, 1 Dill. 893; *Northern Cent. R. Co. v. Baltimore*, 21 Md. 98; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.* 20 N. J. Eq. 61, 380; *Indianapolis & C. R. Co. v. Lawrenceburg*, 34 Ind. 304; *Richmond, F. & P. R. Co. v. Richmond*, 98 U. S. 521, 24 L. ed. 734; *Detroit v. Detroit City R. Co.* 76 Mich. 521. See *Fink v. St. Louis*, 71 Mo. 52.

Although the proposition that the Legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature of the State (*Heland v. Lowell*, 8 Allen, 407; *Brick Presby. Church v. New York*, 5 Cow. 588; *St. Louis v. Boffinger*, 19 Mo. 13, 15, per Gamble, J.; *St. Louis L. R. A.*

Louis v. Manufacturers Bank, 49 Mo. 574; *Jones v. Firemen's Fund Ins. Co.* 2 Daly, 307; *McDermott v. Metropolitan Board of Police Dist. 5* Abb. Pr. 422; *Mason v. Shawneetown*, 77 Ill. 533; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *State v. Tryon*, 39 Conn. 183; *Indianapolis v. Indianapolis Gas Light & Coke Co.* 66 Ind. 396, citing text; *Bearden v. Madison*, 73 Ga. 184; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Starr v. Burlington*, 45 Iowa, 87; 1 Dillon, Mun. Corp. § 308.

The terms "by-law," "ordinances," and "municipal regulation" have substantially the same meaning, and are defined to be "the laws of the corporate district, made by the authorized body, in distinction from the general law of the State." They are local regulations for the government of the inhabitants of the particular place. *State v. Lee*, 29 Minn. 451-453 (1882) and cases, *Vanderburg, J.; Anderson*, Law Dict. 738.

The words "ordinances" and "by-laws" are synonymous. *Bills v. Goshen*, 3 L. R. A. 261, 117 Ind. 221.

Liability of street-car company for injury to pedestrians.

For injuries occasioned by negligence, street rail-

quired by a valid ordinance imposing a penalty therefor renders a street-car company, which has undertaken to obey ordinances in consideration of the right to use the public streets for its tracks, liable to a person who is injured in consequence, although such degree of care may be higher than that which would otherwise be required by law.

(June 29, 1891.)

TRANSFER from the St. Louis Court of Appeals of an action appealed to that court from the St. Louis Circuit Court, which was brought to recover damages for personal injuries alleged to have resulted from defendant's negligence, and in which a judgment had been entered in favor of plaintiff. *Reversed.*

Statement by Sherwood, J.:

Action by infant, seven years of age, through next friend, for injuries received by the former in consequence of coming in contact with one of the defendant Company's cars, which was alleged to have happened by reason of the negligence of that Company, and also because of its negligent failure to observe the requirements of subdivision 4, § 1246, art. 6, Rev. Ord. 1887, of the City of St. Louis. This was the substance of the petition.

Said subdivision 4 reads as follows: "Fourth. The conductor and driver of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible." Section 1251 of the same article provides that "any person, corporation, company, or co-partnership, or the president, superintendent, or manager thereof, violating or failing to comply with any of the foregoing provisions of this article, except as otherwise provided

for, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than \$5 nor more than \$500."

The answer of the defendant was substantially a general denial, as well as the following: "Defendant . . . charges the fact to be that the boy, Bernard Fath, sustained certain injuries at the time alleged, which injuries were caused by his own acts and conduct, in this: that while one of defendant's cars was moving along Columbus Street, in the City of St. Louis, in a usual and lawful manner, said child, without the knowledge of defendant's driver, suddenly and unexpectedly, carelessly, and negligently, ran up to and against the moving car in such manner as to cause it to fall across the track upon which said car was moving; that the driver of said car at the time observed proper care and diligence in the discharge of his duties, and was not guilty of any negligence in the premises. The defendant says that the injuries, if any, sustained by said child . . . were caused by the improper acts and negligent conduct of said child as aforesaid, and by the negligence of said child's parents in permitting said child to be upon the public streets without the care or control of an older person, and were not caused by the negligence or fault of this defendant, or any of its agents or servants." The evidence on behalf of plaintiff tended to show that the plaintiff, Bernard Fath, was a boy between four and five years old when he was injured; that on the 26th day of July, 1884, between 6 and 7 o'clock, and when it was still daylight, said Bernard was on Columbus Street, near Carroll, in the City of St. Louis; that he was either upon defendant's tracks, or approaching same, as one of defendant's cars moved northwardly along Columbus Street; that the driver of defendant's car either did or by the exercise of

way companies are liable, as others are, upon common-law principles, and no more so. *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556, 558; 2 Rorer, Railroads, 1424.

As street-cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicle drawn by horses, no more care can be required of street-railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle, viz., ordinary care. *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1, 26; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534, 558; *Unger v. Forty-Second St. R. Co.* 51 N. Y. 497; *Gilligan v. New York & H. R. Co.* 1 E. D. Smith, 458, 457.

Where a party is situated on a street, where he has a legal right to be, in passing over it, it is the legal duty of the driver of a car approaching him to make a vigilant use of his senses to discover whether the party is in a position of peril, and to control the movement of his car, so far as possible, to avoid injury to him. *Watson v. Broadway & Seventh Ave. R. Co.* 6 N. Y. S. R. 538.

One driving horses along the streets of a city is bound to anticipate that passengers on foot may be at the crossings, and to take reasonable care not to injure them; if he fails to look out for them, or when he sees, does not, so far as in his power, avoid them, he is chargeable with negligence. *Murphy v. Orr*, 96 N. Y. 14.

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The driver of a vehicle in the streets of a city is bound to be vigilant to discover anyone exposed to danger, and if he fails to look in the direction in which he is going and an accident happens in consequence, he is chargeable with negligence. The driver of a street-car is not excused from the performance of this duty by the necessity of making change for a passenger. *Hyland v. Yonkers R. Co.* 15 N. Y. S. R. 824.

If the deceased child exercised due care, and the injury was caused solely by the negligence of defendant's driver, the defendant was liable without regard to the question whether it was negligence in the parents to let the child go with so young an attendant. Nor would negligence upon the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attendant, absolve the defendant from liability. *Ihl v. Forty-Second St. & C. St. F. R. Co.* 47 N. Y. 817.

An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same, whether the action be by an infant or an adult. *Burke v. Broadway & Seventh Ave. R. Co.* 49 Barb. 539. See notes to *People v. Newton* (N. Y.) 3 L. R. A. 175; *Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 316.

proper care and diligence could have seen the boy, and that he was in danger, and could have stopped the car in time to prevent the accident, but that he negligently and carelessly ran against him, resulting in personal injury.

Plaintiff's testimony was conflicting as to the extent of the accident,—whether a wheel dragged between the brake-rod and the front wheel until the car was stopped,—but the evidence tended to show that he was knocked down, bruised, and injured; that there were no bones broken; but that he sustained substantial injuries, and suffered pains, and was laid up in bed for a period of time, and still showed some effects of the injury, in the way of stiffness, nervousness, etc. Plaintiff also offered in evidence the fourth clause afore-said.

The defendant objected to the introduction of the ordinance on various grounds; among them, that "said fourth clause of said ordinance is not a lawful rule governing diligence or negligence in this State; that the same is illegal and void, and against the law of the land; and because the city had no right or authority to enact the same." But the court overruled said objection, and said ordinance was admitted.

The evidence on the part of defendant tended to show that, owing to some local disturbance of a trifling character, a crowd of men, women, and children had gathered on the sidewalk in front of a house on the east side of Columbus Street; that the plaintiff, Bernard, was in the crowd; that, as the car came along, a policeman suddenly scared and scattered the crowd; that the children ran in various directions; that plaintiff ran obliquely in a northwestern direction without looking ahead; that he struck the car between the mule and the dash-board; that he fell, and was caught by the brake-rod and dragged along, but that the car was stopped in time to prevent the front wheel from passing over him; that the driver of defendant's car acted with great promptness and diligence in stopping the car, and that he could not have become aware of the dangerous approach of plaintiff earlier than he did. The jury found a verdict for the plaintiff in the sum of \$600, and there was judgment accordingly, and on appeal to the St. Louis Court of Appeals that judgment was reversed and the cause remanded; but one of the judges of that court deeming that decision contrary to the decision of this court in *Liddy v. St. Louis R. Co.*, 40 Mo. 506, the cause has been transferred here in conformity with section 6, art. 6, of the Constitution.

Sections 20, 23, and 25, art. 9, of the Constitution require that the charter of the city shall be in harmony with and subject to the Constitution and laws of Missouri.

Section 26, art. 8, of the City Charter also declares: "The mayor and assembly shall have power within the city by ordinance not inconsistent with the Constitution or any law of this State or of this charter, . . .

(2) to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, . . . and to regulate the use thereof; . . .

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(5) to license, tax, and regulate . . . street-railroad cars, livery and sale stables, hackney carriages, private carriages, broughes, buggies, wagons, omnibuses, carts, drays, and other vehicles, and all other business, trades, avocations, or professions whatever; (10) to impose, collect, and enforce fines, forfeitures, and penalties for the breach of any city ordinance. (11) To grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same as to their fares, hours, and frequency of trips, and repair of their tracks, and the kind of rails and vehicles."

And sections 1 and 2 of article 10 of the charter provide that "the municipal assembly shall have power, by ordinance, to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a *per capita* tax on the passengers transported, or an annual tax on the gross receipts of such railroad, or on each car; and no street railroad shall hereafter be incorporated or built in the City of St. Louis except according to the above and other conditions in this charter, and in such manner and to such extent as may be provided by ordinance." "The assembly shall have power to regulate the time and manner of running cars, and the rates of fare on street railroads now or hereafter to be built, and the sale of tickets and exchange thereof between the several companies, and to tax the property of street-railroad companies in such manner as may be provided by law."

That charter also contains this provision: "All ordinances in force at the time this charter and scheme go into operation, not inconsistent therewith, shall remain in full force until altered or repealed by the assembly." Section 1, art. 16. The ordinance in question was enacted December 27, 1859. Section 20, art. 12, of the Constitution also makes provision that "no law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained."

Messrs. Hitchcock, Madill & Finkelnburg, for appellant:

Clause 4 of section 1246 of article 6 of the Revised Ordinances of 1887 of the City of St. Louis is void in so far as it undertakes to fix a standard of diligence or liability for negligence in civil suits at common law against street railway corporations.

Kath v. Tower Grove & L. R. Co. 39 Mo. App. 447.

The ordinance in question requires defendant's servants in every case of danger to accomplish the utmost physical possibility which can be attained in stopping a car under any circumstances; a measure of diligence not required of a carrier even towards a passenger, much less in respect of a stranger.

Dougherty v. Missouri R. Co. 97 Mo. 647, 667; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 34.

The care incumbent on railroad companies after discovering the perilous condition of a person on the track is ordinary or reasonable care.

Dunkman v. Wabash, St. L. & P. R. Co. 10 West. Rep. 396, 95 Mo. 232; *Guenther v. St. Louis, I. M. & S. R. Co.* 14 West. Rep. 785, 95 Mo. 286; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595; *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461.

A city ordinance cannot change the common-law liabilities of a civil nature between private parties, nor fix a new standard of negligence as a basis for an action on the case.

Heeney v. Sprague, 11 R. L. 456; *Philadelphia & R. R. Co. v. Erwin*, 89 Pa. 71; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Flynn v. Baltimore Canton Co.* 40 Md. 312; *Kirby v. Boylston Market Assn.* 14 Gray, 249; *Jenks v. Williams*, 115 Mass. 217.

The right of a municipality to regulate the use of its streets by railways does not authorize it to change the fundamental rules of law governing the liabilities of a civil nature—neither to increase nor to diminish them. Ordinances must be in harmony with the general laws of the State.

St. Louis R. Co. v. South St. Louis R. Co. 73 Mo. 70.

Messrs. A. R. Taylor and David Goldsmith, for respondent:

Liddy v. St. Louis R. Co., 40 Mo. 506, rendered within a few years after the adoption of the ordinance, has been tacitly recognized as establishing its validity.

McCarthy v. Cass Ave. & F. G. R. Co. 10 West. Rep. 331, 92 Mo. 536; *Dunn v. Cass Ave. & F. G. R. Co.* 98 Mo. 652; *Lamb v. St. Louis, C. & W. R. Co.* 33 Mo. App. 489.

A similar question has recently been presented in *Hays v. Gainesville St. R. Co.*, 70 Tex. 602, and the same view was there taken in regard to it.

Our Constitution makes a license to street railway companies dependent solely upon the will of the town or city in which it is to be exercised.

Mo. Const. art. 12, § 20.

The granting power may attach to the grant any limitation, qualification or obligation, consistent with the duties which it owes to the people at large.

Fath v. Tower Grove & L. R. Co. 39 Mo. App. 450; *Merz v. Missouri & P. R. Co.* 4 West. Rep. 592, 88 Mo. 676; *Bergman v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 594, 88 Mo. 684.

Sherwood, J., delivered the opinion of the court:

Though the subdivision of the ordinance under discussion has been in existence for over thirty years, its legal validity has never
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been adjudicated by this court, though incidentally touched upon in several instances. *Liddy v. St. Louis R. Co.* 40 Mo. 506; *McCarthy v. Cass Ave. & F. G. R. Co.* 92 Mo. 536, 10 West. Rep. 331; *Dunn v. Cass Ave. & F. G. R. Co.* 98 Mo. 652.

In *Liddy's Case* the validity of the ordinance was not raised in any manner in the trial court, and of course any utterances in this court on the subject are not possessed of authoritative value. The same may be said of the other cases cited, which went off principally on the insufficiency of the testimony on which to base verdicts for the plaintiffs. The point in hand, the legal validity of the ordinance, is therefore *res integra*, so far as adjudications of this court are concerned.

Nor does the case of *Hays v. Gainesville St. R. Co.*, 70 Tex. 602, cited for plaintiffs, discuss or pass upon the status of such an ordinance; its validity is simply assumed. Proceeding, then, to inquire into the validity of the ordinance, it may be admitted, at the outset, that it is beyond the power of a municipal corporation by its legislative action directly to create a "civil duty enforceable at common law;" for this is an exercise of power of sovereignty, belonging alone to the State. This position is fully sustained by the authorities cited on behalf of the defendant. But if we may assume, as seems to be the case from the powers conferred on the city by the provisions of its charter, as well as by section 20 of article 12 of the Constitution, already quoted, that the defendant Company was allowed to lay its tracks upon the streets of the city upon conditions of yielding obedience to the municipal ordinances then or thereafter to be enacted, thereby entering into contractual relations with the city; if this has been done, and the ordinance quoted has been violated by the defendant Company, resulting in injury, as the petition alleges,—then these questions arise: What is the result of such violation, and what, if any, the liability of the defendant, and to whom liable, and the nature and extent of its liability in consequence of such violation? Now, if the case in hand arose upon a statute, and contractual relations had been entered into between the defendant Company and the city, whereby the former had engaged with the latter to perform a public duty in consideration of the benefits to be derived from laying its tracks and operating its road on the streets of the city, the authorities seem to be unanimous in expression that a breach of the public duty thus created, resulting in injury to any person, would render the defendant Company liable to such person for the injury thus received.

The principle here asserted is of ancient date, and is announced in the early case of *Mayor of Lyme Regis v. Henley*, 1 Bing. N. C. 222, citing earlier cases, where it is said that where a matter of public and general concern is involved, "and the king, for the benefit of the public, has made a certain grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and the individuals peculiarly injured, by action."

In *Goshen & S. Turnp. Co. v. Sears*, 7 Conn. 86, it was ruled that the turnpike company, by accepting the charter of incorporation, making the road, and receiving tolls of passengers, became bound to keep the road in repair; and, where a traveler was injured by reason of failure of the company to repair its road, he was held entitled to recover.

To the same effect, see *Wilson v. Susquehannah Turnp. R. Co.*, 21 Barb. 68, and cases cited. In *Conrad v. Trustees of Rhaca*, 16 N. Y. 158, and *Hickok v. Trustees of Plattsburgh*, reported in the same volume, 161, note, the principle under discussion is thus formulated by Selden, J.: "That whenever an individual or corporation, for a consideration received from the sovereign power, has become bound by agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform the agreement, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance." This, Judge Selden says, is the basis of *Henley's Case*, and of the series of the English cases upon which that case was decided. Sustaining the like view, see *Adair v. Brady*, 4 Hill. 630; *Robinson v. Chamberlain*, 84 N. Y. 889; *Fullon F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130.

In *Willy v. Mulledy*, 78 N. Y. 310, it was ruled that where, by the charter of the city, an absolute duty is imposed upon the owners of tenement-houses to have places of egress to the roofs, and also to have fire-escapes upon such houses, this duty is for the benefit of the tenants; and for a breach thereof causing damage, a tenant may maintain an action against his landlord; *Earl, J.*, remarking: "In Comyn's Digest, Action upon Statute (F), is laid down as the rule that 'in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'"

In the Law of Torts, it is said by the distinguished author: "If the duty imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the state or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable." Cooley, Torts, 784.

Upon these authorities, if the defendant Company had gained the franchise of the use of the streets of the city through a contract made with the State on certain conditions, either express or implied, and injury had resulted to anyone by reason of the contracting company failing to comply with such conditions, it is clear that a recovery could be had by such person, notwithstanding that a pecuniary penalty could also be inflicted by fine for the same breach of public duty. *Parker v. Barnard*, 135 Mass. 116, and cases cited.

In the case at bar, should not the same

principle dominate as to the contract in question and the duty assumed? And would not the consequences of the breach of that duty result in a like liability to a person injured by such breach, as well in this instance as in those already cited? It seems that an affirmative answer must be returned in this case as well as in any other; for here all the constituent elements of such liability exist, if the supposition with respect to the defendant Company accepting the existing and future ordinances as a condition of laying its tracks and running its cars on the streets of the city be true, to wit, the agreement, the consideration therefor, and the public duty to be performed as a consequence of such agreement; and under the terms of the Constitution, and of its charter, it is not to be doubted that the municipal authorities *pro hac vice* represent the sovereign power of the State, nor that the duty thus enjoined is none the less a public duty because the area of its performance is circumscribed within the boundaries of the municipality conferring the franchises. Sustaining this position are these authorities: *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Mason v. Shannectown*, 77 Ill. 588; *Siemens v. Eisen*, 54 Cal. 418; *Bott v. Pratt*, 38 Minn. 823, and cases cited.

And it would seem that the municipal authorities had plenary power to enact the ordinance in question, at least so far as to provide a penalty for its breach. This being provided for, and the ordinance accepted by the defendant Company as a condition and as a consideration for the granting of the franchise, the result of a breach of such ordinance, causing injury to an individual, should be that already indicated; for it must be obvious that the ordinance in issue was for the benefit of all those who have occasion to use the streets of the city.

But it is said that "a city ordinance cannot change the common-law liability of a civil nature between private parties, nor fix a new standard of negligence for an action on the case." This may be true if the ordinance is to be construed as having the direct effect of changing a rule of the common law. But it must be remembered that "consent of parties shall alter the form and course of the law." *Dormer's Case*, 5 Coke, 40. And no obstacle is seen in the way in this case why the city should not be able, as a consideration of granting the franchise, to require an enhanced degree of care on behalf of street-car companies,—a degree of care certainly better suited to the crowded streets of cities than the rule of ordinary care, which the defendant Company so strenuously invokes. Surely there is nothing in such an ordinance, or the charter which supports it, lacking harmony with the Constitution and laws of this State. It is true the ordinance may not have a greater direct effect than to authorize the imposition of the prescribed penalty on a defaulting company; but the other consequences attend as inseparable incidents of a breach of duty, resulting in injury to an individual for whose protection the ordinance was clearly designed.

The case at bar is clearly distinguishable.

from that of *Heeney v. Sprague*, 11 R. I. 456, and other similar cases; for there the principle of a liability arising from the breach of contractual relations, whether express or implied, is distinctly recognized, as well as the principle that where the duty is merely one for the benefit of the municipality, or of the public at large, and not distributively to the public as composed of individuals, there the only recovery is the statutory penalty. Under this view, the ordinance in question was clearly admissible in evidence. On the theory already approved, evidence should also be introduced in connection therewith to show the contractual relations entered into between the defendant Company and the city, and the breach of duty consequent

thereon; but at any rate the cause was improperly tried, inasmuch as the instructions given at the instance of the plaintiff and of the defendant were confusing and conflicting; the one for the former exacting the highest degree of diligence of the defendant's driver, while the instruction for the defendant only required the driver of the car to exercise diligence according to the common-law standard,—reasonable or ordinary care. For the reasons announced *the judgment of the St. Louis Court of Appeals, reversing that of the Circuit Court, should be affirmed*, and the cause remanded to the former court, to be proceeded with in conformity hereto.

All concur, except **Barclay, J.**, absent.

INDIANA SUPREME COURT.

STATE of Indiana, *ex rel.* Simeon T. YANCEY, *Appl.*,

v.
Nelson J. HYDE.

(....Ind....)

1. **The title of an Act** which states that it is to abolish one office and create another is not defective on the ground that it does not do what it purports to do, by reason of the facts that the new office is the same as the old one, except in name, and that the Act was passed for the purpose of vacating the old office, of which there was an incumbent, in order to make a place for some other person.
2. **The power of the Legislature to abolish an office** and create another with similar duties in order to provide a place for a certain person is not limited by a constitutional provision that officers may be impeached or removed in such manner as may be prescribed by law.
3. **The determination of the Legislature in abolishing an office and creating a new one** that the change of duties or burdens is sufficient to make the latter a different office cannot be reviewed by courts provided the Act is otherwise valid.
4. **The power to appoint a state supervisor of oil inspection** may be conferred upon the state geologist by the Legislature under Const., art. 15, § 1, authorizing appointments to offices not otherwise provided for in that Constitution to be made as "prescribed by law."

(June 18, 1891.)

A PPEAL by relator from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to determine defendant's right to the office of state supervisor of oil inspection. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. J. Beveredge, D. H. Chase, DeWitt C. Justice, J. W. Vesey, O. H. Bogue, A. L. Brick, J. G. Engle, Bear & Bear and Faris & Hamill for appellant.
Messrs. J. E. McCullough, L. P. Harlan and A. G. Smith for appellee.

Coffey, Ch. J., delivered the opinion of the court:

The facts in this case, as they are disclosed 18 L. R. A.

by the information, are that on the 8th day of November, 1889, the relator was appointed to the office of State Inspector of Oils for the State of Indiana by the governor, and was duly commissioned to hold his office for the period of two years from that date. He qualified on the 11th day of the same month, and entered upon the discharge of the duties of the office, and has ever since continued to discharge such duties. On the 13th day of March, 1891, the governor appointed the relator to the office of state supervisor of oil inspection for this State, and issued to him a commission to serve for the period of four years from that date, and on the 24th day of the same month, he qualified as such officer. In the month of March, 1891, whether before or after the appointment of the relator does not appear, Sylvester S. Gorby, the state geologist, appointed the appellee to the office of state supervisor of oil inspection, under the terms of an Act of the General Assembly passed in 1891. Under this appointment the appellee qualified and entered upon the discharge of the duties of said office. No commission was issued by the governor to the appellee, nor does it appear that the commission last above mentioned issued to the relator was attested by the secretary of state, or that the seal of the State was thereto attached.

This action was commenced by the appellant in the Marion Circuit Court to determine the right to the office; and to an information setting forth the above facts the court sustained a demurrer. The propriety of this ruling presents the question for our consideration.

The last session of the General Assembly passed an Act containing the following title: "An Act Creating the Office of State Supervisor of Oil Inspection, Prescribing the Duties thereof, Providing for the Appointment of such Supervisor, Abolishing the Office of Chief of the Division of Mineral Oils and State Inspector of Oils, Repealing all Laws Inconsistent therewith and Declaring an Emergency."

The Act creates the office of state supervisor of oil inspection, and provides that immediately upon the taking effect of the Act, the

state geologist shall appoint a skilled and suitable person, a resident of the State, not interested in any way in manufacturing, dealing or vending any illuminating oils manufactured from petroleum, as state supervisor of oil inspection, whose term of office shall be for the term of four years from the date of his appointment. In case of a vacancy at any time, the Act requires the state geologist to fill the same. The State supervisor of oil inspection is subject to removal at any time by the state geologist for any neglect or violation of duty enjoined by law. The Act requires the supervisor to appoint deputies, and provides that he and his deputies shall in all respects perform the duties heretofore required by law of the chief of division of mineral oils and his assistants, or state inspector of oils and his deputies; and that they shall receive therefor the same fees and compensation provided by law for the chief of the division of mineral oils and his assistants, or state inspector of oils and his deputies. The state supervisor is required to make a report to the state geologist on the second Monday of January in each year of the inspections made by him and his deputies during the preceding year. He and his deputies are required to comply with the law in force pertaining to the inspection of oils.

The second section of the Act reads as follows: "The office of state inspector of oils as created by section 2 of 'an Act providing for the inspection of all kinds of oil that shall be used for illuminating or combusive purposes, regulating the sale of such oils, providing for certain appointments and removals to be made by the governor, defining what shall constitute certain misdemeanors, prescribing penalties, repealing certain laws and containing other matters properly connected therewith,' approved April 11, 1881, as well as the office of chief of the division of mineral oils, created by section 6 of 'An Act establishing a department of geology and natural resources of the State of Indiana and providing for a director of the department; abolishing the department of geology and natural history and the office of state geologist connected therewith; abolishing the offices of mine inspector and state inspector of oils; repealing all laws or parts of laws conflicting with any of the provisions of this Act, and declaring an emergency:' passed over the governor's veto, and in force February 26, 1889, are hereby abolished; and all the duties and requirements now and heretofore devolved by law upon such officers shall be performed by the state supervisor of oil inspection."

The Act repeals all laws and parts of laws inconsistent with its provisions and contains an emergency clause.

It is contended by the appellant that this Act is unconstitutional for the reasons:

First. That the same is in conflict with the provisions of § 19, art. 4, of the Constitution, which reads as follows: "Every Act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

Second. That the General Assembly has no 18 L. R. A.

power, under the Constitution, to confer on the state geologist the right to appoint to the office in controversy.

Third. That the Act is in conflict with the provisions of § 8, art. 6, of the Constitution, which reads as follows: "All state, county, township and town officers may be impeached, or removed from office, in such manner as may be prescribed by law."

The construction to be placed upon § 19, art. 4, *supra*, we regard as settled by the ably written opinion in the carefully considered case of *Hingle v. State*, 24 Ind. 28. Expressing regrets that the cases upon the subject of the construction of this constitutional provision were in conflict, the court, after a careful review of the cases, reached the conclusion that the mischiefs intended to be prevented by this section were two, namely:

"First. The passage of any Act under a false and delusive title which did not indicate the subject matter contained in the Act; a trick by which members of the Legislature had been deceived into the support of measures in ignorance of their true character.

"Second. The combining together in one Act of two or more subjects having no relation to each other; a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit."

The same ruling was made in the case of *Farbach v. State*, 24 Ind. 77.

Had the General Assembly passed a separate Act entitled "An Act Abolishing the Office of Chief of the Division of Mineral Oils and State Inspector of Oils," containing the provisions found in the Act before us, no one would doubt that the office previously held by the appellant was abolished, and that the title was sufficiently broad to cover the Act. So, if it had passed a separate Act entitled: "An Act Creating the Office of State Supervisor of Oil Inspection, Prescribing the Duties thereof, Providing for the Appointment of such Supervisor," followed by the provisions upon that subject found in the Act before us, it could not be doubted that a new office had been created, the mode of his selection prescribed and his duties fixed, and that the title of such Act was sufficient. Indeed, we do not understand the counsel for appellant as contending that the Act in question is not covered by the title, but the contention is that the Act does not, in fact, do what it purports to do. The argument is that an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, and not in a name; and that, for this reason, the Act does not abolish one office and create another.

Many definitions of an office are set out in the able brief filed on behalf of the appellant; but we deem it unnecessary to set them out or to analyze them in this opinion; for, assuming that the essence of an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, we do not think it follows that the General Assembly, by the Act under consideration, did not abolish one

office and create another. In considering statutes it is our duty to ascertain, if possible, the intention of the legislative body; and when that intention is ascertained, it is our duty to enforce it, unless it violates some provision of the Constitution. The case of *State v. Wiltz*, 11 La. Ann. 439, is not in point here, for in that case it was expressly held by the court that the Legislature did not intend to abolish one office and create another and the decision turns upon the question of the legislative intent. Here there is no doubt as to the intention of the Legislature. As we understand the brief for the appellant, it is conceded that it was the intention to vacate the office held by the appellant with a view of making a place for some other person, and this the Legislature undertook to do by abolishing the office held by the appellant and creating one to be filled by an appointment made by the state geologist. This, we think, was the plain intention; and this, we think, the Legislature has done, unless there is some provision in our Constitution which prohibits such legislation. It is perfectly plain, we think, that there is now no office known as the chief of division of oil inspection; nor is there any office known by the name of the state inspector of oils; but it is equally as plain that there is an office known as the office of state supervisor of oil inspection.

Offices are neither grants nor contracts, nor obligations which cannot be changed or impaired. They are subject to the legislative will at all times, except so far as the Constitution may protect them from interference. *Coffin v. State*, 7 Ind. 157.

"Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened; the duties of the office increased and the compensation lessened by the legislative will." *Gilbert v. Board of Comrs.* 8 Blackf. 81; *Ellis v. State*, 4 Ind. 1; *Walker v. Dunham*, 17 Ind. 483; *Walker v. Peelle*, 18 Ind. 264; *Jeffries v. Rouse*, 63 Ind. 592.

In the case of *Walker v. Peelle*, *supra*, the term of Mr. Walker as state printer had been shortened by an Act of the Legislature. His second point in the case was that the Legislature did not possess the power to shorten his term of office, and upon this subject the court said: "Upon the second point, as to the power of the Legislature to make such enactments, we do not propose to spend much time. We suppose, as the office was created by that body, that it is, in this particular, under its control."

The power of the Legislature to shorten the term of a statutory office, so as to affect an incumbent, once conceded, it is not difficult to see that there is no limit to such power. If it may shorten the term of a three years' office to two years, it may fix the term at one year or at one hour. In other words, the length of time a particular person shall hold is absolutely within the discretion of the Legislature.

It is not claimed that there is any constitutional provision restraining the Legislature

in this matter, except § 8, art. 6, above set out. In our opinion, it is not the purpose of this section to control legislative action upon the subject we are now considering. It was no doubt foreseen by the constitutional convention that some officer of the kind named might prove unfaithful to his trust, and the purpose of this provision was, we think, to enable the Legislature to pass such laws as would authorize his removal, by legal process, whether such office was created by statute or by the Constitution then under consideration. The effect of the Act we are now considering was to put an end to the appellant's term of office and to provide a new mode of selecting someone to discharge, at least some, if not all, of the duties theretofore discharged by the appellant; and that, too, whether the office of state supervisor of oil inspection is to be regarded as a new office or an old office under a new name. The intention to produce this result is plain, both from the title of the Act and from its provisions. In order to end the appellant's term of office, we do not think it was necessary to abolish the office held by him. As it is a statutory office, it was within the power of the Legislature to end the term of the incumbent at any time, and make provision for the selection of a successor.

But we think the appellant is in error in his position that the office of supervisor of oil inspection is an old office under a new name. We think it is in fact what it purports to be, a new office. It is true that the general duties to be performed by the incumbent of this office are the same as those performed by the appellant, but it cannot be said that no new duty is imposed. The imposition of public duties, to be compensated by emoluments received by the person performing such duties, generally constitutes a public office; but it is not true that a public office may not exist without the imposition of duties or the receipt of emoluments, as plainly appears by reading the Constitution, the provisions of which we are now considering. No duties are prescribed or emoluments fixed as to many of the offices made in the Constitution; but it cannot be said that, for this reason, the constitutional convention failed to create the office, or that the Legislature could, by a repeal of the Statutes since passed, fixing the duties and emoluments, abolish the offices created by the Constitution, to which no duties are attached or emoluments fixed by that instrument.

The term of office in this case is changed from two to four years; the mode of selection is changed and the incumbent is subject to removal at the will of the state geologist. As to the number of new duties to be performed or new burdens imposed which would be necessary to make a new office, we do not deem it necessary to inquire, as the Legislature has determined that those imposed in this case are sufficient for that purpose. With that determination we have no right or power to interfere, provided the Act is otherwise valid.

And this brings us to a consideration of the question as to whether the General Assembly may confer upon the state geologist

the power to fill the office in question by appointment. It is earnestly contended by the appellant that the General Assembly possesses no such power, and in support of his contention he relies principally upon the case of *State v. Hyde*, 121 Ind. 20. That was an action commenced by the State, *ex rel.* Yancey, against Hyde to determine the right to the office of chief of the division of mineral oils. Each of the parties claimed the office under an appointment made by the director of the department of geology and natural resources of the State of Indiana. Mr. Collett, from whom Yancey received his appointment, had been appointed and commissioned by the governor, while Mr. Gorby, from whom Hyde received his appointment, had been elected by the General Assembly. The question at issue was as to which, if either, of the two claimants was entitled to the office. This incidentally involved the question of the power of the General Assembly to create and fill, by its own election, the office of director of the department of geology and natural resources; and the question of the power of that officer to appoint the chief of the division of mineral oils. It was held, first, that the General Assembly did not possess the power, under our Constitution, to create and fill, by its own election, the office of director of the department of geology and natural resources, and second, that such officer had no power to fill, by appointment, the office of chief of the division of mineral oils.

Whatever difference of opinion existed among the members of the court, as then constituted, as to the power of the General Assembly to create and fill an office in nowise connected with its legislative duties, there was no division of opinion as to the unconstitutionality of so much of the law then under consideration as attempted to confer on the director of the department of geology and natural resources the power to appoint the chief of the division of mineral oils. The reasons for holding this provision unconstitutional were fully set forth in the dissenting opinion filed at the time by Elliott, *Ch. J.*

The conclusion reached that there was no valid Act of the Legislature attempting to confer on the director of the department of geology and natural resources the power to appoint the chief of division of mineral oils, it must be plain to everyone that the question as to whether the Legislature could or could not confer such power was not involved in the case. The conclusion that the power to fill the office then in controversy resided in the governor was correct, whether § 5152, Rev. Stat. 1881, was to be regarded as in force, or whether it was to be regarded as having been repealed by subsequent legislation; for, if in force, it expressly conferred such power on the governor; and if repealed, there was an absence of statutory provisions upon the subject, and it became the duty of the governor to fill the office under his constitutional duty to see that the laws were faithfully executed. The laws upon the subject of inspecting oils could not be executed without an officer to execute them; and

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if the office was vacant, it was the duty of the governor, in the absence of some other mode prescribed by law, to fill it by appointment. As to whether the argument of the learned judge who wrote the opinion in the case of *State v. Hyde* is sound or otherwise, we do not stop to inquire, for the reason that the conclusion reached, holding that the power to appoint to the office then in controversy belonged to the governor, was so clearly right that the process of reasoning by which the conclusion was reached is wholly immaterial. The argument of the judge who writes an opinion is never to be confounded with the principle of law decided by the court.

In the later case of *State v. Gorby*, 122 Ind. 17, Mr. Gorby claimed the office of director of the department of geology and natural resources by virtue of an election by the General Assembly, while Mr. Collett claimed the same office under an appointment made by the governor of the State. The case involved the question as to whether the General Assembly of the State had the power, under our Constitution, to create an office in nowise connected with its legislative duties, and reserve to itself the right to fill such office by its own election. It was sought by Mr. Gorby to sustain the action of the General Assembly under the provisions of § 1, art. 15, of our State Constitution, which reads as follows: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." It was held that this provision conferred upon the General Assembly the power to provide the manner in which certain state officers might be chosen, but that there was a broad distinction between providing the manner in which an officer might be chosen and in making the choice. In reaching this conclusion, the court relied, in some degree, upon the case of *State v. Kennon*, 7 Ohio St. 546, in which it is said that the distinction between the power to direct the manner, the mode of doing an act and doing the act itself, is almost too clear to admit of demonstration. Assuming that the office then in question was an administrative state office, the incumbent of which was charged with the duty of administering a department of the state government, it was further held that such incumbent, under our Constitution, should be elected by the people, and that it was the duty of the governor of the State to fill such office by appointment until an election could be held. Having reached this conclusion, it was, perhaps, unnecessary to a decision of the cause that anything more should have been said; but it was thought necessary to a proper understanding of the opinion delivered that some of the officers contemplated by that section of the Constitution should be named. In that case it was said by the court, in relation to offices of the nature of the one now under consideration: "In the creation of these and kindred offices, it is within the power of the General Assembly to provide by law that such offices may be filled either by election or by appointment, and when to be filled by appointment it need not provide that such ap-

pointment shall be made by the governor. Such appointments, if the law so provides, could doubtless be made by the governor of the State, or by anyone or more of the administrative state officers." What was said of officers other than the one involved in the case, being beyond the actual controversy between the parties to the suit, was, of course, of no binding force; but it is of value, as it tends to index the mind of the court, in a matter illustrative of the actual adjudication. In this case, however, we are met squarely with the question as to whether the General Assembly possesses the power to confer on the state geologist the legal right to appoint to the office involved in this suit. If it possesses such power, the judgment of the circuit court must be affirmed; otherwise, it must be reversed.

The solution of the question presented for decision depends upon the nature of the office, and the construction to be placed upon this provision of our State Constitution.

The office is not an administrative state office, whose incumbent is charged with the administration of a separate department of the state government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment, and as the appointment of the incumbent is not provided for in the Constitution, the case falls clearly within the provisions of § 1, art. 15. That section applies to such officers only as may be appointed, and for whose appointment no provision is made in the Constitution. As the incumbent to the office in question may be appointed, and as no provision is made in the Constitution for his appointment, the General Assembly has the power to provide, by law, for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is generally the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive; for, by the terms of § 1, art. 8, of the Constitution, the executive department of the State includes the administrative. Of course, it was not the intention that any administrative state officer should perform any duty properly and necessarily belonging to the governor of the State; but it was, we think, the intention that such officers should have the power to perform such duties as should be required of them by law, in the administration of the state government, where such requirement in nowise conflicted with

the powers delegated to the governor alone.

The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer; but the state geologist is an administrative state officer elected by the people. The appointment to the office in controversy here by the state geologist is certainly a manner or mode of selecting an officer for whose appointment no provision is made by our Constitution. Nor does such mode of selection in any manner infringe upon the prerogatives of the governor of the State. There are many appointments conferred by the Constitution upon the governor which can in no manner be affected by legislation. The rule upon that subject is stated by Judge Cooley in his valuable work on Constitutional Limitations as follows: "The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of many duties which they may provide for by law they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially designated for the duty. What can be definitely said on this subject is this: that such powers as are specially conferred by the Constitution upon the governor, or upon any other specified officer, the Legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the Constitution requires of him he cannot be excused by law. But other powers or duties the executive cannot exercise or assume except by legislative authority; and the power which in its discretion it confers, it may also, in its discretion, withhold, or confide to other hands." Cooley, Const. Lim. 6th ed. 133.

The office involved in this controversy does not belong to the class which must of necessity be filled by the governor; but it is an office created by statute, largely under the control of the Legislature which created it, and falls within the constitutional provision which confers upon the General Assembly the power to prescribe the mode or manner of selecting its incumbent.

In our opinion, the Statute now under consideration is not subject to the constitutional objections urged against it, and for that reason, the circuit court did not err in sustaining the demurrer to the information in this cause.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Henry C. PENNY, Admr., etc., of Philinda Hurlbut, Deceased,

v.

Jerome CROUL, *Appt.*

(....Mich....)

1. "The opposite party" whose testimony is excluded by Pub. Acts 1885, pp. 153, 18 J. R. A.

157, as to matters equally within the knowledge of a deceased person, in a suit by the heirs, assigns, devisees, legatees or personal representatives of the latter, means the opposite party in interest, and does not include an executor who has no personal interest in the controversy, which is simply one between the estates of two deceased persons.

2. One interested in the result of a suit

which is in effect between the estates of two deceased persons although brought against an executor individually, because of a right to share in the estate of one of the deceased persons, is excluded by Pub. Acts 1885, pp. 156, 157, as an "opposite party," from testifying to facts equally within the knowledge of the other deceased person, although the witness is not a party on the record.

- 3. A person sued individually for bonds** received from another may show that he received them from the latter as the property of her husband's estate, of which he was executor, as against a claim by her administrator that they belonged to her by gift from the testator.

(*Champlin, Ch. J., and McGrath, J., dissent from propositions 1 and 2.*)

(July 28, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Wayne County in favor of plaintiff in an action brought to recover the value of certain bonds alleged to have been delivered by plaintiff's intestate during her lifetime to defendant for safe keeping and by him retained. *Reversed.*

The facts are fully stated in the opinions.

Mr. F. A. Baker, with *Messrs. Cutcheon, Stellwagen & Fleming*, for appellant :

In applying statutes like the one under consideration in this case, courts should and do regard not the nominal parties but the real parties, whose interests are involved in the issue.

See *Howard v. Patrick*, 38 Mich. 795; *Duryea v. Granger's Estate*, 10 West. Rep. 568, 66 Mich. 593; *Bichelder v. Brown*, 47 Mich. 386; *Youngs v. Cunningham*, 57 Mich. 154, 155; *Mundy v. Foster*, 81 Mich. 321; *Downey v. Andrews*, 48 Mich. 72; *Wood v. Lenawee Circuit Judge*, 84 Mich. 521.

An executor against whom, personally, an action is brought for property which he has accounted for as executor, can raise the same questions by way of defense that could have been raised by or for the estate had the suit been brought against him as executor.

Patterson v. Dushane, 6 Cent. Rep. 927, 115 Pa. 384; *Gray v. Whitney*, 81* Pa. 382; *Swank v. Phillips*, 4 Cent. Rep. 461, 118 Pa. 482; *Sturkey v. Bellah*, 41 Ala. 700.

In a suit against an administrator, a person, although not a party to the suit, but interested in the result of the case, is not competent to prove statements made by the administrator's intestate, which tend to diminish the rights of the decedent.

Drew v. Simmons, 58 Ala. 463; *Key v. Jones*, 52 Ala. 283, 247; *Louis v. Easton*, 50 Ala. 470; *McCrary v. Rash*, 60 Ala. 874; *Meier v. Thiemann*, 7 West. Rep. 141, 90 Mo. 434; *Seeding v. Bonner & Z. I. Co.* 35 Mo. App. 849.

A party made defendant in form but who is plaintiff in interest, will be considered as plaintiff, and held incompetent if called by plaintiff.

Redman v. Redman, 70 N. C. 257; *Weinstein v. Patrick*, 75 N. C. 344.

The *cestui que trust* is not a competent witness under a statute somewhat like ours, although not a party to the suit.

Gabbett v. Sparks, 60 Ga. 582. See also *Wright v. Jackson*, 59 Wis. 569, 577; *Hall v.* 13 L. R. A.

Hamblett, 51 Vt. 589; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593.

While this suit is in form against Jerome Croul, it is in effect against the estate of Chauncey Hurlbut, deceased. Defendant is the mere agent of the estate and not a party to the suit, unless an heir or legatee. The case might well be entitled *The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased.*

Duryea v. Granger's Estate, 10 West. Rep. 568, 66 Mich. 599.

If the real defendant and the opposite party within the meaning of the Statute is the estate of Chauncey Hurlbut, deceased, then the executor, not being an heir or legatee, is a competent witness as to such matters.

Ibid.

Plaintiff could at his own election bring the suit against the executor personally, or in his representative capacity.

Simpson v. Snyder, 54 Iowa, 557; *Scott v. Key*, 9 La. Ann. 213; *De Valengin v. Duffy*, 39 U. S. 14 Pet. 282, 10 L. ed. 457; *Steele v. McDowell*, 9 Smedes & M. 198; *Conger v. Atwood*, 28 Ohio St. 134; *Knor v. Bigelow*, 15 Wis. 415; *Clapp v. Walters*, 2 Tex. 180, 7 Am. & Eng. Encyclop. Law, 345, note 3.

Mr. William H. Wells for appellee.

Morse, J., delivered the opinion of the court:

I am satisfied that the defendant, Jerome Croul, was a competent witness in this case. It was admitted upon the argument by plaintiff's counsel, as it conclusively appears from the record, that the defendant had not converted the bonds in question in this suit to his own individual use; that he took possession of them for the estate of Chauncey Hurlbut, deceased, and has always held them for said estate. It appears that on his first step as executor of Chauncey Hurlbut's estate he inventoried these bonds as the property of such estate, and has ever since accounted to the Probate Court of Wayne County for them and the interest accruing upon them. There is no disguising the issue in this suit. It is really a contest between the estates of Philinda and Chauncey Hurlbut for the ownership of these bonds. With such contest Jerome Croul has no concern, save as executor of the latter estate; and he has and claims to have no personal interest in the subject matter of the suit. This is admitted by the counsel for plaintiff, and yet it is gravely asserted as a matter of law that the plaintiff has a right, by planting his action against Croul individually, not only to apparently change the whole outward face of the contest, but to so shape the conduct and issue upon the trial as to shut out the testimony of Croul as an "opposite party," and, as a consequence thereof, to recover a large sum of money from him personally out of a transaction in which it is admitted he acted as executor, and not for himself, and which he is not allowed to explain, though fraud is charged against him as such executor. There is no excuse for this course, because by the action of Croul the bonds or their proceeds have not been lost to plaintiff's intestate or her heirs. The estate of Chauncey Hurlbut is amply sufficient to pay the judgment in this case twice over.

When we come to examine the question whether or not Mrs. Williams was a competent witness for the plaintiff, it will be plainly apparent why this suit was planted against Jerome Croul individually, and not against him as executor. By making him individually the party defendant the plaintiff has succeeded, under the interpretation of the Statute, to which I shall soon refer, by the court below, in proving his case by the principal heir of Mrs. Hurlbut, and closed the mouth of Croul against denial of her story. If this is a correct construction of the Statute, then it is capable of being made the instrument of the most outrageous injustice, when its enactment was intended to prevent fraud and injustice; and it opens a way by which the estates of deceased persons may be more easily robbed than if no such statute existed; and that, too, by the testimony of those whom the Statute intended to debar from giving evidence in their own behalf of facts equally within the knowledge of the deceased. The Statute, as it now exists, having been frequently amended since its first enactment, reads as follows: "When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person: . . . provided, that whenever the words 'the opposite party' occur in this section it shall be deemed to include the assignors or assignees of the claim, or any part thereof, in controversy." Pub. Acts 1885, pp. 156, 157. It is evident that this Statute is intended to reach the real party in interest, and not a mere nominal party, who is not interested in the result of the allowance or disallowance of the claim against the estate of a deceased person, except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. The proviso was attached in 1885, no doubt, for the express purpose of preventing the practice which prevailed under the Statute before such amendment of assigning the claim against the estate of a deceased person, and then the assignor being sworn as a witness to prove it. The proviso not only cuts off this method of evading it, but also goes further, and also prohibits the assignee from testifying who, in the absence of a fraudulent intent to evade the law in taking the assignment, would be the person to be benefited by the allowance of the claim. It will thus be seen that the Legislature intended not only that the party owning the claims should not be permitted to testify to the matters equally within the knowledge of the deceased person, but also to prevent any evasion of the Statute. It was in this view of the Statute that we held in *Duryea v. Granger's Estate*, 66 Mich. 593, 10 West. Rep. 568, that an administratrix, if not interested in the estate as heir or otherwise, was not the "opposite party" mentioned in the statute, and against whom its prohibition runs,—citing the fact that in *Howard v. Patrick*, 38 Mich. 795, the administratrix was held within the Statute, for the reason that she was also an heir to the estate of her intestate. It was said in *Duryea v.*

Granger's Estate that the suit might well have been entitled "*The Estate of Joseph Granger, Deceased, v. The Estate of Edward Granger, Deceased.*" And in this case now under consideration it might well be entitled "*The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased.*" as the real controversy is without doubt between these two estates. And while it is necessary that these two estates should be represented by the respective executors as nominal parties, that persons may be before the court, the real contest is none the less between the estates of the deceased persons, in which the executors have no personal interest, and are affected only as they represent the estate. Notice also the language of the Statute, "the opposite party, if examined as a witness on his own behalf," clearly indicating that he is not to be permitted to testify "in his own behalf"—in other words, in his own interest—as against one whose lips are closed by death. In the suit which we are considering, the claim against the defendant was established by the testimony of Mary Ann Williams, who was a niece and heir of Philinda Hurlbut, and Margaret Williams, a daughter of Mary Ann Williams. It appeared clearly from their evidence, before the plaintiff closed his case, that Croul took possession of the bonds and held them as the executor of Chauncey Hurlbut's estate. Margaret Williams testified that Mrs. Hurlbut called for her bonds, and wanted Croul to bring them back to her. That Croul put her off for a while, and then said: "Those bonds were never calculated for you. They belong to Chauncey Hurlbut's estate;" and that she could not prove that they belonged to her. It was not claimed by any of plaintiff's witnesses that Croul was trying to get any personal benefit from these bonds; and it was apparent when the plaintiff rested, that Croul was not the real defendant, but only nominally so, because he had been sued in his individual name; that the real defendant was the estate of Chauncey Hurlbut. The defense then showed the proceedings in the probate court,—the filing of the inventory by Croul, in which these bonds were placed as the property of Chauncey Hurlbut's estate; and Jerome Croul's accounts as executor, in which he accounted to said estate for the interest upon the bonds. It was also shown that there had been no distribution of the assets of the estate, and that Philinda Hurlbut, in her lifetime, and October 1, 1885, gave him the following receipt for the interest upon the bonds, by such receipt recognizing that he held them as executor of her husband's estate: "Received, Detroit, October 1, 1885, from Jerome Croul, 40 coupons of \$10 each, \$400, cut from four per cent U. S. bonds belonging to the estate of Chauncey Hurlbut, deceased. Philinda Hurlbut." But when Mr. Croul attempted to state the conversation with Mrs. Hurlbut by which he became possessed of the bonds, or any material circumstance connected with his possession or holding the same, equally within the knowledge of Mrs. Hurlbut, he was prevented from testifying, under the ruling of the court that he was the "opposite party" mentioned in and intended by the Statute, and therefore incompetent to give evidence of any fact equally

within the knowledge of plaintiff's intestate. The ruling of the court was erroneous.

Another important question arises in the case: Was Mary Ann Williams a competent witness on behalf of the plaintiff to any facts equally within the knowledge of Chauncey Hurlbut, deceased? She is an heir of Philinda Hurlbut, and, as such, interested in the result of the suit. The nominal plaintiff is the administrator of Mrs. Hurlbut's estate, but Mrs. Williams is one of the real parties to the litigation. I think she comes clearly within the intent of the Statute. This suit, as heretofore shown, is really a controversy between two estates. Neither Penny, the administrator of Mrs. Hurlbut, nor Jerome Croul, who is defending as the executor of Chauncey Hurlbut, can be said to be an "opposite party." The real parties are the opposite parties, and Mrs. Williams is one of them. The case of *Wright v. Wilson*, 17 Mich. 192, referred to in the brief of plaintiff's counsel, does not touch this case; and *Pendill v. Newberger*, 64 Mich. 220, 12 West. Rep. 47, also cited to sustain the competency of Mrs. Williams as a witness, is not applicable. In the last case, a son and heir-at-law of a deceased party was held not disqualified to testify to a conversation between his deceased father and the defendant. The defendant was living. Had he been dead, and the suit being defended by his executor or administrator, the case would be in point. As it is, it has no relevancy to the issue here. I do not deem it necessary to cite adjudications from other States. This is a question depending upon our own Statutes, and I think has been settled by our own court. In *Howard v. Patrick*, 38 Mich. 795, and *Duryea v. Granger's Estate*, 66 Mich. 593, 10 West. Rep. 568, the reasoning of the opinions would preclude Mrs. Williams from testifying to facts equally within the knowledge of Chauncey Hurlbut, upon the ground that she is an "opposite party" as against his estate. In the first case the testimony of Mrs. Howard was rejected. She was an heir of the estate, as well as administratrix. The question was mooted whether Mrs. Evans, a sister of Mrs. Howard, and equally with her an heir-at-law of her father, was a competent witness under the Statute. It was passed, however, without decision, because it was shown that Mrs. Evans had assigned her interest in the claim, and had no interest in the result of the suit. This was before the amendment precluding an assignor from giving evidence. In *Bachelor v. Brown*, 47 Mich. 366, the real party, who was defending the suit, brought by an executor upon a promissory note, was held to be the real party in interest, and therefore the "opposite party" of the Statute, within its meaning and intent, although he did not appear upon the record as a party to the suit.

In keeping with this principle, that the court should look at the real and not the nominal parties in a cause, is the case of *Wood v. Lena-wee Circuit Judge*, 84 Mich. 521, where the question to be considered was an amendment changing the names of parties to a suit. It was there held that the heirs were the real parties to be benefited by the litigation, and that therefore the substitution of the names of

such heirs for the name of the administrator was admissible. It was also held in *Youngs v. Cunningham*, 57 Mich. 153, *Mr. Justice Champ-lin* writing the opinion, which was concurred in by all the members of the court, that B. F. Cunningham, although not a party to the record, was not a competent witness to testify to facts equally within the knowledge of George Cunningham, deceased, whose wife and children were defending in ejectment, because B. F. Cunningham had executed to the plaintiff, Youngs, a warranty deed of the land in question. The court said: "He was under covenant to sustain the title, and the suit was in effect his suit to try the title to the land. If not within the express letter, he comes within the meaning of the Statute, and is precluded thereby from testifying to facts equally within the knowledge of the deceased." In *Mundy v. Foster*, 31 Mich. 321, in a suit in chancery by a husband to have a trust deed of his deceased wife declared void, and in which the trustees named in such deed were the party defendants, in speaking of the husband's evidence the court said: "When he assumed to testify to the verbal agreement [with his wife], his possession, if not literally within the terms of the Statute against admitting a surviving party to a transaction to testify in certain cases (Comp. Laws 1871, § 5968), was clearly within its policy; and in my judgment he was not a proper witness to prove the making of the contract." It will be noticed that the Statute since then has been broadened and made more far-reaching by amendments, all of which amendments have been on the road to reach the real parties in interest, and to preclude them from testifying to facts equally within the knowledge of the dead person, whose estate is sought to be depleted by such testimony in the interest of the party offering it. The court erred in permitting Mary Ann Williams, an heir-at-law of Mrs. Hurlbut, to give evidence of conversations between Chauncey Hurlbut and his wife, and between said Hurlbut and the witness.

It is argued that the plaintiff had a right to plant this suit against Jerome Croul individually; that the action is one of bailment, and that it is doubtful if Croul could dispute the title of his bailor; but in any event the estate of Chauncey Hurlbut could not be bound by the result of this suit. The right to plant this suit against Jerome Croul individually may be conceded, but the right to maintain it depends upon the facts and circumstances proven in the case. In our opinion, it must be conceded that Jerome Croul had the right to show that he received these bonds of Philinda Hurlbut, of her own free will and consent, and on the understanding that he received them by virtue of his being appointed one of the executors under the will of Chauncey Hurlbut, and as the property of said estate; and that he has the right to come in and defend as such executor, and to maintain and prove by competent testimony that the bonds never belonged to Philinda Hurlbut or her estate, but have ever been, and now are, the property of Chauncey Hurlbut and belong to his estate,—and the estate will be bound in such case by the result of the litigation. In *Hillman v. Schwenk*, 68 Mich. 297, 12 West. Rep. 661, and *Hillman v. Schwenk*, 68 Mich. 301, a similar case, the

executor of an estate was permitted to indemnify the defendant and assume the defense of a suit brought upon a promissory note; and it was held by so doing the estate would be bound by the result; and, further, that in such case the plaintiff would be precluded from testifying to facts equally within the knowledge of the deceased, although the maker of the note was the person sued and the defendant of record. The issue in those cases was similar to the issue in this. The plaintiff claimed to have obtained the note from the testator by purchase before his death. The executor defended upon the ground that there was no such purchase. Here the claim to the bonds is that they were a gift. The executor's defense is that there was no gift. In the *Hillman v. Schwenk* Cases the defendants had no interest in the record except to pay the note to whom it might be found to belong; and in this case Jerome Croul individually has and claims no interest in these bonds. His only concern is to account to the owner of them. The defense that he is making is the defense of Jerome Croul as executor, which it would have been his duty to have made had the bonds been in the hands of a third person and such third person had been made a defendant in this suit instead of Croul. He could have stepped in, had the third person been sued, and defended as the executor of Chauncey Hurlbut, under the authority of *Hillman v. Schwenk*, and under every principle of law and justice; and we know of no reason why he cannot equally and as well defend as executor in case the suit is planted against him individually, instead of being brought against another, when the issue is the same, to wit: Do the bonds belong to the estate of Philinda Hurlbut, or to the estate of Chauncey Hurlbut?

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendant.

Long and Grant, JJ., concur with **Morse, J.**

Champlin, Ch. J., dissenting:

The plaintiff is the administrator of the estate of Philinda Hurlbut, deceased, and as such brought this suit in assumpsit against the defendant to recover the value of forty United States government bonds, which plaintiff claims the deceased in her lifetime placed in defendant's hands for safe-keeping, to be redelivered to her on demand; and that she demanded them and he refused to deliver them to her, but claimed that they were the property of the estate of Chauncey Hurlbut, deceased, of which he was executor. Chauncey Hurlbut, at and prior to July 4, 1885, was the owner of the bonds in question. He had in 1879 made a will, which was, after his decease, admitted to probate, in which he gave his wife his horses, carriages, household furniture, and \$10,000 absolutely, and the income of the estate for her life. After her death a few small bequests were to be paid, and the residue of the estate went to trustees for the perpetual benefit of the Detroit Water-Works. *Penny v. Croul*, 76 Mich. 471, 5 L. R. A. 858.

Chauncey Hurlbut died September 9, 1885, 13 L. R. A.

and his will was admitted to probate October 18, 1885. He left Philinda Hurlbut, his wife, surviving him, and no child. Jerome Croul and Philinda Hurlbut were appointed executors, and they qualified; but Philinda Hurlbut never took any part in the execution of the trusts of the will, or in the administration of the estate. She died October 4, 1886, intestate, and the plaintiff in this suit was appointed administrator of her estate. Mrs. Hurlbut had no children. Her father and mother died before she did. Mary Ann Williams is her sister, and Margaret Williams is a daughter of Mary Ann. It is claimed on the part of the plaintiff that Chauncey Hurlbut, on the 4th day of July, 1885, gave to his wife, Philinda, forty United States government bonds of the denomination of \$1,000 each, and accompanied the gift by immediate personal delivery, in the presence of Mary A. Williams and Margaret Williams; and upon the trial of this cause the plaintiff introduced testimony to establish such gift *inter vivos*. One of the witnesses produced to establish the facts upon which the plaintiff relies for a recovery is Mrs. Mary Ann Williams; and her competency to testify in the cause under the Statute presently mentioned is challenged by defendant. The plaintiff also claims that after Mr. Hurlbut's death the defendant, Croul, was at the house of the widow, and was informed by her of the gift to her of the aforesaid bonds, and that defendant, Croul, represented that it was very dangerous to keep such bonds in the house,—that there was danger of their being murdered,—and offered to take care of the bonds by placing them in a safe, and promised, if Mrs. Hurlbut would do so, that she might cut off the coupons, and that he would deliver them to her whenever she demanded them; and thereupon she delivered them to him for safe-keeping. The exact date at which this occurred is not given by the plaintiff's witnesses. Margaret Williams testified that it was after the probate of the will. Mrs. Williams also thinks it was after the will was proved, but is not certain that it was not before. Mr. Jerome Croul testified that he received the bonds in suit on the 14th day of September, 1885, as the property of Chauncey Hurlbut, and that he had always held them as the property of Chauncey Hurlbut; that they were received by him from Mrs. Hurlbut, in the presence of John Lund. The witness Alexander McArthur testified in behalf of the plaintiff that he had a conversation with the defendant about four months after the funeral of Chauncey Hurlbut, in which Croul said that 'he had got forty thousand dollars in bonds of the old lady; and I asked him how he done that, and he said, 'I got them for safe-keeping,' and that 'she never would smell of them again.' Mr. Croul was sworn in his own behalf, and testified that Mr. Lund was present when he received the bonds from Mrs. Hurlbut; but Lund was not called to dispute or contradict the testimony given by plaintiff's witnesses as to what transpired on that occasion. The fact that October 1, 1885, Mrs. Hurlbut signed a receipt for \$400 for the coupons in which Croul had inserted the statement, 'Cut from four per cent U. S. bonds belonging to the estate of Chauncey Hurlbut, deceased,' was not conclusive that those bonds

belonged to the estate of Chauncey Hurlbut. If the bonds were Mrs. Hurlbut's individual property, she was entitled to the interest; and likewise was she entitled if they belonged to the estate, as the will gave her the whole income during her lifetime. The defendant was permitted to introduce any evidence which he had to show that the bonds belonged to the estate of Chauncey Hurlbut at the time of his death, and this receipt was competent testimony to be considered as tending to show that the bonds belonged in fact to the Hurlbut estate. Defendant, Croul, offered to testify fully to the interview with Mrs. Hurlbut when he received the bonds from her, but it was excluded under the Statute. It is error to suppose that, if Penny, as the administrator of the estate of Mrs. Hurlbut, had brought this action against Croul as executor of the last will of Chauncey Hurlbut, deceased, he would have been a competent witness to testify to facts which, if true, were equally within the knowledge of the deceased, Mrs. Hurlbut. The Statute is not based upon the interest or disinterestedness of a party who seeks to testify as a witness, but upon the injustice and impropriety of permitting a party to an action with a representative of a deceased party testifying at all to matters within the knowledge of the deceased, whose executor or administrator has brought or is defending the suit. The mere fact that he is sued as executor would not permit him in a court of law to open his mouth to testify to facts which the other party could not testify to, because his mouth is sealed by death. The law never intended such an absurdity. If it had intended to make an exception in favor of the opposite party, who should chance to be appointed executor or administrator, it would have so declared. There is no more reason for repealing the plain provisions of the Statute by judicial fiat in favor of executors and administrators than there is in favor of any other disinterested parties; and the law makes no exception in favor of disinterested parties. While the Statute has been construed as embracing within its spirit the real as well as nominal parties to a suit, no well-considered case has made an exception of the parties to the record. This will be apparent from a review of our decisions upon that section of the Statute.

In the case of *Downey v. Andrus*, 48 Mich. 65, all the cases to that time were reviewed. In *Eccard v. Brush*, 48 Mich. 3, a suit against executors and trustees, held, that complainant could not testify to matters equally within the knowledge of the deceased. In *Rayburn v. Mason Lumber Co.*, 57 Mich. 273, held, that the opposite party cannot be permitted to testify to matters equally within the knowledge of a deceased officer of the company sued, nor of a deceased partner in a suit against a partnership. In *Foster v. Hill*, 55 Mich. 540, the bill was filed by the widow and some of the heirs of a deceased person against another heir to set aside a deed executed by the deceased in his lifetime on the ground that it had been obtained by fraud and forgery. Held, that the parties were excluded from testifying as to matters equally within the knowledge of the deceased. In *Schratz v. Schratz*, 35 Mich. 485, it was held that the Statute applies where the

knowledge which the deceased had was proved through letters passing between the parties; and it was held, further, that counsel had a right to cross-examine, to ascertain fully with reference to such matters testified to, which were equally within the knowledge of the deceased party, and might then move to strike out the whole of such testimony because incompetent under the Statute. The testimony elicited on cross-examination is the testimony given in behalf of the party calling the witness. In *Brown v. Bell*, 58 Mich. 58, it was held that this Statute did not apply to proceedings to probate a will on the ground that until the will was probated there was no representative of the deceased, and no one who could be called an opposite party to such representative. The same was held in *Schofield v. Walker*, 58 Mich. 96. In *McClintock's App.*, 58 Mich. 155, it was held that proceedings upon distribution of the estates of deceased persons did not come within the section of the Statute, and that all the heirs might be compelled to testify; that it was in effect a suit between the distributees, who each represented his own interest. In *McMillan v. Bissell*, 63 Mich. 66, 5 West. Rep. 706, the bill was filed by the executors of the last will of Hugh Moffat, deceased, against the daughter and son-in-law of the deceased. The daughter was the residuary legatee of one share he had left, and the son-in-law was also a legatee, so far as the share should be applied to an indebtedness due from him to the estate. Held, that they could not testify to any fact equally within the knowledge of the deceased while living. In *Stackable v. Stackable's Estate*, 65 Mich. 515, 8 West. Rep. 812, it was held that a married woman, who had a husband living, who had boarded the deceased, was not entitled to the money due for board, and could not present it as a claim against the estate without an assignment from her husband; and that she was an assignee within this Statute, which precludes assignees from testifying to facts within the knowledge of the deceased party. In *Ruffum v. Porter*, 70 Mich. 623, 14 West. Rep. 896, the bill was brought against a purchaser from the heirs of a deceased person. Held, that he was not a competent witness. In *Hillman v. Schwenk*, 68 Mich. 293, 12 West. Rep. 661, held, that the testator's personal property vests in the executor for the purpose of administering the estate; and, where suit was brought upon a note which the defendant claimed belonged to the deceased party at his death, and the executor indemnified the defendant, and took upon himself the defense of the suit, the plaintiff was disqualified from testifying; and held, also, that legatees and devisees did not represent the estate in the prosecution or defense of suits. In *Taylor v. Bunker*, 68 Mich. 258, 12 West. Rep. 565, plaintiff brought suit against an administrator. Held, that the testimony was not rendered admissible by the fact that other parties were present and had knowledge of the matters testified to equally with the deceased. In *Hood v. Olin*, 68 Mich. 165, 12 West. Rep. 508, the plaintiff claimed title to certain property as mortgagee under a mortgage by one Nead, and brought a replevin against the firm of Ware & Olin. During the pendency of the suit Ware died. Held, that the statute did not prevent Nead from testifying.

ing to matters equally within the knowledge of Ware or the firm. *Bassett v. Shepardson*, 52 Mich. 5, announces the general doctrine. In *Singer Mfg. Co. v. Benjamin*, 55 Mich. 380, the action was replevin, brought against the defendant individually. Held, that defendant in replevin, under a plea of the general issue, could show that plaintiff had no right to possession when suit was commenced, and for this purpose could show that he was special administrator of a deceased person, who was the owner of goods at the time of his death; and, having shown that he defended in a representative capacity, a witness, who had been agent of the plaintiff corporation, was excluded from testifying to matters which, if true, were equally within the knowledge of the deceased, and which knowledge the witness acquired while he was agent. In *Hillman v. Schwenk*, 68 Mich. 297, 12 West. Rep. 661, held that, in a suit brought to recover upon a note made payable to a person since deceased, indorsed by said deceased in his lifetime, and which note it was claimed belonged to the deceased at the time of his death, and had been improperly obtained by the plaintiff, and where a legatee was assuming the defense, this fact did not prohibit the plaintiff from testifying as to matters equally within the knowledge of the deceased. In *McCutcheon v. Loud*, 71 Mich. 433, plaintiff made a contract with one Gay, who was trustee for a firm of which he was a member. Gay died. Held, that plaintiff could not testify to the contract made with Gay, as the suit was brought against and defended by the surviving partners. *Lautenshlager v. Lautenshlager*, 80 Mich. 290, 291, was a proceeding to probate what was claimed to be a will, and it was held that the statute did not apply to such proceedings. In *Wilson v. Wilson's Estate*, 80 Mich. 472, Eliza Wilson presented a claim before the commissioners on claims in the estate of Helen Wilson, deceased. Held, that a daughter of the claimant was a competent witness to testify to matters equally within the knowledge of the deceased. In *Lake v. Nolan*, 81 Mich. 115, it was held, in a controversy between an alleged grantee and a widow claiming her dower right, that the Statute did not apply. In *Barker v. Hebbard*, 81 Mich. 267, after the trial defendant died, and upon the second trial the plaintiff offered to introduce a stenographer's minutes of what plaintiff swore to on the first trial. Held, excluded by the Statute. *Jackson v. Cole*, 81 Mich. 440. This was not a suit wherein the representative of the decedent is a party to the record. Plaintiff sued defendant upon a claim against him, assigned to her by her husband in his lifetime. Held, that she was a competent witness to testify to the assignment. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 298, held that testimony of a party is admissible as to matters equally within the knowledge of an agent of a corporation, since deceased, if such matters testified about were also within the knowledge of any surviving officer or agent of the corporation.

There certainly is nothing in these authorities to support the contention that Croul is a competent witness to testify to matters which were equally within the knowledge of Philinda Hurlbut, because he claims these bonds as an

executor of the estate of Chauncey Hurlbut, deceased.

If this reasoning is to prevail, which is claimed by the defendant's counsel, we have a case prosecuted and defended by the representatives of deceased persons, where the Statute says the opposite party shall not be permitted to testify, and yet where they both can testify. The estate is not supposed to be in possession of facts about which it can speak, even if permitted to by the Statute. I always supposed that the estate of a deceased person is the property left by the person upon his death, and that the legal title to personal property vested in the executor or administrator, and that the person having the legal title to the property is the real party in interest. It is said that executors are merely agents of the estate, and not parties to the suit. If mere agents, and not parties, then death would have no effect to abate the suit; the party would be still before the court. But, as I read the Statute, an agent, though sued, is not exempt from the prohibition of the Statute. An agent may possess knowledge of facts which were equally within the knowledge of the deceased, and, if sued by a representative of the deceased as a party, he could hardly be permitted to testify to such matters by showing that he was an agent. Indeed, the deceased may have been his principal, and the suit may have arisen out of that relation. The case of *Duryea v. Granger's Estate*, 66 Mich. 599, 10 West. Rep. 568, is relied on to support the contention that Croul is a competent witness. The case was not reversed upon that ground. Two of the judges merely concurred in reversing, without assenting to the reasons given for the reversal. That was a case of a claim presented against the estate of a deceased party. This is not. Counsel for the defendant says in his brief that this "case may well be entitled '*The Estate of Philinda Hurlbut, Deceased, v. Estate of Chauncey Hurlbut, Deceased.*'" There is no principle of pleading or practice which will authorize a cause to be so entitled, even if it had been against Jerome Croul, executor of the estate of Chauncey Hurlbut, deceased. Cases should be entitled with the names of the parties to the suit. In a suit brought by an executor or administrator, the administrator or executor is the party, and not the estate. The parties to the suit determine how the papers in the suit should be entitled, but the entitling never determines who are the parties. It would be a novel way to determine who is "the opposite party" under the Statute by entitling papers in the suit in any particular name. Would a declaration which commenced with "The Estate of Philinda Hurlbut, plaintiff in this suit, files this declaration against the estate of Chauncey Hurlbut in a plea of," etc., bring any parties before the court? Is there any rule of pleading heretofore discovered that would sanction such pleading? Yet, in order to evade the Statute, and build up a fictitious construction, the estate must be invested with an entity, and called a party to the suit, to let in the representatives of the deceased to testify, when the Statute plainly forbids it. Where the suit is between representatives of deceased parties the Statute prohibits both of those representatives from testifying; yet, under this construction, by a strange metamor-

phosis, both can testify simply by calling the suit one between two estates. Croul, as executor, is not a mere nominal or disinterested party. If the property belongs to him as executor, he is really the party possessed of the legal title. Does the Statute permit him, even if he is so invested with the legal title, and is seeking to defend it, to testify to facts which were in the knowledge of the deceased party, who, in her lifetime, claimed to own the property, and whose administrator is seeking to recover it for her, and whose title Croul is disputing?

Before proceeding to the determination of the competency of the witnesses, it is necessary to consider the character in which the parties to this suit stand before the court. It is claimed that the question of the competency of the witnesses should be considered as if the suit was instituted against Jerome Croul in his representative capacity as executor of the last will of Chauncey Hurlbut. But I do not accede to this proposition. According to his own testimony, he must have received these bonds in his individual capacity, before he was appointed executor, and before the will was admitted to probate. If the bonds were the property of Philinda Hurlbut, it can make no difference how he regarded them. It is possible that she might, after he had collected the avails from the United States, and turned them in to the estate, maintain an action for money had and received against him as executor, so as to be reimbursed out of the assets of the estate. *De Valengin v. Duffy*, 89 U. S. 14 Pet. 283, 10 L. ed. 457; *Baring v. Putnam*, 1 Holmes, 261; *Conger v. Atwood*, 28 Ohio St. 134. The general rule is that, where the executor does some act or makes some promise after the decease of the testator, he is chargeable in his individual capacity, and not as executor. The exception is limited to cases where the transaction which constituted the cause of action arose in the lifetime of the deceased. Such is not this case. The transaction which constitutes the cause of action here arose after the decease of Chauncey Hurlbut, and is based upon a contract of bailment between Jerome Croul and Philinda Hurlbut. As a general rule, a bailee cannot dispute the title of the bailor, but it is a defense to an action brought against him by the bailor for non-delivery of subject bailed that it was taken by or delivered to a person having paramount title and right of possession. In such case the burden of proof is upon the bailee. In this case Jerome Croul, the individual, and Jerome Croul, as executor of the last will of Chauncey Hurlbut, deceased, are two distinct persons in the law. One represents Jerome Croul, the individual, and the other represents the estate of Chauncey Hurlbut, deceased. It was just as competent for him to show in defense for not delivering these bonds that they belonged to him as executor, as it would have been to show, if such had been the fact, that they belonged to the Preston National Bank. Although that defense was open to him, and he was not shut out from it in this case, yet he, as executor, was no more a party to the suit than would the Preston National Bank have been had he sought to show that he had delivered the bonds to it on demand, and that it had the paramount title and right to the possession thereof. The important issue in the suit was,

In whom was the paramount title? and this should be borne in mind in testing the competency of the witnesses to testify in this cause. The plaintiff, as administrator of the estate of Philinda Hurlbut, claimed the paramount title, which was delivered through an executed gift of the bond by Chauncey Hurlbut to Philinda Hurlbut. The defendant claims that the paramount title was in the executor of the last will of Chauncey Hurlbut. Individually he made no claim to the bond, but denied his liability as bailee. Neither in this suit did the estate of Chauncey Hurlbut claim the bonds. Jerome Croul individually made the claim that he had delivered the bonds to the executor of Chauncey Hurlbut's estate. The Statute referred to reads as follows: "That when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." 2 How. Stat. § 7545. This suit is prosecuted by plaintiff as the representative of Philinda Hurlbut, deceased, against Jerome Croul in his individual capacity; and, as he is the opposite party, he is excluded by the plain terms of the Statute. A judgment in this case will not bind the assets of the estate of Chauncey Hurlbut in the hands of the executor, and cannot be collected by the plaintiff out of such assets. He was therefore not a competent witness to testify to matters equally within the knowledge of Philinda Hurlbut. *Yerkes v. Blodgett*, 48 Mich. 211; *Downey v. Andrus*, 43 Mich. 65; *Bassett v. Sheppardson*, 52 Mich. 8.

Buchelder v. Brown, 47 Mich. 366, is cited as supporting the contention of the defendant. That case holds that where an executor brings suit upon negotiable paper, and a third person claims the paper, and takes upon himself the defense of the suit upon that ground, such third person is deemed an opposite party to the executor, and cannot testify to facts which, if true, must have been within the knowledge of the deceased. We adhere to the principle there asserted. It shows that, if it were true that the third party here, viz., Jerome Croul, as executor, and representing the estate of Chauncey Hurlbut, claims the bonds, and has taken upon himself, as such executor, the defense of the suit, he is not a competent witness to testify to any facts which, if true, were equally within the knowledge of Mrs. Hurlbut. The mistake which it seems to me the counsel for the defendant make is the assumption that Jerome Croul is not the real party defendant, when in point of fact and law he is. As before stated, if he could have been made liable as executor (which is at least doubtful), the plaintiff having elected to proceed against him individually, he is bound by the election, and defendant must respond in damages, unless he, as an individual, can show he has delivered the bonds to a person who has a title paramount to that of the administrator. Mrs. Williams was a competent witness for the plaintiff. The suit was not defended by the personal representatives of a deceased party. This disposes of the errors assigned. The defendant was permitted to introduce any competent testimony tending to show

that the bonds in question belonged to the estate of Chauncey Hurlbut, and also that he had always treated them as belonging to the estate; that he had included them in his inventory, and had accounted for both principal and interest to the estate. The estate is not yet closed, and if he has acted under a mistake of fact it is presumed it may be rectified. The court instructed the jury that the plaintiff must establish the fact claimed by him that the bonds in question were given by Mr. Hurlbut to his wife, Philinda Hurlbut, and delivered to her, by a preponderance of evidence, and that the

burden of proof was upon the plaintiff upon that issue; and in conclusion he said: "If you believe from all the evidence that these bonds, at the time Mr. Hurlbut died, were found in the house, and given to Mr. Croul after his death,—were not the property of Mrs. Hurlbut,—then your verdict will be for the defendant. If you find from the evidence that it was the property of Mrs. Hurlbut at the time of Mr. Hurlbut's death, then your verdict will be for the plaintiff." I think the judgment should be affirmed.

McGrath, J., concurs with **Champlin, Ch. J.**

NEW YORK COURT OF APPEALS (2d Div.).

William H. CROSSMAN *et al.*, *Appts.*,
2,
UNIVERSAL RUBBER CO. of New York,
Resp't.

(...N. Y....)

1. An election of remedies is not made by attachment and bill in chancery based on

fraud in procuring credit on a purchase by an insolvent corporation so as to defeat an action on subsequently maturing purchase-money notes, as the remedies are not inconsistent, being in each instance for the recovery of price.

2. To prevent abatement of an action on purchase-money notes, it may be shown that a prior attachment and bill in chancery for the recovery of the debt had been respectively discontinued and unproductive.

NOTE.—*The law as applied to the election of remedies.*

Mr. Bigelow, in the fifth edition of his well-known work on Estoppel (1890), concisely states the law applicable to the doctrine of election: "A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. *Strosser v. Ft. Wayne*, 100 Ind. 443, 452; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Moshier v. Frost*, 110 Ill. 206; *Lehman v. Clark*, 85 Ala. 109; *Rabittie v. Orr*, 88 Ala. 185; *Espy v. Comer*, 80 Ala. 333; *Jones v. Clouser*, 14 West. Rep. 286, 114 Ind. 337. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' Citing *Re Chesham*, L. R. 31 Ch. Div. 466, 473. *Chitty, J.* And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498; *Fields v. Bland*, 81 N. Y. 239; *Scholey v. Rew*, 90 U. S. 21, Wall. 351, 23 L. ed. 99; *Rodermund v. Clark*, 46 N. Y. 354; *Morris v. Rexford*, 18 N. Y. 552. See *Meyer v. Clark*, 45 N. Y. 286; *Succession of Monette*, 26 Ala. Ann. 28; *Weedon v. Landreaux*, Id. 729; *Connihan v. Thompson*, 111 Mass. 270; *Watson v. Watson*, 128 Mass. 152; *Lilley v. Adams*, 106 Mass. 50; *Sloan v. Holcomb*, 29 Mich. 153; *Kunzie v. Wixom*, 39 Mich. 384; *Walsh v. Varney*, 38 Mich. 73; *Thompson v. Howard*, 31 Mich. 309; *Stoddard v. Cutcompt*, 41 Iowa, 329; *Lee v. Templeton*, 73 Ind. 315. The election, if made with knowledge of the facts, is in itself binding,—it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position." *Kinney v. Kiernan*, 49 N. Y. 164; *Syme v. Badger*, 92 N. C. 708; *Mendenhall v. Mendenhall*, 8 Jones, L. 287; *Jones v. Gerock*, 8 Jones, Eq. 190; *Yorkly v. Stinson*, 97 N. C. 236, 240; 1 *Bigelow, Fraud*, 436.

What is conclusive evidence of election.

The case of *Conrow v. Little*, 5 L. R. A. 903, 115 N. Y. 387, 393, is to the effect that the commencement of the action, where all the facts are known, is conclusive evidence of an election. There must be a time when the election of the parties should be considered final, and that time is determined by the commencement of an action to enforce a particu-

lar remedy. It was also held that the discontinuance of such an action was immaterial. It was the fact that the plaintiffs once elected their remedy, and acted affirmatively upon such election, that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. 2 *Herman, Estoppel*, 1172, § 1045.

Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. *Sanger v. Wood*, 3 Johns. Ch. 416, 1 L. ed. 668.

In *Mattlage v. Poole*, 15 Hun, 556, it was held, in substance, that where a vendor sells goods to the agent of an undisclosed principal, he may elect whether he will sue the agent for the price of the goods or the principal, but that he cannot have a recovery against both, and that where he has prosecuted the one to judgment he can have no recovery against the other.

In *Bank of Beloit v. Beale*, 34 N. Y. 473, the plaintiff had prosecuted his action, in which he affirmed the act of his agent, and stress was laid upon that fact. *Davies, Ch. J.*, cited *Lloyd v. Brewster*, 4 Paige, 537, 3 L. ed. 551, in which the like fact existed and was made the basis of the decision, and *Leonard, J.*, cited the case of *Morris v. Rexford*, 18 N. Y. 552, where the plaintiff had replevied his goods.

In *Wright v. Ritterman*, 4 Robt. 704, 1 Abb. Pr. N. S. 423, it was held by the Superior Court of the City of New York that the pendency of an action on a contract for goods sold and delivered will not prevent the bringing of an action for the conversion of the same goods; that the plaintiff may have two remedies in such a case, and an adjudication brought to obtain either, whether for or against him, may be a bar to the other; but at any time previous to such an adjudication, he may discontinue the first action and proceed with the second.

Something more than the mere bringing of a suit is necessary to make the election final and conclusive, and to constitute it the act must be a clear and affirmative one, changing the relations of the parties to the subject matter, and which the party making the election cannot retrace without the other's consent. *Deens v. Dunklin*, 33 Ala. 47; *Bennett v. Goldthwait*, 100 Mass. 494.

(April 21, 1891.)

APPEAL by plaintiffs from a judgment which had been entered, in accordance with an order of the General Term of the Superior Court for the City of New York, after it had considered exceptions ordered to be heard before it in the first instance, upon a verdict which the judge holding the Trial Term had directed to be returned in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by **Bradley, J.:**

Appeal, from judgment entered pursuant to order of the General Term of the Superior Court of the City of New York, denying new

trial, and directing judgment on verdict in favor of the defendant. The plaintiffs, partners doing business in the firm name of W. H. Crossman & Bro., in the City of New York, about the 1st of May, 1888, sold and delivered to the defendant, a corporation of the State of New York, a quantity of goods, at the price of \$9,309, for which the defendant gave them its three promissory notes of date May 5, 1888, payable to the order of the plaintiffs. This action was brought upon the one of them made for \$3,166.61, payable at four months. The defense alleged is that before any of the notes matured the plaintiffs, by bill in chancery in the State of New Jersey, and by attachment in the supreme court of that State, had taken proceedings founded upon alleged fraud in the purchase by the defendant, and that by so doing

Where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him. *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387.

There are many cases where the fact of bringing suit to enforce one of two inconsistent remedies has been held an election, although the suit has not proceeded to judgment. One class of those cases is where the plaintiff has realized some benefit from the suit by means of a provisional remedy therein, or otherwise, as in *Morris v. Rexford*, 18 N. Y. 552, where, in replevin, the plaintiff obtained a redelivery of his goods; or in *Butler v. Hildreth*, 5 Met. 49, where the plaintiff secured his demand by an attachment of property.

It is said in an instructive note to the case of *Smith v. Hodson*, 4 T. R. 211, in 2 Smith, Lead. Cas. 7th Am. ed. p. 198, that "whatever may be the rule in other cases, there can be no doubt that when the ground taken in a suit is prejudicial to the other side by cutting off from a good defense, or precluding a recovery on a valid cause of action, it will preclude the person who adopts it from shifting his ground subsequently to the injury of his opponent. . . . The principle applies wherever an attempt is made to gain an inequitable or unfair advantage by presenting the same matter in different and inconsistent aspects. . . . and furnishes the true explanation of most of the cases examined in this note."

The right to rescind a contract for fraud must be exercised immediately upon its discovery, and any delay in doing so or the continued employment, use and occupation of the property received under the contract will be deemed an election to affirm it. *Strong v. Strong*, 3 Cent. Rep. 48, 102 N. Y. 69.

One cannot experiment upon a contract void for fraud by trying to enforce it with knowledge of the fraud, and that result being unsatisfactory seek at last to rescind it. *Acer v. Hotchkiss*, 97 N. Y. 305.

When a party has elected to sue upon a written contract as it is, and has been defeated, he is bound by that election, and cannot thereafter bring an action to reform the contract. *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498.

Adopting one of several remedies is a waiver of others.

A vendor of goods on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute and rely on the responsibility of the vendee, or he may disaffirm or reclaim his property. But he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone. The law 18 L. R. A.

tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price. In peculiar circumstances a party may take either one of these courses, but having rightfully made his choice, the right to follow the other is extinct and gone. *Littlefield v. Brown*, 1 Wend. 404, 7 Wend. 454, 11 Wend. 467; *McElroy v. Mancus*, 13 Johns. 121; *Sanger v. Wood*, 3 Johns. Ch. 418, 422, 1 L. ed. 668-670; *Jenkins v. Simpson*, 14 Me. 384; *Butler v. Miller*, 1 N. Y. 496.

A common carrier contracts with his passenger to carry him safely and to treat him respectfully, and if this contract is broken, and the passenger has sustained personal injury through the negligence or wrongful act of the carrier, or his agents or servants, the injured party may, at his election, proceed as for a tort, and recover according to the principles pertaining to that class of actions as distinguished from actions on contract. *Baltimore C. P. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134.

Where common-law remedy is available.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly, or by necessary implication, takes away the common-law remedy. *Miles v. O'Hara*, 1 Serg. & R. 32; *Boaz v. Helster*, 6 Serg. & R. 20; *Almy v. Harris*, 5 Johns. 175; *Farmer's Turnp. R. Co. v. Coventry*, 10 Johns. 389; *Colden v. Eldred*, 15 Johns. 220; *Booker M'Robert*, 1 Call. 243; *Bearcamp River Co. v. Woodman*, 2 Me. 404; *Fryeburgh Canal v. Frye*, 5 Me. 38; *Baltimore v. Howard*, 6 Harr. & J. 363; *Coxe v. Robbins*, 9 N. J. L. 364; 8 Chitty, Fr. 130.

If a party resist a recovery against him in a court of law upon a portion of his defense, where he had full knowledge of the whole defense, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is deemed to have waived the grounds of defense so omitted to be made. *Hempstead v. Watkins*, 6 Ark. 317.

But an unsuccessful effort to plead equitable defenses at law will not bar the defendants of relief in equity. *Nelson v. Dunn*, 15 Ala. 501.

And although the defendant in an action at law be able to prove that his signature to a writing obligatory was obtained by fraud, and thus to defeat the action, yet it is competent for him, at his election, to suffer judgment to go against him, and to apply to a court of equity for relief. *Brittin v. Crabtree*, 20 Ark. 309. See note to *Terry v. Munger* (N. Y.) 8 L. R. A. 216.

the plaintiffs had made an election of remedy inconsistent with that of this action. The trial court held that such defense was established, and directed a verdict for the defendant. Upon that subject it appears that the defendant was engaged in business in New Jersey; and that on the 1st of August, 1888, the plaintiffs instituted a proceeding by attachment in the supreme court of that State against the property of the defendant, and that a few days after the plaintiffs filed a bill in chancery in that State against the defendant, as an insolvent corporation, alleging its insolvency, and its indebtedness to the plaintiffs for goods obtained from them; and that the delivery of the goods to it was brought about by fraud, in that the president of the defendant represented to the plaintiffs that the Company was perfectly solvent, by which the plaintiffs were induced to deliver the goods, and take the promissory notes, which they "bring into court and tender themselves willing to surrender, under the direction of the court;" that such representations were untrue, as the corporation was then insolvent, and known by such president to be so; and added that they "repudiate the contract, and would take back the materials delivered, if it were possible to do so;" and the prayer for relief was that a receiver be appointed and injunction issue. A receiver was appointed, whose duty it was to take possession of all the property of the defendant in the State of New Jersey, with a view to the ultimate distribution of the proceeds among its creditors, as provided by the Statute of that State relating to proceedings against insolvent corporations. As the defendant did not answer the bill, its insolvency may be assumed.

Mr. Carlisle Norwood, Jr., for appellants:

An election of remedies in personal actions is only the formal expression of an election of rights. The election of rights is in every case the exercise of the choice open to a party and the remedy selected is merely the expression of the choice made. In every case the courts have held the party to his choice, because his action on making it so affected the rights of the other party that an abandonment of such election to assert some different right would, in consequence of the first choice, be a prejudice to the party against whom such election of rights had been asserted, by cutting him off from a good defense, or precluding a recovery on a valid cause of action.

R. 1 Rol. 726, Z. 15 (Rolle, Abr. p. 726, line 15).

The expression in Comyn's Dig., *Election C. 2*, cited by Earle, J., in *Fowler v. Bovey Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450: "If a man once determines his election, it shall be determined forever," refers solely to "an election between a remedy by real action and a remedy by personal action," in a certain class of cases. *Equitable Co-op. F. Co. v. Hersee*, 83 Hun, 177.

In personal cases, a party does not have to abide by his first or other choice of a remedy.

Comyn, Dig. *Election, C. 2*, citing Co. Litt. 146, a, p. 178.

Where the courts have held that a party was bound by his "election of remedies," the term 13 L. R. A.

was misused, and in all the cases the courts intended nothing more than that he was bound by an election of rights, to which he gave expression, and of which election of rights he furnished evidence by the remedy or form of action invoked to enforce his rights.

See *Kinney v. Kiernan*, 49 N. Y. 168; *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387; *Equitable Co-op. Foundry Co. v. Hersee*, 4 Cent. Rep. 189, 108 N. Y. 26; *Hays v. Midas*, 104 N. Y. 602.

Mr. Benjamin Estes, for respondent:

The plaintiffs have elected their remedy in the actions in New Jersey. They have disaffirmed and repudiated the notes over there and got their remedy, and now seek to affirm what they entirely disaffirm in the other actions. This they cannot do. The course they have pursued in the courts of New Jersey is a perfect bar and defense to this action. It is not merely matter in abatement.

The doctrine of pleading the pendency of a former suit in abatement has no application. The suits are not for the same cause.

Terry v. Munger, 8 L. R. A. 216, 121 N. Y. 162, 167-171; *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387, 398, 394; *Morris v. Rexford*, 18 N. Y. 556, 557; *Moller v. Tuska*, 87 N. Y. 166, 169; *Rodermund v. Clark*, 48 N. Y. 857; *Kennedy v. Thorp*, 51 N. Y. 176; *Fowler v. Bovey Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450; *Embree v. Hanna*, 5 Johns. 101.

Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies.

Sarger v. Wood, 3 Johns. Ch. 416, 1 L. ed. 668; *Littlefield v. Brown*, 1 Wend. 398, 11 Wend. 467; *Beach v. Tuck*, 47 Hun, 536.

Powers v. Benedict, 88 N. Y. 605, 610, merely holds that where goods had been sold to a fraudulent vendee, the vendor might disaffirm the contract of sale, issue a writ of replevin for all the goods and take such as could be found and reclaimed, and for the rest he might prove a claim in bankruptcy against the fraudulent vendee for the value of such as could not be reclaimed.

Bradley, J., delivered the opinion of the court:

The question arises whether the proceedings taken by the plaintiffs in the courts of New Jersey constituted an election of remedy inconsistent with that which they seek to enforce by this action upon the note taken by them for a portion of the consideration of the sale of the goods, which was the subject of those proceedings in that State. Those proceedings were taken there with a view to the collection of the purchase price of the goods sold, and such price is represented by the notes. The rule is well settled that, when a party has elected to adopt and has pursued one of two inconsistent remedies, he is not permitted to afterwards avail himself of the other. In Comyn's Digest, *Election*, it is said: "If a man once determines his election, it shall be determined forever; as, if an obligation delivered to the use of A be refused when he is first informed of it, he cannot afterwards accept it." And the same author adds: "But where an election is of several remedies, if he chooses one he may afterwards

have the other in personal cases, as where he has election of several actions." It is the inconsistency of the remedy sought with that he has before adopted and pursued which determines the right of a party as between them; and this, as the consequence, is founded upon the principle that the other party may otherwise be in some manner prejudiced in respect to a defense or cause of action by the abandonment of the one and resort to the other of such remedies. But whether or not that is the effect is not the subject of inquiry. In the case where a party may resort either to an action upon contract or in tort, the election between them concludes him. And the question has more frequently arisen where a purchase of property is obtained by fraud. Then, after the seller has elected to rescind the sale, and has proceeded for the purpose of recovery of the property or for its conversion, he denies to himself the right to abandon that remedy, and seek to recover in affirmance of the sale; and the effect is the same when his election is effectually made to prosecute for recovery of the purchase money with knowledge of the fraud. He then has lost his right to rescind the sale and reclaim the property. *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 115 N. Y. 387; *Terry v. Munger*, 121 N. Y. 162, 8 L. R. A. 216. And the same rule is applicable to other cases, where there are two existing and substantially inconsistent remedies. Then the adoption and pursuit of one of them excludes from the party the benefit of the other. *Rodermund v. Clark*, 46 N. Y. 354; *Fowler v. Bovey Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145; *Kennedy v. Thorp*, 51 N. Y. 174; *Littlefield v. Brown*, 1 Wend. 398.

But that incompatibility is not applicable to the present case. The attachment proceeding in New Jersey was instituted and had in affirmance of the sale of the goods to collect the purchase money, and the purpose of the suit in chancery there was the same. Neither was founded upon rescission of the contract of sale. Pursuant to the Statute of that State under which the bill was filed, providing for proceedings by creditors of insolvent corporations, domestic and foreign, the plaintiffs filed their bill, and caused the appointment of a receiver of the property of the insolvent defendant. It is true that in the bill they alleged fraud on the part of the defendant in making the purchase, and offered to surrender the notes under the direction of the court. But reference must be had to the nature of the bill, in view of its purpose, and of the Statute under which it was filed, to determine the character of the suit. It is seen that it was founded upon the debt arising out of the sale and purchase of the goods, and instituted to collect the purchase money. The consideration of the sale was what the plaintiffs sought to recover, and the attachment proceeding and the chancery suit were in the nature of proceedings *in rem* for that purpose. It cannot, therefore, properly be said that the plaintiffs sought to or did avoid the contract of sale; but that they did, for the purpose of an earlier remedy to obtain the purchase money, seek, by reason of the alleged fraud, to be relieved from the credit given. This did not have the effect to otherwise impair the contract of sale. *Weigand v. Schel*, 4 Abb. App. Dec. 595, *8 Keyes, 120. In the suit and proceedings there, as in 18 L. R. A.

the action here, the purpose was to recover or collect the price for which the goods were sold. So far there is no inconsistency of remedy. The credit was there sought to be repudiated for the fraud, because the stipulated time of payment had not then expired. This action was brought after the expiration of that time, and is founded upon the promise of the defendant, furnished by its note, to pay such amount of the purchase money. The giving of the notes was not a payment, but their apparent effect was a suspension of the right of action to recover it. If the plaintiffs had recovered in assumpsit upon the implied promise to pay for the goods the amount of the purchase price, they would have been required to surrender the notes. But this they did not do, and they still hold the note in question. In effect, it is an express promise to pay so much of the purchase money. It is not seen how the remedy by this action is inconsistent with that founded upon the implied promise to pay for the goods; the practical effect is the same, and both proceed upon the affirmance of the sale. While the action upon the note is not consistent with the repudiation and proceeding in disregard of the credit in the courts of New Jersey, the incompatibility in practical effect had relation to the time of application of remedy, and not substantially to its nature or purpose. The conclusion follows that the defense cannot effectually rest upon the doctrine of election of remedies, as those pursued in the New Jersey courts were not inconsistent in their purpose and effect with that of this action. But relief from that defense does not necessarily enable the plaintiffs to recover here. When it appeared, as alleged, that the plaintiffs had taken the proceedings by attachment, and in the chancery suit in that State, their pendency there presumptively operated by way of abatement of the present action, else the plaintiffs may have had the means of twice collecting the same debt against the defendant. *Embree v. Hanna*, 5 Johns. 101. The plaintiffs, however, if the facts permitted, may have shown that those proceedings had been discontinued, or, as they did not charge the defendant personally with the debt, that neither of them was effectual to produce any fund to apply upon their claim, or that they could be productive of a sum applicable to it, sufficient partially only, and to what extent, to satisfy it. The plaintiffs offered to prove that the attachment proceeding had been discontinued; also offered evidence in relation to proceedings founded upon the chancery suit, with the view, as claimed, of making it appear that nothing had been, or could by them, as creditors of the defendant, be, realized by such proceedings; and that such suit was unproductive, through the action of the receiver, for such purpose. Those facts were essentially important, and, if permitted to prove them, it must, for the purposes of the question here, be assumed that they would have been shown by evidence legitimate for that purpose.

The exclusion of the evidence so offered was error, and for that reason the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except Vann and Brown, JJ., absent.

ALABAMA SUPREME COURT.

HIGHLAND AVENUE & BELT R. CO.,
Appt.,
v.
 Margaret A. BURT.

(.....Ala.....)

Stopping a train drawn by a dummy engine with no regular stopping place for a reasonable time on a request to stop is not the full measure of the conductor's duty, but before starting he must see that no passenger is in the act of alighting, or in a position that will be perilous if the train starts.

(June 8, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to re-

cover damages for personal injuries alleged to have resulted from the negligence of defendant's servants. *Affirmed.*

Plaintiff was a passenger on one of defendant's trains drawn by a dummy engine. She told the conductor her destination and when the cars stopped there she attempted to get off and was injured. Plaintiff claimed that when the cars stopped she proceeded to alight without delay and that the cars started too soon, throwing her to the ground. Defendant claimed that the cars stopped a reasonable time to allow passengers to alight, that several did alight in safety and that before the conductor signalled to go ahead he looked to see if anyone else wished to get off and failed to see plaintiff, who was alighting from the opposite side of the car.

NOTE.—*Duty of railway conductors in stopping and starting trains.*

It is the duty of railway officials and agents to give passengers at its stations reasonable notice of the starting of its trains (Central R. & Bkg. Co. v. Perry, 53 Ga. 461, 66 Ga. 746), and to give its passengers in its trains due notice of the approach of the train to its stations, in order that the passengers who are to leave the cars may prepare to alight. Dawson v. Louisville & N. R. Co. (Ky.) 11 Am. & Eng. R. R. Cas. 184. See Patterson, Railway Accident Law, § 267.

Degree of care required of carrier.

The highest degree of care and skill is required in the transportation of passengers. Washington & G. R. Co. v. Varnell, 98 U. S. 479, 25 L. ed. 236; George v. St. Louis, Iron Mt. & S. R. Co. 34 Ark. 613, 1 Am. & Eng. R. R. Cas. 294; Delaware, L. & W. R. Co. v. Dailey, 37 N. J. L. 526; Brunswick & A. R. Co. v. Gale, 56 Ga. 322; Baltimore & O. R. Co. v. Wightman, 26 Gratt. 431; Mackoy v. Missouri Pac. R. Co. 18 Fed. Rep. 236; Jamison v. San José & S. C. R. Co. 55 Cal. 593, 3 Am. & Eng. R. R. Cas. 350; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. 510; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 1 Am. & Eng. R. R. Cas. 225.

Where, after coming to a full stop, and while passengers were alighting, the train was suddenly moved without warning, it is immaterial whether the motion was backward or forward. The fact that a passenger injured under such circumstances was intoxicated would not relieve the company from liability. Such intoxication would have a bearing upon the question of contributory negligence. Millman v. New York Cent. & H. R. R. Co. 6 Thomp. & C. 595, 4 Hun, 409, 38 N. Y. 642.

Length of stoppage.

A railway company has not discharged its duty to its patrons or relieved itself from liability to them until it has stopped at the end of their journey a reasonable time for them to get off the train in safety. Jeffersonville, M. & I. R. Co. v. Parmelee, 51 Ind. 42; Keller v. Sioux City & St. P. R. Co. 27 Minn. 178.

It is the duty of a railway company, at a time when passengers are getting out of the cars, after an announcement by the conductor that ten minutes would be given for refreshments, to permit the cars to stand still. Sauter v. New York Cent. & H. R. R. Co. 6 Hun, 446.

Railway trains are bound to stop at stations a reasonable length of time to enable passengers to get on and off. Swigert v. Hannibal & St. J. R. Co. 18 L. R. A.

75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; Wabash, St. L. & P. R. Co. v. Rector, 104 Ill. 296, 9 Am. & Eng. R. R. Cas. 264.

Signals.

It is the imperative duty of a railroad company, through its proper agents, to give reasonable signals of the departure of its trains from its stations, and they should be such signals as would ordinarily attract the attention of passengers and others interested in the movements of the train. Should a passenger needlessly loiter about a railway station, and neglect to board a train, then the company, as regards such passenger, is only bound to exercise ordinary diligence; and it is the duty of the passenger to use caution in observing signals which might be given by the agents of the company. Perry v. Central R. Co. 66 Ga. 746.

Starting of train.

The fact that the conductor of a train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train will not relieve the company from liability for injuries received by such person in consequence of the conductor's starting the train without giving him time to get on, provided the conductor actually sees him attempting to board the train when he gives the signal to start. Swigert v. Hannibal & St. J. R. Co. 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322.

A carrier is liable for injuries to a passenger in alighting from a train, caused by the starting of the train with a jerk without giving sufficient time to alight in safety. Texas & P. R. Co. v. Miller, 11 L. R. A. 395, and note, 79 Tex. 78.

He must provide safe means of access to and from its stations for the use of passengers, and passengers have the right to assume that the means provided are reasonably safe. Delaware, L. & W. R. Co. v. Trautwein, 7 L. R. A. 435, 52 N. J. L. 169; Murphy v. Rome, W. & O. R. Co. 32 N. Y. S. R. 381.

A railroad company is bound to use a high degree of skill and vigilance to guard against accidents to its passengers. Palmer v. Delaware & H. Canal Co. 117 N. Y. 170.

The duty of common carriers with respect to the transportation of persons and property is independent of contract. Delaware, L. & W. R. Co. v. Trautwein, *supra*.

Duty of carrier to land passengers safely. See notes to Missouri Pac. R. Co. v. Northam (Tex.) 3 L. R. A. 368; Walker v. Vicksburg, S. & P. R. Co. (La.) 7 L. R. A. 111.

The court charged the jury as follows :

"It was the duty of defendant, on reaching the stopping place at St. John's Church, to stop the dummy a reasonable length of time for plaintiff to alight, and the plaintiff's duty, when it stopped, to alight with reasonable diligence; that when it stopped, if the conductor went to the car in which plaintiff was, to help the passengers off, and if during such reasonable time given for passengers to alight plaintiff was up and in the act of alighting, it was the duty of the conductor to know it, and not start the train while she was in the act of alighting; that if the train stopped a reasonable length of time for the plaintiff to alight, and at the expiration of such time she was still in her seat, and not in the act of getting off, then the conductor had the right to turn his attention away from the car to the engineer, and to signal the engineer to go ahead, and if thereafter plaintiff arose, and attempted to alight, and fell, the defendant is not liable, unless the conductor or engineer actually knew she was trying to get off, and, so knowing it, could, by the exercise of reasonable care, have prevented her fall." The defendant requested the court to give the following written charges, which were refused: (1) "That, if the train stopped a sufficient time to allow the plaintiff time to get off, then the defendant was not guilty of negligence in its management." (2) "That if the jury believe that the car stopped at St. John's Church a sufficient time for plaintiff to alight, and the conductor, without knowing of the intention of plaintiff to alight there, and without knowing or seeing that she was in the act of alighting, started the train, then the defendant would not be guilty of negligence, and plaintiff would not be entitled to recover." (3) "If the jury believe from the evidence that the train came to a full stop at the place where the plaintiff wished to alight, and remained there long enough for two ladies in another seat of the car to alight therefrom safely, then, on the undisputed evidence, as to the character and construction of the car in which plaintiff was riding, this was a reasonable time for the car to stop for the plaintiff to alight." (4) "That if the jury believe from the evidence that the train of the defendant was stopped at St. John's Church for a reasonable time for plaintiff to have alighted from the car, then after this time the conductor was not required to be on the lookout for the plaintiff to alight." (5) "That, under the evidence in this case, the train stopped at St. John's Church a reasonable time for plaintiff to alight."

Mr. Alexander T. Loudon for appellant.

Mr. Richard H. Fries for appellee.

Coleman, J., delivered the opinion of the court:

The plaintiff sued to recover damages for personal injury alleged to have been sustained in consequence of the negligence of the defendant by moving forward the train upon which she was a passenger while she was in the act of alighting, and before she had reasonable time to get off. We regard the law with respect to the duty to be exercised by ordinary railroads for the safety of passengers getting on and off their trains as well settled.

13 L. R. A.

When a train of an ordinary railroad is brought to a stand-still at the proper and usual place for receiving passengers, and for permitting passengers to alight, and remains stationary for a reasonably sufficient length of time for this purpose, the duty of the trainmen in this regard has been performed; but, while the performance of this duty may relieve the trainmen from the further duty of seeing and knowing that the passengers are on or off, as the case may be, even this would not excuse from culpability, if those in charge of the train in fact saw or knew that its movement would probably imperil a passenger in the act of getting off or on the train, and, in disregard of the peril, caused the train to move, and thereby inflict injury. *Montgomery & E. R. Co. v. Stewart* (Ala.) 8 So. Rep. 711, and cases cited; *Birmingham U. R. Co. v. Smith*, 90 Ala. 68; *Central R. & Bkg. Co. v. Miles*, 88 Ala. 262.

The law has also been well settled in regard to the duty of the driver or the person in charge of a horse car operated for the carriage of passengers. In the latter case, it is the duty of the driver to await a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by a movement of the car. If he fail in these respects, and injury results from such failure, his employer is liable. 90 Ala. 68, *supra*. The reasons for applying a different principle in the case of ordinary railways and horse cars are fully stated in 90 Ala. *supra*. The case of *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, was one in which the passenger-cars were drawn by a dummy engine. Plaintiff testified in that case that she gave the notice to stop by pulling the bell strap, and upon this signal being given the train stopped. It was in evidence that, by a rule of the company, passengers were required to motion the conductor when they wished to get off. This much of the evidence is stated to show that the rules of the company in regard to stopping, applicable to ordinary railroads, having regular stations, did not apply, but its management for the convenience of passengers in regard to stopping was somewhat similar to that of street horse cars; that is, the train would stop, on being signaled to that effect by the passenger, at any place where a municipal ordinance did not prohibit it. After laying down the general rule applicable to ordinary railways, that the stoppage required was for a time reasonably sufficient to enable the passengers to conveniently alight, the court in 89 Ala., *supra*, added that "the duty of keeping a diligent lookout rested on the engineer and conductor, to see that a premature start of the train, such as might endanger her safety, should not be negligently made." Where dummy engines are used for the transportation of passengers, and conductors are in the control of the cars, and there are no regular stopping places or stations for receiving and putting off passengers, and the conductors are not informed in advance where the passengers desire to alight, and cannot know how many are expected to alight when the motion or signal is given to

stop, and the rules and conditions for governing such engines and cars for carrying passengers are not such as to invoke the principles which prevail in ordinary railways, the presumption does not arise that the duty of the conductor is performed by merely stopping a reasonable length of time, sufficient to enable passengers to get on or off, but, in such cases, the same measure of duty is required as that imposed upon the driver of a horse-car; that is, he shall inform himself by looking and seeing how many passengers desire and intend to alight, and in any event, to see and know that no passenger is in the act of alighting, or in a position which would be rendered perilous by putting the car in motion. If after stopping and waiting a reasonable time for passengers to get off, the conductor places himself in a position where he can see and know, and there are no indications that others have any desire or intend to alight or get on, the conductor may then cause the car to move; and if passengers, after this, attempt to get on or off, without further notice to the conductor, and he has no actual knowledge of their intention and position, they do so at their peril, and not at the peril of the carrier. The first and second charges requested by defendant relieved the conductor of the duty to take any precaution or steps to inform himself as to whether plaintiff was in the act of alighting at the time he signaled the engineer to go forward. We are

not prepared to hold "that a sufficient time to allow the plaintiff to get off" comes up to the rule declared in repeated decisions of this State, where we have held "that the train must await a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence" or "to conveniently alight." The charges asked to this effect were calculated to mislead in respect to the time the train was required to await. The court was not authorized to charge the jury, as a matter of law, that, because two other ladies had alighted with safety, the car had stopped a reasonable time. This may have been matter for legitimate argument before the jury, but did not authorize the legal conclusion. The plaintiff's testimony tended to show that she arose for the purpose of getting off as soon as the train stopped, and that she continued to move in that direction until she was thrown off by the sudden movement of the car. The same objection obtains against the fifth charge. This charge also invades the province of the jury. The fourth charge may assert the principle applicable to ordinary railroads, but does not apply to dummy engines, under the facts proven in this case. The charges given to the jury by the trial court are in accord with the views of this court herein expressed.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James BURT

v.

ADVERTISER NEWSPAPER CO.

(....Mass.....);

1. **Free and open comment and criticism** upon the acts of a person which are matters of public concern are privileged.
2. **The privilege of discussion** as to the acts of public persons does not extend to the making of false statements of fact.
3. **Reasonable cause to believe** a libelous charge to be true is no defense for its publication.
4. **Evidence in a libel case** that the libel has been published before is not admissible in

mitigation of damages, except where defendant's libel refers to and professes on its face to be based on the former one.

5. **Where one charged with fraud** in the New York custom house admits that sugar was valued there lower than in Boston, and claims that the Boston polariscope gives too high a valuation, evidence that it does not is admissible.
6. **Damages from publication of a libel cannot be enhanced** by the republication thereof by other persons even if there was a general probability of its republication.

(June 29, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to

NOTE.—Fair criticism of public men allowable.

The public conduct of a public man is matter of public interest, and may be discussed with the fullest freedom. It may be made the subject of hostile criticism, provided the language of the writer be kept within the limits of an honest intention to discharge a public duty, and is not made a means of promulgating slanderous and malicious allegations. The question for the jury is whether the writer has transgressed the bounds within which comments ought to be confined; or whether it was made the opportunity for gratifying personal vindictiveness and hostility. *Seymour v. Butterworth*, 3 Fost. & F. 372; *White v. Nichols*, 44 U. S. 3 How. 267, 11 L. ed. 591; *Moore v. Butler*, 48 N. H. 161; *Forward v. Adams*, 7 Wend. 204; *Cook v. Hill*, 3 Sandf. 341; *VanWyck v. Guthrie*, 4 Duer, 268; *VanWyck v. Aspinwall*, 17 N. Y. 18 L. R. A.

190. See *Campbell v. Spottiswoode*, 3 Best & S. 776; *Smith v. Tribune Co.* 4 Biss. 447; *Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Aldrich v. Press Printing Co.* 9 Minn. 138; *Powers v. Dubois*, 17 Wend. 63; 4 Field, *Lawyers' Briefs*, § 524.

The official conduct of men in public life, and the fitness and claims of candidates for official station, are fair subjects for review and criticism in the public prints, and such honest criticism, although it be unfriendly and severe, can give no occasion for the suggestion that it proceeds from unworthy or indirect motives. *Hart v. Townsend*, 67 How. Pr. 88.

Judges and text-book writers furnish plentiful definitions of what constitutes a libel, with varying shades of difference. They all agree that a malicious publication, tending to expose a person to ridicule, contempt, hatred, degradation of character, is libelous. 2 Addison, *Torts*, 309; *Bergmann v.*

recover damages for the publication of an alleged libel which resulted in a verdict in favor of plaintiff. *Sustained.*

The facts sufficiently appear in the opinion.

Meers. A. Hemenway and H. N. Sheldon, for defendant:

The Byrne report and affidavits were, by reference, incorporated into the alleged libels. Accordingly this report and these affidavits should have been admitted in evidence as really a part of the articles complained of.

Cook v. Hughes, Ryan & M. 112; *Van Vactor v. Walkup*, 46 Cal. 124, 184; *Darby v. Ouseley*, 1 Hurlst. & N. 1, 11; *Morehead v. Jones*, 2 B. Mon. 210; *Rez v. Lambert*, 2 Campb. 898; *Weaver v. Lloyd*, 1 Car. & P. 296; *Thornton v. Stephen*, 2 Mood. & Rob. 45; *Hedley v. Barlow*, 4 Fost. & F. 237; *Nash v. Benedict*, 25 Wend. 645; *Gould v. Weed*, 12 Wend. 12; *Hotchkiss v. Lothrop*, 1 Johns. 286; *Scripps v. Foster*, 41 Mich. 742; *Thompson v. Boyd*, Mill. 80; *Young v. Gilbert*, 93 Ill. 595; *Child v. Homer*, 18 Pick. 503.

This evidence was competent upon the question of damages, to show that defendant had made its publications in good faith and without any actual malicious intention.

Blackburn v. Blackburn, 8 Car. & P. 146, 4 Bing. 895; *Jellison v. Goodwin*, 43 Me. 287; *Hotchkiss v. Porter*, 30 Conn. 414; *Fry v. Bennett*, 28 N. Y. 324; *Stanley v. Webb*, 21 Barb. 148; *Brown v. Wright*, 6 La. Ann. 258.

The defendant's offer was not, as in *Lothrop v. Adams*, 183 Mass. 471, 477, to show that reports were in circulation against the plaintiff, unknown to the defendant before the publication, but to show public documents published and circulated by the United States government, containing the same charges as the libels and weightier charges of the same character, and made in terms the express ground and foundation of its statements.

Whitney v. Janesville Gazette, 5 Biss. 880; *Willover v. Hill*, 72 N. Y. 86; *Reynolds v. Tucker*, 6 Ohio St. 516; *Hatfield v. Lasher*, 81 N. Y. 246; *Larrabee v. Minnesota Tribune Co.* 86 Minn. 141; *Duke v. State*, 19 Tex. App. 14.

These articles were privileged. If any of them were privileged, or if any of the charges made against the plaintiff were privileged, then the issue as to these was whether they were published without malice, in good faith, and in the honest belief of their truth; and the evidence offered was competent upon that issue.

Bradley v. Heath, 12 Pick. 163; *Remington v. Congdon*, 2 Pick. 810; *Swan v. Tappan*, 5 Cush. 104; *Lawler v. Earle*, 5 Allen, 22; *Atwill v. Mackintosh*, 120 Mass. 177.

It was competent for the defendant to put in such testimony as this in mitigation of damages.

Cooks v. O'Brien, 2 Cranch, C. C. 17; *Wetherbee v. Marsh*, 20 N. H. 561; *Minezinger v. Kerr*, 9 Pa. 312; *Galloway v. Courtney*, 10 Rich. L. 414; *Eviston v. Cramer*, 54 Wis. 220; *Taylor v. Church*, 8 N. Y. 452; *Huson v. Dale*, 19 Mich. 17; *Weed v. Robbins*, 32 Barb. 315; *Burt v. McBain*, 29 Mich. 260, 268.

The damages may be swollen by proof of actual or express malice; whether this is or is not contended to exist, they may be mitigated by affirmative evidence of the defendant's good faith and freedom from actual malice.

Scripps v. Reilly, 38 Mich. 10; *True v. Plumley*, 36 Me. 466; *Haight v. Hoyt*, 50 Conn. 588; *Doe v. Roe*, 32 Hun, 628; *Symonds v. Carter*, 32 N. H. 453.

The measure of damages depends in a large degree upon the motives which actuated the defendants in making the publication, and the circumstances under which it was made.

Caldwell, J., in *Erber v. Dun*, 12 Fed. Rep. 526.

Express malice aggravates the wrong done by the utterance of slanderous words.

Bigelow, Ch. J., in *Markham v. Russell*, 12 Allen, 578, 575.

In such case the degree of malice would properly measure the damages.

Coffin v. Coffin, 5 Mass. 1, 6, 44.

Though the presumption of legal or technical malice is conclusive so far as concerns the maintenance of the action, yet such evidence as was offered by this defendant is competent to reduce the amount of the damages.

Lick v. Owen, 47 Cal. 252; *Marks v. Baker*, 28 Minn. 162; *Hewitt v. Pioneer Press Co.* 23 Minn. 178; *Storey v. Early*, 86 Ill. 461; *Shipp v. Story*, 68 Ga. 47; *Edgar v. Newell*, 24 U. C. Q. B. 215; *Cook v. Barkley*, 2 N. J. L. 169. See *Carpenter v. Bailey*, 53 N. H. 590; *Eviston v. Cramer*, 54 Wis. 220, 225; *Stow v. Converse*, 4 Conn. 18.

Everyone has a right to comment on matters of public interest and general concern, however severely, provided he does so fairly and with an honest purpose.

Henwood v. Harrison, L. R. 7 C. P. 606, 621; *Wason v. Walter*, L. R. 4 Q. B. 98, 94; *Miner*

Jones, 94 N. Y. 51-64; *Byrnes v. Mathews*, 12 N. Y. S. R. 74.

When anyone consents to be a candidate for a public office, he must be considered as putting his character in issue, so far as respects his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intent of informing the people, are not libelous. Com. v. Clap, 4 Mass. 169; Com. v. Odell, 3 Pittsb. 449.

The editor of a newspaper may lawfully publish the fact that a person has been arrested, and upon what charge. *Usher v. Severance*, 20 Me. 9; 4 Walt. Act. and Def. 306.

The cases are uniform in holding that if the words used are capable of a construction which will make them actionable it presents a question for the jury, even though they are also capable of an innocent construction. It is only when the language is incapable of a construction injurious to the plaintiff that the court is justified in withholding it from the jury. *Sanderson v. Caldwell*, 45 N. Y. 400; *Patch v. Tribune Assn.* 38 Hun, 388; *Purdy v. Rochester Print. Co.* 96 N. Y. 373; *Townshend, Slander and Libel*, § 28.

The assertion of a libel either by insinuation, irony, question or allusion, is the same as if asserted directly in terms. *Folkard's Starkie, Slander and Libel*, 181, 183; *Gibson v. Williams*, 4 Wend. 330; *Byrnes v. Mathews*, 12 N. Y. S. R. 74.

For further annotation on this subject, see notes to *Morey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. 621; *Price v. Conway* (Pa.) 8 L. R. A. 198; *Sillars v. Collier* (Mass.) 6 L. R. A. 680; *Hayes v. Press Co.* (Pa.) 5 L. R. A. 648; *Byam v. Collins* (N. Y.) 2 L. R. A. 120; *Park v. Detroit Free Press Co.* (Mich.) 1 L. R. A. 549.

v. Detroit Post & T. Co. 49 Mich. 358; *Kelly v. Tinkling*, L. R. 1 Q. B. 699.

Surely, a discussion of the public matters directly affecting the threatened commercial prosperity of Boston and its vicinity, and weighty beyond everything else to all good citizens, must be privileged.

Wason v. Walter, L. R. 4 Q. B. 98, 94; *Kane v. Mulvaney*, 2 Ir. C. L. Rep. 402; *Campbell v. Spottiswoode*, 8 Best & S. 769; *Harle v. Catherrall*, 14 L. T. N. S. 801.

Whoever fills a public position renders himself open to public discussion, and must accept an attack as a necessary though unpleasant appendage to his office.

Parmiter v. Coupland, 6 Mees. & W. 108; *Seymour v. Butterworth*, 3 Fost. & F. 878, 877; *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 689; *Hedley v. Barlow*, 4 Fost. & F. 224.

Even the local interest of the inhabitants of Boston, to avoid the unfair diversion of its business to New York, would alone be sufficient to call for the application of this rule.

Cox v. Feeney, 4 Fost. & F. 18; *Purcell v. Souler*, L. R. 2 C. P. Div. 218; *Harle v. Catherrall*, *supra*; *Crane v. Waters*, 10 Fed. Rep. 619; *Press Co. v. Stewart*, 12 Cent. Rep. 275, 119 Pa. 584; *Davis v. Duncan*, L. R. 9 C. P. 396.

Plaintiff's conduct having been made the subject of investigation by the government, and the result of that investigation, with the evidence which supported it, having been published and circulated broadcast by the national government, and acted upon by the removals of officers, and then brought into the domain of national politics, these matters and the plaintiff's connection therewith become fit subject of comment.

Kelly v. Tinkling, L. R. 1 Q. B. 699, 701; *Smith v. Higgins*, 16 Gray, 251, 252; *Gott v. Pulsifer*, 122 Mass. 235, 238; *Barrows v. Bell*, 7 Gray, 801, 818; *Gassett v. Gilbert*, 6 Gray, 94, 97; *Moore v. Butler*, 48 N. H. 161; *Palmer v. Concord*, 48 N. H. 211; *Ormsby v. Douglass*, 37 N. Y. 477; *Adcock v. Marsh*, 8 Ired. L. 360; *White v. Nicholls*, 44 U. S. 8 How. 266, 11 L. ed. 591.

Nor will the mere use of strong terms of condemnation, such as robbery, swindle or conspiracy, and the like, in an otherwise privileged statement, take away that character.

Klinck v. Colby, 46 N. Y. 427; *Atwill v. Mackintosh*, 120 Mass. 177, 182.

There has been here no attack upon the personal character of the plaintiff; nothing has been said of him except in connection with his public acts, nor without adequate and more than adequate support in official publications or official records.

Morrison v. Belcher, 8 Fost. & F. 614; *Carr v. Hood*, 1 Campb. 855, note; *Tabart v. Tipper*, Id. 851; *Alderson, B., in Gathercole v. Miall*, 15 Mees. & W. 819, 840; *Campbell v. Spottiswoode*, 8 Best & S. 769, 776.

For any republication not actually privileged, however innocently made, the plaintiff can recover full compensation from the publisher thereof, and therefore he cannot recover from defendant.

Stevens v. Hartwell, 11 Met. 542; *Kenney v. McLaughlin*, 5 Gray, 8; *Watkin v. Hall*, L. R. 3 Q. B. 896; *McPherson v. Daniels*, 10 Barn. 18 L. R. A.

& C. 263, 269; *DeCrespigny v. Wellesley*, 5 Bing. 892; *Sans v. Joeris*, 14 Wis. 663; *Howler v. Chichester*, 26 Ohio St. 9; *Fitzgerald v. Stewart*, 53 Pa. 348; *Prime v. Eastwood*, 45 Iowa, 640; *Larkins v. Tarter*, 3 Sneed, 681; *State v. Butman*, 15 La. Ann. 166; *Cade v. Redditt*, Id. 492; *State v. Derry*, 4 West. Rep. 92, 20 Mo. App. 552; *McDonald v. Woodruff*, 2 Dill. 244; *Clifford v. Cochran*, 10 Ill. App. 570; *Bransletter v. Dorrough*, 81 Ind. 527; *Mason v. Mason*, 4 N. H. 110; *Lewis v. Niles*, 1 Root, 346; *Austin v. Hanchet*, 2 Root, 149; *Kennedy v. Gifford*, 19 Wend. 296; *Inman v. Foster*, 8 Wend. 602; *Terwilliger v. Wands*, 17 N. Y. 54, 57; *Hampton v. Wilson*, 4 Dev. L. 468.

The utterer of a slander is not responsible for unauthorized repetition of it by others.

Shurtleff v. Parker, 180 Mass. 293; *Hastings v. Stetson*, 126 Mass. 829; *Prime v. Eastwood*, 45 Iowa, 640, 644.

Messrs. R. M. Morse, Jr., and F. J. Stimson, for plaintiff:

The documents excluded would not have been privileged to the defendant newspaper even if only copied in full. They were not even privileged to Byrne himself.

Shekell v. Jackson, 10 Cush. 25; *Cowley v. Pulsifer*, 187 Mass. 392; *Clark v. Binney*, 2 Pick. 112, 117; *A. C. Freeman's note on Libel*, 15 Am. St. Rep. 342, 347, 348.

Comments by newspapers, even on public documents or matters which are privileged, must be fair and upon a question of public interest.

Lothrop v. Adams, 183 Mass. 471, 475, 482, pl. (6); *Fraser, Libel*, art. 13, p. 19, note 1; *A. C. Freeman. Newspaper Libel (note to 15 Am. St. Rep. 318, 364)*.

The matter or thing commented on must be a fact, not another libel, as here.

Fraser, Libel, pp. 20, 21; *Campbell v. Spottiswoode*, 8 Best & S. 778.

These articles cannot be considered fair comments; nor is the honesty of the plaintiff, a private citizen, matter of public interest.

Clark v. Binney, 2 Pick. 118.

These articles, therefore, original with the defendant newspaper, were not themselves privileged to it.

Cowley v. Pulsifer, 187 Mass. 394, 395.

Reports, rumors, etc., claimed to be sources of information, are not admissible in libel suits, even in mitigation of damages.

Peterson v. Morgan, 116 Mass. 350; *Mahoney v. Belford*, 132 Mass. 398; *Alderman v. French*, 1 Pick. 1, 18; *Clark v. Munsell*, 6 Met. 378, 389; *Kenney v. McLaughlin*, 5 Gray, 8, 7; *Watson v. Moore*, 2 Cush. 183, 140; *Fraser, Libel*, p. 49.

Particularly is it so when defendant reiterates the libel by a plea in justification.

Wolcott v. Hall, 6 Mass. 514, 518; *Bodwell v. Swan*, 3 Pick. 877.

It is no defense, even if defendant believed the report true.

Clark v. Brown, 116 Mass. 504, 507; *Fraser, Libel*, p. 20; *Parkhurst v. Ketchum*, 6 Allen, 406.

Nor are they admissible to disprove malice.

Peterson v. Morgan, *Alderman v. French*, *Bodwell v. Swan* and *Clark v. Munsell supra*.

So, even although evidence of subsequent defamation was admitted to prove malice.

Bodwell v. Swan, supra.

Conductors of the public press are not, in the absence of a statute to that effect, entitled to peculiar indulgence and especial rights and privileges.

Shekell v. Jackson, 10 Cush. 27.

Holmes, J., delivered the opinion of the court:

In this case there must be a new trial. We shall state the grounds on which we come to this conclusion and shall discuss such of the rulings as dealt with questions which are likely to come up again. Some matters not likely to recur we shall pass over. The first question which we shall consider is raised by the presiding judge's refusal to rule that the articles were privileged. The requests referred to each article as a whole. Each article contained direct and indirect allegations of fact touching the plaintiff and highly detrimental to him, charging him with being a party to alleged frauds in the New York custom house. Some or all of these allegations we must take to be false. Therefore the ruling asked was properly refused.

We agree with the defendant that the subject was of public interest and that in connection with the administration of the custom house the defendant would have a right to make fair comments on the conduct of private persons affecting that administration in the way alleged. But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case a bona fide statement not in excess of the occasion is privileged although it turns out to be false. In the former what is privileged, if that is the proper term, is criticism not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true.

The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests both intrinsically meritorious. When private inquiries are made about a private person, a servant for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is, much greater than in the other case.

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If one private citizen wrote to another that a high official had taken a bribe no one would think good faith a sufficient answer to an action. He stands no better certainly when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Shekell v. Jackson, 10 Cush. 25, 26.*

The distinction to which we have referred has been brought out more clearly in England than it has been in our own decisions. Thus in *Davis v. Shepatone, L. R. 11 App. Cas. 187, 190, Lord Herschell* says: "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordship's opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege." *Popham v. Pickburn, 7 Hurlst. & N. 891, 898; Le Pay v. Burnside, L. R. 4 Ir. 556, 565, 566; Campbell v. Spottiswoode, 3 Best & S. 769, 779; Walker v. Brogden, 19 C. B. N. S. 65; Reg. v. Flowers, L. R. 44 J. P. 377, 378; Negley v. Farrow, 60 Md. 158; Hamilton v. Eno, 81 N. Y. 16; State v. Schmitt, 49 N. J. L. 579, 586, 8 Cent. Rep. 626; Existon v. Cramer, 57 Wis. 570; Scripps v. Foster, 41 Mich. 742, 746; Shekell v. Jackson, supra.*

The foregoing language is applicable to the case at bar. The defendant in all the articles makes statements of fact on its own behalf, and in the second fairly may be understood to intimate that the private sources of information alleged by the words "we say this on authority," apply not merely to the existence of corruption in the New York custom house but to the plaintiff's connection with it. The articles published by the defendants so far as they contained false statements were not privileged.

We should add, however, with reference to another trial that there was evidence that some of the charges in the articles were true, and so far as the jury might find them to be so, inasmuch as the matter under discussion was a matter of public concern, the defendant would be justified not only in making those charges, but in free and open comment and criticism in regard to them.

The next question, the first which is raised by the bill of exceptions, is whether the court below rightly excluded a letter from the secretary of the treasury of the United States and an *ex parte* report on the same subject made to the treasury department containing similar charges against the plaintiff

coupled with evidence that the writer of the articles had these documents before him and believed the statements contained in them. The evidence was offered to show that the defendant acted in good faith and as it is commonly said to negative express malice, in support of its plea of privilege, also as bearing on damages, and generally for any purpose for which it might be admissible.

We already have considered how the defendant stands in respect of privilege. It is said that the report tended to prove that the defendant had reasonable cause to believe the charges to be true, and that it tended to show that the plaintiff was less damaged than he otherwise would have been by reason of the fact that similar charges had been made and published before. As to the former of these suggestions it is enough to say that it is not a justification that the defendant had reasonable cause to believe its charges to be true. A person publishes libelous matter at his peril. *Watson v. Moore*, 2 Cush. 133, 140; *Parkhurst v. Ketchum*, 6 Allen, 406; *Clark v. Brown*, 116 Mass. 504, 507.

Then as to damages. The damages recovered are measured in all cases by the injury caused. Vindictive or punitive damages are never allowed in this State. Therefore, any amount of malevolence on the defendant's part in and of itself would not enhance the amount the plaintiff recovered by a penny, and reasonable cause to believe the charges or absolute good will would not cut it down. *Watson v. Moore*, *Parkhurst v. Ketchum* and *Clark v. Brown*, *supra*. Apart from the Statute (Pub. Stat. chap. 167, § 80) and possibly from privilege the defendant's motives and intent are totally immaterial. Its liability is the usual liability in tort for the natural consequences of a manifestly injurious act.

See *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741, 787. No doubt there might be cases, especially of slander, where it is impossible photographically and phonographically to reproduce the overt act complained of where the defendant's motive would afford an inference as to the character of the act and the impression made by it. No doubt a manifestation of malevolent motives might enhance damages under our rule allowing damages for injured feelings. *Mahoney v. Belford*, 132 Mass. 393, 394; *Hastings v. Stetson*, 130 Mass. 76, 78; *Markham v. Russell*, 12 Allen, 573. See *Ford v. Ford*, 143 Mass. 577, 579; *Leonard v. Allen*, 11 Cush. 241. But there is nothing of that sort in this case. *Watson v. Moore*, 2 Cush. 133, 140; *Clark v. Munsell*, 6 Met. 373, 388.

As a general proposition the defendant cannot show that the plaintiff's damages are less than they otherwise would have been because the charge has been made and published before. *Mahoney v. Belford*, 132 Mass. 393; *Peterson v. Morgan*, 116 Mass. 350, and cases cited; *Alderman v. French*, 1 Pick. 1, 18. See *Scott v. Sampson*, L. R. 8 Q. B. Div. 491; *Hatfield v. Lasher*, 81 N. Y. 246, 249, 250.

But with reference to what we shall have to say concerning the fourth count, it should be added that probably a different rule would apply if the defendants' publication professes on its face to be based upon other pub-

lications which are referred to, and the fact is so.

The last ground on which it was argued that the report should have been admitted was that it was made a part of the libel by reference. We are of opinion that the articles with the exception of that set out in the fourth count do not refer to the report in such a way as manifestly on their face to need the report in order to explain them. The report was laid before us by agreement of counsel.

It is a very long document which it would have been useless to read through to the jury, and from such inspection as we have been able to make does not in any way explain, qualify or mitigate the expression used by the defendant. On the contrary, its only effect could be to raise either a belief or a strong suspicion that the defendant's charges were true. For that purpose it was of course incompetent, and therefore as a practical matter the only effect of allowing it to go in would have been an injustice to the plaintiff.

But the article set out in the fourth count stands somewhat differently from the others. This refers to the report in terms and then proceeds to say that the affidavits in the report and the later affidavits denying the former, when marshaled together, make a terrible indictment against the plaintiff; that the new affidavits evidently are intended to shield him; and implies that the public, on reading the two sets, will believe the former. The jury, if they should compare the documents, might agree with the inferences of the defendant, and to that extent might find the allegations of the article to be true. Under this count alone the report should have been admitted, for the above reason and with reference to the damages, as we have stated earlier.

Another exception is to the exclusion of evidence that the polariscope used in the Boston custom house did not give too high a valuation. One evidence of fraud in the New York custom house was that sugar was valued lower there than in Boston. The plaintiff admitted the fact and gave as one reason for it that the Boston examiner overestimated the quartz plate by which he tested his instrument. He gave this reason when attempting to secure the removal of the Boston examiner from New York after the latter had been sent there to reform the alleged New York practices. The evidence offered tended to prove the existence of the fraud and perhaps that the plaintiff knew of its existence and should have been admitted.

The court was asked to rule that the plaintiff could not recover for repetitions of the defendant's libels by others, and several other rulings tending in the same direction were asked.

The court instructed the jury as follows: "One who publishes a libel is not responsible for the publication of it by others; that is to say, he is not responsible for the injurious act of another. But there is a general principle which runs through all tort cases, which is generally stated in this way: That a man is presumed to intend the natural and probable consequences of his acts, and that

instruction therefore should be qualified in that way. He is not responsible for the injurious acts of another in publishing, but he is under obligations to the plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting a libel into circulation. To that extent he is responsible, and only to that extent." The general proposition laid down is correct, no doubt if rightly understood, and it was applied to libel, under what circumstances and with what meaning does not appear, in *Miller v. Butler*, 6 Cush. 71. But if applied to libel or slander without further explanation it is likely to be misleading, and when put as a qualification of the ruling asked hardly can fail to be so.

The meaning which naturally would be conveyed to the jury is that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons not actually intended by the defendant are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual. *Hastings v. Stetson*, 126 Mass. 829, 331; *Shurtliff v. Parker*, 180 Mass. 298, 296; *Hayes v. Hyde Park* (Mass.) 12 L. R. A. 249; *Leonard v. Allen*, 11 Cush. 241, 246.
Exceptions sustained.

NEW YORK COURT OF APPEALS.

Francis C. LAWRENCE, *Respt.*,
v.
METROPOLITAN ELEVATED R. CO. *et al.*, *Appts.*
(....N. Y....)

The use of a house as a place of prostitution does not affect the liability for depreciation of its value from the construction and operation of an elevated railroad in the street in front of it.

(June 2, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to recover damages for injuries to his property by reason of the construction and operation of an elevated railroad in the street in front of them, and to enjoin the further operation of the road. *Affirmed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies and Brainard Tolles, for appellants:

Entirely irrespective of the illegality of the use, the fact that the premises during the period in question were applied to a use with which the elevated railroad did not interfere, was of the highest relevancy.

Talman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Colrick v. Swinburne*, 8 Cent. Rep. 701, 105 N. Y. 508.

The rule of damage is the impairment of the rental value of the premises to the time of the

commencement of the action, and the impairment must be determined with reference to the condition in which the premises were when the road was built and with reference to the uses for which the premises were then rented or to which they could have been put in the condition they were in.

Greene v. New York Cent. & H. R. R. Co. 65 How. Pr. 154.

If the use is illegal the law cannot recognize any such thing as damages from interference with it.

Kane v. Johnston, 9 Bosw. 154; *Sherman v. Fall River I. W. Co.* 5 Allen, 218; *Jaques v. Bridgeport H. R. Co.* 41 Conn. 61.

In a case where the law refuses damages for an interference with the unlawful use of property, equity will not intervene to prevent such an interference by injunction. The maxim is, that he who doeth iniquity shall not have equity.

Francis, *Maxims of Equity*, p. 7; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *Regby v. Connoy*, L. R. 14 Ch. Div. 432; *Smith v. White*, L. R. 1 Eq. 628.

Messrs. Henry A. Forster and John A. Weeks, Jr., for respondent:

Even if the house had been disreputable that would not have justified the defendant in taking an easement in it and damaging it greatly without compensation.

Ely v. Niagara County Suprs. 86 N. Y. 297; *McKeon v. See*, 4 Robt. 469; *Blodgett v. Syracuse*, 86 Barb. 526.

Andrews, J., delivered the opinion of the court:

The judgment awarded to the plaintiff

NOTE.—The rule in condemnation proceedings.

The true rule, the only rule, which will do equal justice to all parties is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, What is it now fairly worth in the market, and what will it be worth after the improvement is made?—following *Bronson, J. (Re Furman Street*, 17 Wend. 649). The rule is itself approved in many subsequent cases, and in the *Albany Northern R. Co. v. Lansing*, 16 Barb. 71, it is said: "They" (the commissioners) 13 L. R. A.

"were to consider how the taking of the land . . . would affect the residue of the owner's land. Would it leave that residue in an inconvenient unmarketable shape? If so, this fact might properly be taken into the account in determining the amount of compensation. Thus, if the land to be taken should lie between the owner's house and the highway, the amount of compensation should be vastly more than for the same quantity of land, equally valuable in itself, but situate in some remote part of the owner's premises." *Henderson v. New York Cent. R. Co.* 78 N. Y. 423.

damages in the sum of \$2,150 for loss in the diminution of rents of premises in Amity Street in the City of New York, owned by the plaintiff between April 26, 1882, and the time of the trial, occasioned by the construction of the elevated railway in the street, and also awarded an injunction against the further maintenance of the structure, unless the defendant should pay to the plaintiff the sum of \$4,000, which was found to be the permanent depreciation in the value of the plaintiff's property by reason of the maintenance and operation of the defendants' road, upon the assumption that the street should continue to be used for the railway. The defendants do not assail these findings, nor question the measure or character of the relief granted by the judgment, except upon a single ground. Evidence was given tending to show that prior to the construction of the elevated railway, and from time to time subsequent thereto during the period for which loss of rents was claimed and awarded, the house on the premises was let by the plaintiff to tenants, and was by them used as a house of prostitution; the plaintiff, during the whole period for which damages were claimed, lived abroad, and the premises were placed in the charge of a real-estate agent, who let them for the plaintiff.

The evidence on the part of the plaintiff tended to show that the construction and operation of the railway in Amity Street had resulted in making the locality less desirable for residence purposes, and that, in consequence, the owners of tenant-houses on the street were obliged, in order that they should be occupied, to let them to an inferior class of tenants, for brief periods, and at a reduced rent. The plaintiff's agent rented the house in question to such tenants as applied, and, among others who occupied the house for a part of the period for which damages were awarded, were persons who used the house for disreputable purposes. It is not claimed that the house was let for the purpose of being used as a house of prostitution; and, while there is some evidence tending to show that the plaintiff's agent had notice that in some cases the house was so used, and that he renewed leases after such notice, there is an entire absence of any evidence that the agent in any way affirmatively aided, abetted, or countenanced such use, or that the rent was fixed with any reference thereto. The locality seems to have steadily deteriorated in the character of its inhabitants since the construction of the railway.

The defendants' counsel requested the trial judge to find that the plaintiff's house was used as a house of prostitution to the knowledge of the plaintiff's agent, and also that, for the purposes for which it was used, the acts of the defendants had caused no diminution in the rental value. The court refused these requests as irrelevant, and an exception was taken. Exceptions to the refusal to find these facts present the only questions upon which the defendants rely for a reversal of the judgment.

The principle that courts will not lend their aid to enforce any claim repugnant to

justice, or bottomed upon an illegal transaction, or give relief contrary to good morals or public policy, is familiar, and is founded upon the most obvious policy. The rule is most frequently invoked in cases on contract. Where a party seeks to enforce a contract obligation the consideration of which is illegal, or which provides for the performance of an illegal or criminal act, the case is plain.

There is a class of cases, however, where the contract sued upon appears to have some relation to an illegal transaction, or in a sense to spring out of it, where the courts have had difficulty in determining whether the contract fell within the principle. The sale of smuggled goods, or the sale of goods which the vendor knew were purchased to be smuggled, doing nothing to aid or in furtherance of the illegal purpose beyond the bare act of sale, are exceptions.

The general doctrine in these and like cases was very exhaustively considered in the opinions on the argument and reargument in *Tracy v. Talmage*, 14 N. Y. 162, 210. In the present case the plaintiff is not seeking to enforce an illegal contract, nor, indeed, any contract at all. His claim is based upon a trespass, whereby he has been prevented from receiving rents from his house which he would have received except for the unauthorized use of the street by the defendants, and to restrain the further continuance of the trespass, except on condition of compensation being made for the injury to the inheritance. The fact that the house had been used as a house of prostitution did not enter as an element into the award of damages, nor could that fact be properly considered. If the plaintiff had sought to enhance the damages on the ground that the rental value of the house as a house of prostitution had been depreciated by the construction of the railway, and the award had been based upon that consideration, the defendants would have had just ground of complaint. If the fact had been found that the acts of the defendants did not diminish the rental value of the house as a house of prostitution, it would not show or tend to show that the plaintiff had not been injured in the amount awarded by the court. The testimony showed that the railway had diminished, by the amount awarded, the rents which would have been realized for the ordinary use of the property. We are of opinion that the requests to find were properly refused. They were based upon a misapprehension of the doctrine that courts will not enforce immoral or illegal claims. The particular use of the house had nothing to do with the injury suffered by the plaintiff, but the injury was wholly independent of such use. The occupation of the house as a house of prostitution was no justification of the injury of which the plaintiff complains. The plaintiff is not seeking to enforce any claim founded upon such occupation. The judgment neither sanctions nor encourages such use. It awards damages which the plaintiff has sustained, however the house may have been occupied. The case of *Ely v. Niagara County Supra.*, 36 N. Y. 297, is quite analo-

gous. It was there held that it was no defense to the liability of a county for the destruction of the plaintiff's house by a mob that the house was kept by her as a bawdy-house, and a resort for thieves and criminals.

The findings requested were irrelevant, and the judgment should therefore be affirmed.

All concur.

Re Application for Ancillary Administration upon ESTATE OF James D. PROUT, Deceased.

(....N. Y.....)

A bond for double the value of the personal estate in the State, as in the case of principal administration, may be required under Code Civ. Proc., § 2699, on granting ancillary administration, where the security already given in the place of principal administration is insufficient, although that section provides that the bond may in the discretion of the surrogate be in such a sum "not exceeding twice the amount which appears to be due from the decedent to residents of the State" as will secure resident creditors. The section is intended to allow, but not to require, a smaller bond than in ordinary cases.

(June 2, 1891.)

A PPEAL by Hannah M. Prout from an order of the General Term of the Supreme Court, Second Department, affirming an order of the Surrogate for Kings County, requiring her to give a bond in twice the amount of the full value of the personal estate of James D.

Prout, deceased, situated in New York State, as a condition of his granting her ancillary letters of administration upon such estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. William J. Groo*, for appellant:

On granting ancillary letters of administration the surrogate cannot require a bond exceeding twice the amount which appears to be due creditors in this State.

Re Mugrave, 5 Dem. 427; *Moyer v. Weil*, 1 Dem. 71; *Evans v. Schoonmaker*, 2 Dem. 249; *McEvoy's Estate*, 8 Law Bull. 81; *Lynes v. Ooley*, 1 Redf. 405, 14 Abb. Pr. 461.

Mr. G. H. Crawford for respondent.

Andrews, J., delivered the opinion of the court:

The question turns upon the power of the surrogate to require an administrator's bond in double of the value of the personal estate, in this State, of James D. Prout, who, at the time of his death, was a resident of New Jersey, as a condition to the grant of ancillary administration. The personal estate of the decedent, at the time of his death, consisted of personal effects of the value of about \$2,500, in New Jersey, and of stocks and securities of the value of about \$40,000, deposited with a safe deposit company in the City of Brooklyn. On the first day of August, 1889, letters of administration were issued by the Probate Court of New Jersey to the widow of the decedent upon her petition setting forth that the personal estate of the decedent in that State did not exceed the

NOTE.—Code provisions as to letters testamentary.

The New York Code of Civil Procedure, § 2699, relating to the grant of ancillary letters testamentary or of administration, authorizes a surrogate, upon the issuance of such letters, to fix the penalty of the official bond in his discretion, except that he cannot require any larger penalty than twice the amount which appears to be due to resident creditors. *Evans v. Schoonmaker*, 2 Dem. 249.

The Code requires that an administrator with the will annexed shall give security (§ 2645). It also gives to any person interested in the estate the right to insist that the bond given shall be in the full amount required by law, and with sufficient securities, and not only in an amount large enough to secure the separate interest of such person (§ 2697). *Re Weeks' Estate*, 1 N. Y. Civ. Proc. 166.

Although Code Civ. Proc., §§ 2645, 2697, literally require an administrator with the will annexed to give a bond in a penalty "not less than twice the value of the personal property of which the decedent died possessed," etc., yet, where he is also an administrator *de bonis non*, those provisions are to be construed as fixing the minimum penalty of his bond at the value of the property left unadministered. *Sutton v. Weeks*, 5 Redf. 353.

Section 2697 confers upon the surrogate no authority to accept less security than double the value of the personal property of the deceased, exclusive of such claim, or to issue letters limiting in any way the administrator's authority over that property. *Re Malloy*, 1 Dem. 421.)

Origin of the law requiring administration bonds.

The English Statute (21 Henry VIII. chap. 5, § 8; 22 & 23 Car. II. chap. 10, § 1), requiring bond to be given to the ordinary upon committing administration of the goods of any person dying intestate, is 18 L. R. A.

Incorporated into the statutes of every State in the Union. 1 Woerner, Administration, § 249.

The law in the several States is uniform on this point, requiring the administrator, whether with the will annexed, *de bonis non*, temporary or permanent, to give bond, with two or more sufficient securities, in a sum at least double the value of such personal property as may come into his possession belonging to the estate of the decedent; with the exception of Louisiana, where the minimum is fixed at "one fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory exclusive of bad debts" (Civ. Code, art. 1048), and Mississippi, where it must equal the value of the personal estate at least. *Miss. Code* 1880, § 1995.

In Pennsylvania, an administration where no bond is given is by statute declared void (Act March 15, 1832, § 27), and there, as well as in South Carolina, the register or ordinary neglecting to take the administration bond is liable for all damages; and although the damages do not appear to result from the neglect, yet the law will presume so. *Boggs v. Hamilton*, 2 Mill. (S. C.) 381. See 1 Woerner, Administration, § 249.

Statutory regulation of the subject.

In most of the American States statutory provision exists by virtue of which a testator may relieve his administrator or executor from the necessity of giving a bond by incorporating words to that effect in some recital of the will, and his wishes in this regard will be respected, unless it satisfactorily appears that there is danger of a fraudulent misappropriation or waste of the decedent's property, in which case the court will interfere and direct the execution of an appropriate bond. This rule is enforced in the following States: Alabama (Code 1886, §§ 2024, 2025); California (Code Civ. Proc. §§ 1368, 1366);

sum of \$2,500. The administratrix, on the granting of the letters, executed her bond with sureties in the penal sum of \$5,000 to the surrogate of Monmouth County, New Jersey, where the decedent resided, conditioned to account for the personal estate of the intestate "in the State of New Jersey," which has or shall come to her hands. The petitioner did not disclose in her petition the fact that there was any other personal estate of the decedent beyond what was in his actual possession in that State at his decease. On the first day of April, 1890, the widow, who with her infant child had become a resident of Brooklyn, applied to the surrogate of Kings County by petition, for ancillary letters of administration, the petition setting forth, among other things, the granting of the letters in New Jersey, and that the decedent left personal estate in Kings County of the value of about \$40,000, and that one Moses P. Prout, of Brooklyn, is or claims to be a creditor of the decedent, and that there was no other person claiming to be creditor known to the petitioner. The surrogate thereupon issued a citation to creditors of the decedent, and on the hearing Moses P. Prout presented affidavits to the effect that the decedent was indebted to him in the sum of \$7,371.73, with interest; that the decedent, at his death, was the owner of securities to the amount above mentioned, deposited in a safe deposit company in Brooklyn; that the only security given by the administratrix was the bond of \$5,000, and that she had no pecuniary responsibility apart from her in-

terest as widow in the estate of the decedent. The surrogate made an order that ancillary letters be granted to the widow, on condition that she should give a bond, with sureties, to be approved by the surrogate, in a penalty of double the value of that part of the personal estate of which the deceased died possessed, which at his death was within the County of Kings.

The administratrix appeals from the order on the ground that the surrogate had no power to require a bond upon the application for ancillary letters, in a penalty exceeding twice the amount of the debts owing by the intestate to creditors within the State. This question depends upon the true construction of section 2699 of the Code of Civil Procedure. That section is as follows:

"Upon the return of the citation the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed to be due, from the decedent to residents of the State. Before ancillary letters are issued the person to whom they are awarded must qualify, as prescribed in article fourth of this title for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the State, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive from the persons to whom the letters are issued, upon

Colorado (Gen. Laws 1883, § 3519); Connecticut (Gen. Stat. 1883, § 548; double the amount of debts); Illinois (Rev. Stat. 1885, p. 195, § 7); Kansas (Dassler's Stat. 1885, chap. 37, § 3, 4); Kentucky (Gen. Stat. 1887, p. 697, § 4); Maine (Rev. Stat. 1883, chap. 64, § 9); Mississippi (Rev. Code 1880, § 1982); Missouri (since November 1, 1879) (Rev. Stat. 1879, § 12); Nevada (Comp. Laws 1873, §§ 553, 559); Ohio (Rev. Stat. 1880, §§ 5993, 5997); Oregon (Code 1887, § 1068); Rhode Island (Pub. Stat. 1882, chap. 184, § 14); Tennessee (Code 1884, §§ 3063, 3066); Texas (Rev. Stat. 1886, art. 1890, 1893); Vermont (Felton v. Sowles, 57 Vt. 382); Virginia (Code 1887, § 2642); West Virginia (Kelley's Rev. Stat. 1878, chap. 146, § 7), and Wisconsin, Rev. Stat. 1878, §§ 3794, 3795.

In England, and in several of the American States, the bond is dispensed with. Illustrations of this rule are found in the statutes of the following States: Florida (Dig. 1881, p. 79, § 11, p. 80, § 12); Georgia (Code 1882, § 2447); Louisiana (Civ. Code, art. 1877); New York (Code Civ. Proc. § 2638; Demarest's Estate, 1 N. Y. Civ. Proc. Rep. 302); North Carolina (Rev. Code 1883, § 1515); Pennsylvania (Brightly's Purd. Dig. 1883, p. 510, § 21, p. 511, § 28), and South Carolina, Rev. Stat. 1873, p. 448 et seq.

In every case, when a complaint is made to a surrogate that the circumstances of a person appointed executor are so "precarious" as not to afford adequate security for his due administration of the estate (2 Rev. Stat. 72, § 18), it must depend upon its own peculiar features and circumstances, of which the surrogate is the appropriate judge. *Shields v. Shields*, 60 Barb. 57.

Nor has an administrator appointed in another State any authority here; but it seems that a voluntary payment to an administrator so appointed would protect the party. *Williams v. Storrs*, 6 Johns. Ch. 363, 2 L. ed. 148.

18 L. R. A.

The power conferred by law upon executors and administrators cannot accompany their persons beyond the bounds of the sovereignty which has conferred it. *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 622.

Each of the sureties in the official bond of an administrator, etc., must be worth at least the penalty of the bond over all debts, liabilities and property exempt from execution. Where such a surety has become insufficient, since qualification, the surrogate's court may require a new or additional surety. *Sutton v. Weeks*, 5 Redf. 353.

Each administrator accounts for the property in his hands, before the tribunals of the State or sovereignty from which his authority emanates. *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 639; 2 Kent, Com. 431; *Story*, Conf. L. § 518; *Banta v. Moore*, 15 N. J. Eq. 97.

There can be no propriety in requiring security to be given in the State of the intestate's domicile for funds, to which the administrator, by virtue of the grant of administration in one State, has no title, for the due administration of which he has already given security in a foreign jurisdiction, and over which the tribunals of another sovereignty exercise legitimate control. *Lewis v. Grognaard*, 17 N. J. Eq. 425.

Whether the executor's pecuniary responsibility, his habits and business, and other facts bearing upon the permanence and certainty of his circumstances, all considered, render the funds safe in his hands, is the main point to be ascertained. *Cotterell v. Brock*, 1 Bradf. 152.

The question for the surrogate is: Is it safe to put this estate in the hands of the person named as executor? Can he be trusted to administer it faithfully and honestly, as directed by the will? *Martin v. Duke*, 5 Redf. 600. See note to *Williams v. Storrs*, 6 Johns. Ch. 363, 2 L. ed. 148.

an accounting and distribution, either within the State or within the jurisdiction where the principal letters were issued."

If the surrogate had power to impose, as a condition to the granting of letters ancillary, that the administratrix should give a bond to secure the whole fund which might come to her hands by virtue of such letters, the imposition of the condition was a discreet exercise of such power. The general rule in this and other States requires that the administrator should give security in double the value of the personal estate of an intestate before assuming the administration. The actual location of the personal estate, or of the securities by which it is represented, is not, under our statute, material in determining the amount of the bond in a case of purely domestic administration, for the rule that personal property is deemed to follow the person of the owner fixes the legal possession in the intestate at his place of residence—wherever, in fact, the property may be. Where the administrator has properly qualified and assumed the administration in the State of the domicile, he is invested with power to receive the debts owing to the intestate, and take possession of the securities, and give proper acquittances wherever the debtors or securities may be, whether within or without the State.

But where a debtor or the securities are in a foreign jurisdiction, and are not voluntarily paid or surrendered to the administrator of the place of the domicile of the intestate, the courts of the foreign jurisdiction will not enforce the recovery of the debts or securities, upon his application, until he has procured ancillary letters or a new administrator has been authorized under the laws of the place where assets may be. It is unnecessary to enter into the reasons of this rule. They are familiar and the rule has been frequently recognized. See *Parsons v. Lyman*, 20 N. Y. 108; *Despard v. Churchill*, 58 N. Y. 192; *Re Hughes*, 95 N. Y. 55.

The unquestioned rule of the common law that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile, makes security there taken on the granting of letters of administration covering the whole personal estate of the intestate an adequate protection to all parties interested, and where ancillary letters are applied for in another State or jurisdiction there would not seem to be any necessity that additional security should be required were it not for another principle almost universally recognized, that the claims of creditors living in a jurisdiction where ancillary letters are sought, are entitled to have their just rights in the assets of the intestate secured by a proper bond as a condition of granting the application. To this end security is usually required to be given by the applicant for ancillary administration enforceable in the tribunals of the place for the protection of creditors therein residing. The course of legislation in this State upon the subject of ancillary administration and the security required may be briefly stated. The Revised Statutes enacted that "every person appointed administrator" should give a bond

in a penalty not less than twice the value of the personal estate of which the deceased died possessed. Provision was made for granting letters on the application of foreign executors or administrators where persons not inhabitants of this State shall die leaving assets here (§ 31). There was no provision exempting persons applying for ancillary letters, from the operation of the general rule declared in section 42, and it would seem that they, as well as domestic administrators, were required to give a bond in a penalty twice the value of the property upon which administration was sought. Section 2699, of the Code of Civil Procedure undertook to define the practice on the application for ancillary administration, which was left much at large under the Revised Statutes. In construing the section the various conditions to be provided for may justly be considered. There might be domestic creditors entitled to protection. The assets in this State might be less or more than sufficient to provide for the rights of citizens here. Or, again, there might be no creditors. Ancillary letters may become necessary to enable the administrator or executor to recover assets by hostile proceedings out of the jurisdiction where the principal letters were issued. It is contended on the part of the appellant that on an application for ancillary letters under section 2699 no security can be required in any case exceeding twice the amount of claims of domestic creditors, and that the discretion of the surrogate is only to be exercised within this limit. It is evident that this construction would, in the present case, defeat the general policy which requires an administrator to give adequate security for the whole estate which may come to his hands. The security given in New Jersey was limited to the sum of \$5,000, double the value of the personal estate of the intestate in his actual possession there, taking no account of the much larger amount in this State, and this course seems to have the sanction of the New Jersey courts. *Lewis v. Grogard*, 17 N. J. Eq. 425.

The contention of the appellant, if sustained, would enable the administratrix to take into her possession \$40,000, in securities belonging to the estate, without any security except a bond not exceeding double the amount of the debt of \$7,805, alleged to be due to Moses P. Prout. It may be then that the primary purpose of section 2699 was the protection of domestic creditors. The citation is required to be issued to creditors only (§ 2698). The Legislature may have assumed that proper and adequate general security would be exacted by the law of the place of the principal administration. But, although the language of section 2699 is vague, we think it is capable of a construction which will subserve the general policy of the law. The Legislature in this section first declares a general rule, that before ancillary letters are issued, the person to whom they are awarded must qualify as provided in the fourth article of the title for the qualification of an administrator upon the estate of an intestate. Referring to the fourth title, it is found that section 2667

prescribes as one of the acts to be done by an administrator, to qualify him for the office, that he shall execute a bond in a penalty not less than twice the value of the personal property of which the intestate died possessed, subject to certain exceptions, one of which is that with the consent of all the next of kin of the intestate, the bond may, upon notice being given to creditors, be limited to twice the amount of their debts. The exception in section 2699 was, we think, intended to give the surrogate a discretion to modify the general rule declared in the preceding clause, and to accept a bond less in amount than that prescribed in ordinary cases of administration, if by reason of adequate security having already been given, additional security for the protection of the general interests was not, in his judgment,

required, or where the next of kin had consented to waive security, and in a case of domestic creditors, where their protection was the only interest involved, to prescribe a limit, beyond which security should not be exacted.

It is somewhat difficult to so construe the language. But the solicitude with which courts guard the rights of infants and persons standing in the relation of beneficiaries of trusts, and the uniform policy in respect of security required of administrators, justify the court in going to the verge of construction in order to protect parties so situated, and to carry out the general policy of the law.

We think the order should be affirmed.
All concur.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Pff.*
in Err.,

v.

COMMONWEALTH OF VIRGINIA.

(....Va....)

A state statute prohibiting freight trains running on Sunday between sunrise and sunset except with livestock or perishable freight, or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce so far as it applies to interstate freight trains.

(*Lacy, J., dissents.*)

(June 25, 1891.)

ERROR to the Circuit Court for Pulaski County to review a judgment affirming a judgment of the County Court imposing upon

defendant a fine for an alleged violation of the Sunday Laws. *Reversed.*

Statement by **Lewis, P.:**

Error to judgment of the Circuit Court of Pulaski County, rendered March 25, 1891, affirming a judgment of the County Court of that county against the Norfolk & Western Railroad Company in a prosecution for a misdemeanor. The indictment was for running a train of cars on Sunday, contrary to the Act of March 19, 1884, now carried into section 8801 of the Code. That Act forbids the running of trains between sunrise and sunset on a Sunday, except such as are used exclusively for the relief of wrecked or disabled trains, or for the transportation of the United States mails, passengers, live-

NOTE.—State law cannot regulate interstate commerce.

Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

It was said in *Henderson v. New York*, *supra*, to "be clear from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Marshall, *Ch. J.*, in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

As illustrating how far the Supreme Court of the United States has gone in defining "commerce between the States" as used in the constitutional provision on that subject, see *The "Daniel Ball" v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547. See also *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

A question to be determined is this, Does transportation upon a railroad passing through more States than one, or from a point in one State to a point in another, constitute commerce; and, if so, is it commerce between the States? That such trans-

portation is commerce, and commerce between the States, has been uniformly held both by the Supreme Court of the United States and by the supreme courts of a number of the States. *State Freight Tax Cases*, 82 U. S. 15 Wall. 231, 21 L. ed. 163; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Western U. Teleg. Co. v. Texas*, 105 U. S. 464, 26 L. ed. 1068; *Head Money Cases*, 112 U. S. 591, 23 L. ed. 801; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 29 L. ed. 161; *Stone v. Farmers L. & T. Co.*, 116 U. S. 383, 39 L. ed. 645; *Pickard v. Pullman S. Car Co.*, 117 U. S. 43, 29 L. ed. 798.

Any regulation by a State of the charges for the transportation of goods from one State to another is a regulation of interstate commerce, and a violation of the Federal Constitution. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 592, and note; *State v. Chicago & N. W. R. Co.*, 70 Iowa, 162.

A statute prohibiting corporations engaged in transporting goods or passengers between different States from limiting their liability as common carriers by contract is not a regulation of commerce among the States. *Hart v. Chicago & N. W. R. Co.*, 69 Iowa, 485.

For further annotation upon this subject, see notes appended to the following cases. *State v. Wiggin* (N. H.) 1 L. R. A. 56; *People v. Budd* (N. Y.) 5 L. R. A. 559; *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754; *State v. Winters* (Kan.) 10 L. R. A. 616.

stock, or articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage. Section 5258, Rev. Stat. U. S., however (not noted in the indictment), makes every railroad in the country, operated by steam, an agency of commerce for the transportation, among other things, of "freights on their way from one State to another State." There was a motion to quash the indictment, on the ground that it was not sufficiently certain,—that is to say, that, even admitting the charge in the indictment to be true, the defendant was not necessarily guilty of any offense under the laws of the land; which motion was overruled, whereupon the defendant pleaded not guilty. The facts were argued at the trial, and are as follows: That on Sunday, the 21st day of September, 1890, the defendant, by its agents and employes, ran over the New River Division of its Road, in Pulaski County, after 9 o'clock in the morning, and before sunset, a train of cars loaded with coal and coke, which was being transported from Bluefield, a station on defendant's road, in the State of West Virginia, into and through Virginia, and that said train was being run only for the transportation of said coal and coke. The defendant demurred to the evidence, whereupon the jury conditionally assessed the fine of \$50. The county court overruled the demurrer, and rendered a judgment for the fine assessed, which judgment was afterwards affirmed by the circuit court.

Messrs. Phlegar & Johnson and Brown & Moore for plaintiff in error.

Mr. R. Taylor Scott, Atty-Gen., for the Commonwealth.

Lewis, P., delivered the opinion of the court.

The defendant's contention on the merits in the trial court, and here, is that the Statute upon which the indictment was founded is, so far as it applies to a case like the present, repugnant to the Constitution of the United States, which gives to Congress the power to regulate commerce among the several States. The precise propositions contended for on this point are: (1) That the Act of Transportation mentioned in the proceedings was commerce between the States; (2) that such commerce is, as to all matters that admit of uniformity of regulation, subject only to congressional regulation; (3) that section 3801 of the Code is a regulation of commerce; and (4) that, as such, it cannot be applied to interstate commerce, or to the train in question. It is an historical fact, well known, that to secure uniformity and freedom in commercial intercourse, and, with that view, to establish a single government empowered to regulate commerce, was the chief consideration that led to the formation and adoption of the Federal Constitution. Accordingly, that instrument ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. 1, § 8. The power thus conferred, as the Supreme Court of the United

States has repeatedly decided, is complete and exclusive. It is the unlimited power, in other words, to prescribe rules by which commerce shall be governed, and to determine how far it shall be free and untrammelled. Any attempt, therefore, by a State to regulate foreign or interstate commerce is the attempted exercise of a power which has been surrendered by the States, and granted exclusively to the national government. It is an attempt to do that which Congress alone is authorized to do, and hence is a nullity. As was said in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. "Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." And in a subsequent part of the same opinion it was said that transportation is not only essential to commerce, but that it is commerce itself, and that every obstacle to it, or burden laid upon it, by legislative authority is regulation. See also *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391.

"It cannot be too strongly insisted upon," said the court in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, "that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints which the States might choose to impose upon it that the commerce clause of the Constitution was intended to secure; and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of the transportation must be done could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." And in a still more recent case it was remarked that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694. There is, indeed, what has been termed a kind of neutral ground which may be constitutionally occupied by the State, so long as it interferes with no Act of Congress. Thus, where the subject is local in its nature or sphere of operation, such as the establishment of highways, the construction of bridges over navigable streams, the regulation of harbor pilotage, the erection of wharves, piers and docks, in these and other like cases, which are considered as mere aids rather than regulations of commerce, the State may act until Congress supersedes its authority, but where the subject is national in its character, admitting

of uniformity of regulation, such as the transportation and exchange of commodities between the States, Congress alone can act upon it. The case of *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996, is sometimes cited as an authority to the contrary; that is, for the proposition that, in the absence of congressional action, a State may regulate interstate commerce within its own territorial limits. But this statement is broader than the decision justifies; for it was expressly said in that case that "whatever subjects of this power are in their nature national, or admit of only one uniform system or plan of regulation, may be justly said to be of such a nature as to require exclusive legislation by Congress." And in the very recent case of *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 128, known as the "*Original Package Case*," where the subject is fully considered, Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language: "The power to regulate commerce among the States is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government." But these powers, it was said, "though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power." And in the same case the principle was again announced, as it had often been before, that the transportation of passengers or of merchandise from one State to another is in its nature not local, but national, and therefore admitted of but one regulating power.

These authorities, which are only a few of many that might be cited to the same effect, are sufficient to show the invalidity of legislation by the States in regard to subjects of commerce which are in their nature national, no matter what may be the avowed object of such legislation, and that nothing is gained by calling it the "police power." The subject was elaborately discussed, and with his accustomed force, by Mr. Justice Miller, in *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543, where it was declared that, however difficult it may often be to distinguish between one class of legislation and another, it is clear, from our complex form of govern-

ment, that whenever the statute of a State invades the domain of legislation which belongs exclusively to Congress it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States. In *Hannibal & St. J. R. Co. v. Husen*, *supra*, it was said: "We admit that the deposit in Congress of the power to regulate foreign commerce, and commerce among the States, was not a surrender of that which may properly be denominated 'police power.' What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. . . . But whatever may be the nature and reach of that power," it was added, "it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government." Nor does it matter, in such a case, that Congress has not acted; for it is now settled that the silence of Congress is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. "Hence," as was decided in *Leisy v. Hardin*, following many previous decisions, "inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." In *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, the court in an opinion by Mr. Justice Lamar, said: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transaction, it is subject to the regulation of Congress." It is also a well-established principle that an article of commerce transported from one State to another is protected by the Constitution against interfering state legislation until it has mingled with, and become a part of, the common mass of property within the latter State; and, if this be so, *a fortiori* is it protected while *in transitu*. *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Wellton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 128. Tested by these principles, which are axiomatic, it is clear that the judgment complained of is erroneous.

That the transportation of the coal and coke mentioned in the proceedings was an act of

commerce, national in its character, is too plain to admit of doubt; and it is equally clear that the legislation in question, in so far as it extends to a case like the present, is unwarranted and void. A Statute which forbids the running of interstate freight trains between sunrise and sunset on a Sunday is, by its necessary operation, no matter what its professed object may be, a regulation of commerce. At all events, it is an obstruction to interstate commerce, which, for the purposes of the present case, amounts to the same thing, for, in any view, it is an invasion of the exclusive domain of Congress, and therefore void. To say that the State may, in the exercise of her police powers, enforce by statute the observance of the Sabbath, not as a religious duty, but as a day of rest, is no answer to the constitutional objection here raised. The validity of such legislation, when not in conflict with a higher law, is acknowledged by all, and its wisdom and propriety denied by none, certainly not by this court. But when, in a case like the present, it contravenes the Constitution of the United States, the latter must prevail, because it is "the supreme law" in all matters relating to the regulation of interstate commerce. Such a statute, if passed by Congress, so far as it concerns foreign or interstate commerce, would be valid, not, however, as the exercise of police power, but as a regulation of commerce; and the reason which would make such legislation valid as an Act of Congress makes it invalid as an Act of a State Legislature. As to the effect of the Statute in question, if sustained, upon the commercial interests of the country, we need not stop to inquire. It is enough to say that, to the extent indicated, it is not valid. In *Henderson v. New York*, *supra*, it was decided that, whatever may be the nature and extent of the police power of the State, "no definition of it and no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confined exclusively to the discretion of Congress by the Constitution." This principle was reaffirmed in *Leisy v. Hardin*, where it is said that such a subject matter is not within the police power of a State, unless placed there by congressional action; and the observations of Mr. Justice Matthews in *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. ed. 700, were quoted in the opinion, to the effect that, in view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States. The fact, if it be a fact, that the statute in question was not intended as a regulation of commerce, does not, we repeat, affect the case. There may be no purpose, it has been held, upon the part of a Legislature, to violate the Constitution, and yet a statute, enacted under the forms of law, may, by its necessary operation, injuriously affect rights secured by the Constitution, in which case the statute, to that extent, must be declared void. *Drimmer v. Reiman*, 188 U. S.

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78, 84 L. ed. 862. This is merely stating in different form the proposition affirmed in the *Henderson Case*, namely, that, in whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect,—a proposition that would seem to be incontrovertible. In the last-mentioned case, a statute of New York which required the master or owner of every vessel landing passengers at the Port of New York from a foreign country to give a bond in a prescribed penalty for each passenger so landed, as an indemnity against any expense to be incurred by the State or city for the support of such passengers, was held void, as being a regulation of commerce, although it was sought to be sustained as a police regulation to protect the State against the influx of paupers; the practical result of the statute being to impose a burden upon all passengers so landed from a foreign country. So, in the case of *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, a similar statute of California, intended to prevent the introduction of lewd women into that State, was held void, as going beyond the necessity of the case, and amounting, in its practical operation, to a regulation of foreign commerce. Upon the same principle, statutes prohibiting the introduction of intoxicating liquors into the State enacting them have been held to be infringements of the commerce clause of the Constitution, and not valid police regulations to guard against the evils of intemperance. And numerous illustrations of the same principles are to be found in the adjudged cases, all of which show that when, in the attempted exercise of the police power, no matter upon what grounds it is sought to be exercised, the action of a State comes in conflict with a power vested exclusively by Constitution in Congress, such attempt is a nullity; and the present case comes within this principle.

The power of the State to enforce observance of the Sabbath as a police regulation stands upon no higher footing than her power to guard against the evils of vice or intemperance, or of imported pauperism, or infectious diseases. In either case the nature and extent of the power is exactly the same, and there is no principle for holding otherwise. Our attention has been called, in this connection, to *State v. Baltimore & O. R. Co.*, 24 W. Va. 783, wherein a "Sunday Law," so called, similar to the one we are considering, was upheld, under circumstances resembling those of the present case. The court in that case admitted that the transportation between the States is commerce between the States, and that such commerce is necessarily under the exclusive control of Congress; but it denied that non-action by Congress is equivalent to a declaration that such commerce shall be free and untrammelled, and upon that ground sustained the statute *in toto*. As to the last proposition, we have already shown by the cases referred to—some of them decided since that case was decided—that the rule is otherwise, and, after a careful examination of the case, we find nothing in it to raise a doubt that the rule has been rightly settled.

The judgment must therefore be reversed, and the defendant discharged from further prosecution under this indictment, which ought to have been quashed.

Lacy, J., dissenting:

This is a writ of error to a judgment of the Circuit Court of Pulaski County, rendered at the March Term, 1891, when the circuit court affirmed the judgment of the county court, rendered at the February Term, 1891, of said county court, where the plaintiff in error was convicted for a violation of the Sunday Laws of this Commonwealth, and adjudged to pay a fine of \$50. It is admitted that the said plaintiff in error openly violated the law of the State, upon the ground that it is in violation of the Constitution of the United States, because it is an interference by the State with the subject of commerce among the States; that the Constitution of the United States provides (art. 1, § 8) that the Congress shall have power to regulate commerce with foreign nations, and among the States, and with the Indian tribes. Our Code provides that "if a person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit \$2 for each offense. Every day any servant or apprentice is so employed shall constitute a distinct offense." Code Va. § 3799. This plaintiff in error is a domestic corporation, domiciled within the State of Virginia, holding its chartered rights under the grant of the State, whose charter, by its express terms, provides that it may be altered, modified or repealed by any future Legislature as may think proper. Id. § 1240. The absolute prohibition against laboring at its calling being, in the legislative mind, inexpedient in its application to this or other domestic corporations, the Legislature, in 1884, enacted a statute which modified the general law, and excepted such trains as were loaded with passengers and perishable freight, and which suffer injury by delay, and provided as follows: "No railroad company, receiver, or trustee controlling or operating a railroad shall, by any agent or employé, load, unload, run or transport upon such road on a Sunday any car, train of cars or locomotive, nor permit the same to be done by any such agent or employé, except when such cars, trains or locomotives are used exclusively for the use of wrecked trains, or trains so disabled as to obstruct the main track of the railroad, or for the transportation of the United States mail, or for the transportation of passengers and their baggage, or for the transportation of live-stock, or for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage: provided, however, that, if it should be necessary to transport live-stock or perishable articles on a Sunday to an extent not sufficient to make a whole train-load, such train-load may be made up with cars loaded with ordinary freight." Section 8803 provides that "the word 'Sunday,' in the preceding section, shall be con-

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strued to embrace only that portion of the day between sunrise and sunset; and trains *in transitu* having started prior to twelve o'clock on Saturday night may, in order to reach the terminus or shops of the railroad, run until nine o'clock the following Sunday morning, but not later." Section 8803 provides the penalty, which is immaterial in this case; the fine assessed not being in violation thereof. These sections constitute our Sunday Laws, not very stringent, it must be admitted, as far as railroads are concerned; its extreme liberality in the privileges to labor on the Sabbath accorded therein suggesting the thought that, when the law was drawn, the railroads in some form stood by consenting; but how this is I have no information. However that may be, the law is now obnoxious to the railroad in question, and in some localities the lower courts have refused to enforce the law.

The question now to be inquired into is, What is the nature of this law? Is it an Act to regulate commerce with foreign nations, or among the States, or with the Indian tribes? And does it thus invade the granted powers of the Congress, under the Constitution of the United States, and conflict with them? If so, it cannot be upheld. It certainly was not so intended. Nothing is said about commerce nor about transportation between the States. It is absolutely limited in its operation to the State of Virginia. It is to be found in the chapter of our Code entitled "Of Offenses against Morality or Decency: Protection of Religious Meetings." The section which precedes it is entitled "Profane Swearing and Drunkenness, how Punished." The section which succeeds it is entitled "Sale of Intoxicating Liquors on Sunday, how Punished." The next is, "Disturbance of Religious Worship, how Punished." It is intended as an exercise of the police power of the State, in the interest of morality and decency, and that is what I think it is. It is no part of the province of Congress, under its granted powers, to enact police laws for the regulation of such affairs within a State; and if this State may not enact, for the protection of its citizens, police laws for the observance of the Sabbath day, we must ever remain practically without such. I think I am sustained in this view by the decision of the courts of this country, both state and federal; and I will briefly proceed to consider this. Commerce consists of the various agreements which have for their object facilitating the exchange of the products of the earth, or the industry of man, with the intent to realize a profit. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation of persons and property, as well as the purchase, sale and exchange of commodities. The power conferred upon the Congress by the above clause is exclusive, so far as it relates to matters within its purview which are material in their character, and admit of a requisite uniformity of regulation affecting all the States. That clause was adopted in order to secure uniformity against discriminating

state legislation. State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys and other improvements of harbors, bays and rivers within a State, if their free navigation be not thereby impaired. Congress, by its inaction in such matters, virtually declares that until it deems best to act they may be controlled by the State. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238 (opinion of Mr. Justice Field). In the case of *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, the same learned justice said: "In supposed support of this position, numerous decisions of this court are cited by counsel to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States." Upon an examination of these cases, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between places was required to be conducted. In all the cases the legislation condemned operates directly upon commerce, either by way of tax upon its business, license upon its pursuits in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, reported in 48 U. S. 7 How. 445, 12 L. ed. 770, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In *Pennsylvania v. Wheeling & B. Bridge Co.*, reported in 54 U. S. 13 How. 518, 14 L. ed. 249, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. And in all the other cases, when legislation of a State has been held to be null for interfering with the commercial power of Congress,—as in *Brown v. Maryland*, 25 U. S. 12 Wheat. 425, 6 L. ed. 680; *Tax Cases*, 79 U. S. 12 Wall. 204, 20 L. ed. 370; and in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347,—the legislation created in the way of tax, license or condition a direct burden upon commerce, or in some way directly interfered with its freedom; and it may be said generally that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land, or engaged in commerce, foreign or interstate, or in any other pursuit. Judge Cooley says, in his work on Constitutional Limitations (p. 722): "The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is sometimes dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to

go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions the exercise of state power is excluded.

Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations that are made by Congress do not often exclude the establishment of others by the State covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." In the late case of *Cordwell v. American R. Bridge Co.*, 118 U. S. 205, 28 L. ed. 959, after citing the earlier cases, the court said that they illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until Congress interferes and supersedes their action. I will cite as an illustration of my view of this subject yet another decision of the Supreme Court of the United States upon this subject, which applies to a through line of railway, and is much in point. In the case of *Stone v. Farmers L. & T. Co.* 116 U. S. 307, 29 L. ed. 686 (one of the *Railroad Commission Cases*), that court said: "There can be no doubt that each of the States through which the Mobile & Ohio R. R. passes incorporated the Company for the purpose of securing the construction of a continuous line of interstate communication between the Gulf of Mexico, in the south, and the Great Lakes, in the north. It is equally certain that Congress aided in the construction of parts of this line of road, so as to establish such a route of travel and transportation; but it is none the less true that the corporation created by each State is, for the purposes of local government, a domestic corporation, and that its railroad within the State is a matter of domestic concern. Mississippi may govern this corporation as it does all domestic corporations, in respect to every act, and everything within the State which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision of this court, regulate freights and fares for business done exclusively within the State; and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.

So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence, etc., as much of its road as lies within the State, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to put its tariffs and time-tables at proper places, etc. This company is not entirely relieved from state control in Mississippi, simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the State as well as within." See also *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Chicago & A. R. Co. v. People*, 105 Ill. 657; *Rae v. Grand Trunk R. Co.* 14 Fed. Rep. 401; *Iowa v. Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 391; *Chicago, M. & St. P. R. Co. v. Becker*, 82 Fed. Rep. 849. And as to the right of the State to regulate the charge for taking on through cars—"switching" as it is called—by a state commission it was held to have no reference to interstate commerce, in the case of *Chicago, M. & St. P. R. Co. v. Becker*, *supra*. And again it was held in *State of Iowa v. Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 891, that, even if such switching be an act of interstate commerce, such regulation is valid, as it does not refer to the carriage of freight outside the State. And, again, it was said by the Supreme Court of the United States in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, that the power to prescribe regulations to protect the health of the community, and to prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with interstate commerce. The Interstate Commerce Act itself, passed February 4, 1887, and amended March 2, 1889, when Congress subjected to its control all common carriers engaged in continuous interstate or international transportation of passengers or property, was held not to include the carriage or handling of passengers, by rail or otherwise, when such carriage or handling is performed wholly within a State. *Ex parte Koehler*, 30 Fed. Rep. 867. This is the result of all the decisions of the federal courts. If the Act in question only applies to and operates upon transportation within the State, it is immaterial that the company operated on is part of an interstate line. It must not only affect commerce, but it must affect commerce with foreign nations, or among the States, or with the Indian tribes. But, if the Act is one done in the exercise of a police power, it is within the legitimate and unchallenged do-

main of the State; such as to regulate concerning the public health, public peace and morality and decency.

Now, what is this police power, and where does it reside? It is defined to be the authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, and is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life. The power vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances as they shall judge to be for the good and welfare of the Commonwealth, and for the subjects of the same. The exercise of this power, at least, has been left with the individual States, and cannot be taken from them, and exercised wholly or in part under legislation of Congress. *Cooley, Const. Lim.* 715; *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 598.

Quarantine and health laws of every description, proper regulations for the use of highways, and the general right to control and regulate the public use of navigable waters are unquestionably with the State under the police power. Indeed, the police power of a State, in a comprehensive sense, embraces its whole system of internal regulations by which the State seeks, not only to preserve the public order, and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners which are calculated to prevent a conflict of rights. Judge Cooley says, in the American-constitutional system the power to establish the ordinary regulations of police has been left with the States individually, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress; so decided, as we have seen, in *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 598. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. The State may also, under this power, says the same learned author, regulate the grade of railways, and prescribe how and upon what grade railway tracks may cross each other; and it may apportion the cost of making the necessary crossings between the corporations owning the roads; and it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places when their approach might be dangerous to travel, or to station flightmen at such or any other dangerous places. The Legislature has power by general laws, from time to time, as the public exigencies may require, to regulate corpora-

tions in their franchises so as to provide for the public safety. This is held to be a mere police regulation. *Galena, C. & U. R. Co. v. Loomis*, 18 Ill. 548. But certain powers directly affecting commerce may sometimes be exercised, when the purpose is not to interfere with congressional legislation, but merely to regulate the time and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion. *Vanderbilt v. Adams*, 7 Cow. 351, where Woodworth, J., states very clearly the principles on which police regulations are sustained in such cases.

We have said that the laws to prevent the desecration of the Sabbath came properly under the police power of the State. Judge Cooley says, on this subject, the statute for the punishment of public profanity requires no further justification than the natural impulses of every man who believes in a Supreme Being, and recognizes His right to the reverence of His creatures. The laws against the desecration of the Christian Sabbath by labor or sports are not so readily defensible by arguments, the force of which will be admitted by all. The laws which prohibit ordinary employments are to be defended either on the same ground which justifies the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. Judge Cooley, speaking of those laws enacted to prevent desecration of the Sabbath, says they are not unconstitutional as a restraint upon trade and commerce. There can no longer

be any question, if any there ever was, that such laws may be supported as regulations of police. *Specht v. Com.* 8 Pa. 812; *Bloom v. Richards*, 2 Ohio St. 387; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 190. Upon this subject of the Sabbath day observance, I have found none but state decisions in a great multitude of cited cases. It does not appear to have been ever, so far as my investigation has gone,—which has been somewhat limited, and not thorough,—a matter of decision with the federal courts, so far as the States are concerned. And I believe there is no probability that Congress will ever assume the right to regulate the observance of the Sabbath day in the States. If, however, it should ever do so, I do not doubt that the American Congress will protect the American Sabbath day from unnecessary desecration, by whomsoever it is essayed. Nor do I doubt that, if the Supreme Court of the United States should have this question under consideration, it would hold, as my view is, that the Sunday Laws of this Commonwealth are within the police powers of the State, and, moreover, that they in no wise affect interstate commerce, but, being limited in their operations to the State, whatever effect they have upon the through line of transportation outside of the State, it is no more than is proper, and in no way an interference with the granted power of the Congress. It is to be regretted, as it is a federal question, that it cannot go up to the Supreme Court of the United States, and be settled there. Holding the views I do, I am constrained to dissent from the opinion of the majority.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Mary E. DOZIER

v.

FIDELITY & CASUALTY CO. of New York.

(46 Fed. Rep. 446.)

Sun-stroke or heat prostration is not a bodily injury "sustained through external, violent and accidental means" within the meaning of an insurance policy covering such injuries, but expressly excluding liability for "any disease or bodily infirmity."

(June 8, 1891.)

ACTION to recover the amount alleged to be due on a policy of accident insurance on demurrer to petition. *Demurrer sustained.*

Statement by **Phillips, J.:**

This is an action on an accident insurance policy. The assured, Willoughby L. Dozier, on the 26th day of April, 1890, took out a pol-

icy of insurance in the defendant Company, which, by its terms, would expire on the 26th day of April, 1891. The assurance was "against bodily injuries sustained through external, violent, and accidental means." It did not cover "any disease or bodily infirmity." The insured was, by occupation, a supervising architect. The petition, by his wife, the named beneficiary, alleges that the assured, while in the discharge of his ordinary avocation, and without any voluntary exposure on his part, came to his death on the 28d day of June, 1890, "by sun-stroke or heat prostration." To this petition the defendant demurs, on the ground that petition does not state facts sufficient to constitute a cause of action, in that it shows on its face that the alleged injury was not accidental, within the meaning of the policy.

Messrs. Warner, Dean & Hagerman for defendant in support of the demurrer.

Messrs. Peak, Yeager & Ball, for petitioner, *contra*:

Insanity is not a disease, and one afflicted with insanity was as much the subject of an accident as if he had fallen from the top of a house.

North America Acc. Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740.

NOTE.—For various notes on the subject of accident insurance, see *Union Mut. Acc. Assn. v. Frohard* (Ill.) 10 L. R. A. 388; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685; *Paul v. Travelers Ins. Co.* (N. Y.) 8 L. R. A. 443.

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There are more of the elements of an accidental nature in sun-stroke than in insanity.

An accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency, happening by chance or unexpectedly; taking place not according to the usual course of things; casual, fortuitous."

North American L. & Acc. Ins. Co. v. Burroughs, 69 Pa. 48.

The killing of a person by lightning is an accident.

Hutchcraft v. Travelers Ins. Co. 87 Ky. 300.

A stroke of the sun's heat is as unexpected and as accidental to the party who receives it as a stroke of lightning. As at least throwing some light upon the question, see—

United States Mut. Acc. Assn. v. Barry, 181 U. S. 100, 38 L. ed. 60, 23 Fed. Rep. 712; *McGlinchy v. Fidelity & C. Co.* 80 Me. 251.

Philips, J., delivered the opinion of the court:

The question to be decided is whether or not death resulting from sun-stroke, or heat prostration comes within the means of injury insured against. This precise question does not appear to have been passed upon by any American court, but it is not too much to say, perhaps, that it may be regarded as settled in the negative in England by the opinion of *Chief Justice Cockburn* in *Sinclair v. Maritime Passenger's Assur. Co.*, 3 El. & El. 478. The policy there assured against "any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake." The assured was master of the ship *Sultan*, and in the course of his voyage he arrived in the *Cochin River*, on the southwest coast of India, and in the usual course of his vocation he was smitten by a sun-stroke, from the effect of which he died. On full consideration, it was held that his death must be considered as having resulted from a natural cause, and not from accident, within the meaning of the policy. The policy there did not, as here, contain the words "external, violent," and yet the learned chief justice held that the term "accident," as used in the policy, involved necessarily some violence, casualty, or *vis major*. He says: "We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental, unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship, and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly

be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes. In the present instance, the disease called 'sunstroke,' although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected, and so died."

According to this high authority, a disease produced by a known cause cannot be considered as accidental. This conclusion has been accepted as authoritative by text-writers. *Bliss, Ins.* § 399; *May, Ins.* 3d ed. § 519. If sun-stroke or heat prostration is properly classified among diseases, it is expressly excepted from the operation of this policy. It is discussed in works on pathology under the head of diseases of the brain. *Niemeyer*, in his work on *Practical Medicine* (vol. 2, pp. 181, 182), treats of it under the head of diseases of the brain. He asserts that the investigations and experiments of so renowned a specialist as *Obernier* have entirely exploded the once common notion that sun-stroke, or *insolatio*, depends upon hyperæmia of the brain, induced by the action of the sun's rays on the head. The rays of the sun are not essential to it. "It is now known that in this disease there is a serious derangement of the heat-producing function, and a great rise in the bodily temperature, which, in extreme case, may reach 109 degrees or 110 degrees Fahr." And he concludes that, while nothing is yet known of the anatomical lesions upon which sun-stroke depends, yet "the disorder has a definite material basis." A standard *Encyclopædia* (*Britannica*, vol. 22, p. 666) terms it a "disease," and prescribes its methods of treatment. From this and other standard works we collate the following facts: That it is a term applied to the effects upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air. "Although most frequently observed in tropical regions, this disease also occurs in temperate climates during hot weather. A moist condition of the atmosphere, which interferes with the cooling of the overheated body, greatly increases the liability to suffer from this ailment." The common notion that sun-stroke or "heat prostration," as it is termed in the petition, comes like a stroke of lightning from a piercing ray of the sun, is utterly at fault. It affects persons frequently during

the night. It often results from overcrowding in quarters, as in the case of soldiers in barracks, and to persons in poorly ventilated rooms. Also persons whose employment exposes them to heat more or less intense, such as laundry workers and stokers, are apt to suffer from this in hot seasons. "Causes calculated to depress the health, such as previous disease, particularly affections of the nervous system, anxiety, worry or overwork, irregularities in food, and, in a marked degree, intemperance, have a predisposing influence; while personal uncleanness, which prevents, among other things, the healthy action of the skin, the wearing of tight garments, which impede alike the functions of heart and lungs, and living in overcrowded and insanitary dwellings, have an equally hurtful tendency." Longmore, in his reports of cases occurring in the British army in India, where it is quite prevalent, attributes it much to the foul air and badly ventilated quarters, and he also speaks of its pathological conditions. In all its forms, ranging from "heat syncope" and "heat apoplexy" to "ardent thermic fever," it is subjected to medical treatment as a disease, and its fatality is estimated at 40 to 50 per cent. With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, small-pox, or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance. The "accident," as used in the policy, is presumed to be employed in its ordinary, popular sense, which means "happening by chance;" "unexpectedly taking place;" "not according to the usual course of things." So that a result ordinarily, naturally, flowing from the conduct of the party cannot be said to be accidental, even where he may not have foreseen the consequences.

It is not deemed essential to a vindication of the correctness of the conclusion reached to review the various American decisions illustrating the application of the term "accidental" employed in such policies further than to note the palpable distinction between them and the case at bar. Death by drowning is accidental, as there is present the *vis major*, external and violent, producing asphyxia, and in the act producing the injury there is something unforeseen, unexpected, and unusual. May, Ins. § 516.

In *United States Acc. Assn. v. Barry*, 181 U. S. 100, 33 L. ed. 60, the assured, after two other persons had jumped from a platform five feet from the ground with safety, also jumped therefrom, followed, as to him, with serious consequences, producing a stricture of the duodenum, from which death ensued. In that case the deceased intended to, and thought that he would, alight safely, and it was a question for the jury to say whether or not it was an accident that he did not. The court says: "If the death is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result

effected by accidental means; but if in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

In *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52, the assured was found dead in his bed in the morning, caused evidently by inhaling coal gas. The case turned upon the question whether or not this gas was a poison or poisonous substance, within the meaning of the exception contained in the policy. The controversy among the experts was as to whether death resulted from carbonic oxide or carbonic acid, and as to their resultant poisonous power, both causing death by suffocation. Such a death clearly came within the term "accidental," and it was left to the jury to determine whether or not carbonic oxide is poisonous within the meaning and intent of the words "poison" and "poisonous" as used in the policy. This course was pursued by the court in view of the conflict in the testimony as to whether such gases were strictly "poisonous" in the ordinary acceptance to be imputed to such term in the policy. These cases do not present the question of an accident, and disease as in the case at bar. In *Bacon v. United States Mut. Acc. Assn.*, 123 N. Y. 304, it was held that death resulting from a malignant pustule, caused by the infliction upon the body of diseased animal matter containing bacillus anthrax, is death from disease, and not within the terms of an accident policy similar to the one under consideration. It was likened to what is called "wool sorter's disease," because it happens to people who handle wool and hides, such as tanners, butchers and herdsmen. Although the medical experts admitted that this species of malady belonged to pathology, yet they attempted to except this instance from the classification of disease by defining it as a "pathological condition, and succumbing of the body to the infliction of this particular poison." But the court held that a pathological condition "means neither more nor less than a diseased condition of the body," and therefore, as the policy expressly excepted bodily infirmity or disease, there could be no recovery. The court says: "No abrasion of the skin is needed to produce the contact of the bacilli, and what follows from such contact seem to be as plainly a disease as in the case of small-pox or typhoid fever."

Sun-stroke seems to be recognized by the courts in New York as a disease. In *Boos v. World Mut. L. Ins. Co.*, 6 Thomp. & C. 364, the contention was as to whether the court should take judicial cognizance of the fact that sun-stroke was "a serious disease," within the terms of the policy. There seemed to be no question made that it was not a disease, but whether the fact of its seriousness should be left to the determination of the jury. Courts may take cognizance of facts generally known and recognized in nature, science and history. They will take notice of processes in art and science, the results of which are matters of common knowledge. *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200. They will take notice of the

art of photography, and its production of correct likenesses. *Underbrook's Case*, 76 Pa. 340; *Cozens v. Higgins*, 1 Abb. App. Dec. 451. Also, that coal oil is inflammable. *State v. Hayes*, 78 Mo. 318.

So should courts take notice that fever in its multiform grades is a disease, and I apprehend, in view of the universal assignment of apoplexy in pathology among the diseases of the brain, that it would not be seriously questioned that courts in trials before juries may assume it to be a bodily disease.

It is suggested in argument by the learned counsel for plaintiff that at some time anterior to the issuance of this policy the defendant's policies contained an express exception against injury by sun-stroke, and that in its circulars distributed at the time

the policy in question was issued it asserted that practically all the old conditions had been expunged from its policies. It is therefore argued that this was tantamount to an assurance on its part that sun-stroke would thenceforth be regarded by it as expressed within the terms "external, violent and accidental." What the facts are touching this assertion the court cannot know, and what the law arising thereon may be the court is not required on this issue to say, as no such facts appear in the petition. The court can look alone to the petition in passing on the demurrer. The demurrer admits only such facts as appear on the face of the petition, and such as are well pleaded.

It results that *the demurrer is sustained*.

MARYLAND COURT OF APPEALS.

Samuel D. HELFRICH, *Appt.*,

v.

CATONSVILLE WATER CO.

(....Md.....)

(June 16, 1891.)

The right of the owner of land bordering on a stream to use it as a pasture in a reasonable way is not affected by the fact that the waters are thereby made unfit for use, although the water-works of an incorporated company have been established lower down to supply the public with water from that stream.

APP^EAL by defendant from a decree of the Circuit Court for Baltimore County enjoining him from permitting cows or other animals to enter or stand in, or defoul the waters of, a stream from which plaintiff supplied the inhabitants of Catonsville with water for domestic purposes. *Reversed*.

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Irving, Robinson, Bryan, Briscoe, Miller, Fowler and McSherry, *JJ.*

NOTE.—Pollution of waters.

A person has a right to use a stream as it passes through his lands for all reasonable purposes, and in the manner in which such streams are usually enjoyed. *Carhart v. Auburn Gas Light Co.* 22 Barb. 307, 308; *Radcliff v. Brooklyn*, 4 N. Y. 202; *Thomas v. Brackney*, 17 Barb. 664, 666-669; *O'Riley v. McChesney*, 8 Lans. 278; *Snow v. Parsons*, 28 Vt. 459, 461-463; *Pitts v. Lancaster Mills*, 18 Met. 156; *Cary v. Daniels*, 8 Met. 476, 477; *Jacobs v. Alford*, 42 Vt. 308.

The question whether his use of the stream is a reasonable one, under the circumstances, is one of fact. *O'Riley v. McChesney*, *supra*; *Hay v. Cohoes Co.* 2 N. Y. 156; *Tremain v. Cohoes County*, Id. 163; *Thomas v. Brackney*, *supra*; *Honsee v. Hammond*, 39 Barb. 89; *Sampson v. Hoddinott*, 38 Eng. L. & Eq. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Pollitt v. Long*, 58 Barb. 20; *Crosley v. Lightowler*, L. R. 2 Ch. App. 478; *McCallum v. Germantown Water Co.* 54 Pa. 40; *Crosby v. Bessey*, 49 Me. 539; *Maroly v. Shults*, 29 N. Y. 246; *Angell, Watercourses*, 6th ed. 397, § 224, note 1; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429; *Russell v. Scott*, 9 Cow. 279; *Baldwin v. Calkins*, 10 Wend. 169; *Holman v. Boiling Spring B. Co.* 14 N. J. Eq. 385.

The question whether a particular use of the water of a stream by one owner is consistent with the rights of other owners on the stream below is generally one of fact for a jury. In the absence of a right by prescription or grant the test is whether the particular use, under the circumstances, is a reasonable one (*Prentice v. Geiger*, 74 N. Y. 341); As such owner has the right to enjoy the continued flow of the stream, to use its force, and to

make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in their enjoyment by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment through the exercise by others of their natural rights is in the standard or measure of reasonable use. *Gould v. Boston Duck Co.* 13 Gray, 442; *Haskins v. Haskins*, 9 Gray, 390; *Tourtellot v. Phelps*, 4 Gray, 370, 376; *Thurber v. Martin*, 2 Gray, 394; *Pitts v. Lancaster Mills*, 18 Met. 156; *Wadsworth v. Tiltonson*, 15 Conn. 393; *Springfield v. Harris*, 4 Allen, 494; *O'Riley v. McChesney*, 49 N. Y. 672.

The riparian owners of lands adjoining fresh water, non-navigable streams, take title, *ad usque flum aquæ* (to the thread of the stream), and thereby acquire the right as incident to such title to the usufructuary enjoyment of the undiminished and undisturbed flow of such water. "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent," is the expressive language of the common law, and is of universal application. *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Chenango B. R. Co. v. Paige*, 83 N. Y. 173, 38 Am. Rep. 407; *Smith v. Rochester*, 92 N. Y. 463. See notes to *Barton v. Union Cattle Co.* (Neb.) 7 L. R. A. 457; *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296; *Columbus & H. Coal & Iron Co. v. Tucker* (Ohio) 12 L. R. A. 577; *Brown v. Cunningham* (Iowa) 12 L. R. A. 583.

Messrs. Luther M. Reynolds and George R. Willis for appellant.

Messrs. Edwin J. Farber and John I. Yellott, for appellee:

The appellee, as riparian owner along the stream in question, claims the right to have the water come to it in its pure and natural condition.

Wood, Nuisances, 1888, § 427, p. 500; High, Inj. 1890, §§ 794, 798; Pom. Remedial Rights, 1887, § 8; Angell, Watercourses, 1877; Kerr, Inj. § 878, p. 898; *Woodyear v. Schaefer*, 57 Md. 8.

Equity will protect this right by injunction.

High, Inj. 1890, §§ 794, 795, 798, and cases; Kerr, Inj. §§ 877, 878, p. 892, and cases; *Clowes v. Staffordshire P. W. Co.* L. R. 8 Ch. App. 142; *Lockwood County v. Lawrence*, 77 Me. 297; *Red River Rolling Mills v. Wright*, 30 Minn. 251; Gould, Waters, § 219; *McCallum v. Germantown Water Co.* 54 Pa. 53; *Holsman v. Boiling Spring B. Co.* 14 N. J. Eq. 335.

1. By preventing a constantly recurring grievance which cannot be otherwise prevented.

Adams, Eq. 312; *Belknap v. Trimble*, 3 Paige, 601, 8 L. ed. 290; *Weber v. Gage*, 39 N. H. 186; *Merrifield v. Lombard*, 18 Allen, 18; *Cadigan v. Brown*, 120 Mass. 494; *Clark v. Stewart*, 56 Wis. 154; *Woodward v. Worcester*, 121 Mass. 245; *Harris v. Mackintosh*, 133 Mass. 280; *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Woodyear v. Schaefer*, 57 Md. 1.

A probable nuisance, if in some degree it at present exists, and is expected to increase, is good ground for injunction.

Goldsmid v. Tunbridge Wells I. Comrs. L. R. 1 Ch. App. 349.

2. Where the injury is irreparable.

By an irreparable injury is meant one for which there is no adequate remedy at law.

Gould, Waters, 1888, § 508; *Lockwood County v. Lawrence*, 77 Me. 312; *Canfield v. Andrew*, 54 Vt. 1; Kerr, Inj. §§ 198, 199; *Holsman v. Boiling Spring B. Co.* 14 N. J. Eq. 348, and cases cited; Dan. Ch. Pr. 1868, § 2; Story, Eq. Jur. §§ 926, 927.

The appellant in this case cannot discolor or make muddy the waters of the stream to the injury of the appellee's use, business or betterments.

Clowes v. Staffordshire P. W. Co. L. R. 8 Ch. App. 125.

Appellant cannot otherwise pollute or befoul it to the detriment or damage of appellee's business.

Holsman v. Boiling Spring B. Co. 14 N. J. Eq. 335; *McCallum v. Germantown Water Co.* 54 Pa. 40. See also Angell, Watercourses, § 186, and cases; Gould, Waters, § 544, and cases; *Lockwood County v. Lawrence*, 77 Me. 297; *Lewis v. Stein*, 16 Ala. 219, and cases; *Wood v. Sutcliffe*, 2 Sim. N. S. 166; *Silver Spring B. & D. Co. v. Wanskuck*, 18 R. I. 615; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769.

No one has a right to use water through his land so as to foul it or render it corrupt or unhealthy, and unfit to be used by the landowner below for domestic purposes.

McCallum v. Germantown Water Co. 54 Pa. 40.

Nor can he use it so that producing no apparent, sensible effect, yet his use would be such as to disgust the senses.

18 L. R. A.

Wood, Nuisances, § 427, p. 500; *Woodyear v. Schaefer*, 57 Md. 1; *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

All acts done by a man on his own land whereby the rights of his neighbor in water are injuriously affected, may be considered together as nuisances relating to water.

Kerr, Inj. 1871, § 877.

The appellee cannot commit, or permit any act to be committed, in his user of the water, which will amount to a public nuisance.

Whatever is injurious to a large class of the community, or annoys that portion of the public that necessarily comes in contact with it, is a public nuisance at common law. Wood, Nuisances, § 17, note 1, § 18, p. 500, § 427, and cases cited; *State v. Taylor*, 29 Ind. 517; *Hackney v. State*, 8 Ind. 494, 495, and cases; *People v. Cunningham*, 1 Denio, 524.

And especially can the appellant permit no use to be made of the water which will be injurious to or endanger public health.

High, Inj. 1890, § 798, p. 609, and cases; *Goldsmid v. Tunbridge Wells I. Comrs.* L. R. 1 Eq. 163.

Nor can the appellant use his lot as a stockyard or barnyard to the damage of the appellant and the discomfort of the public.

Barclay v. Com. 25 Pa. 505.

Whether the use exercised by the appellant is a natural use as claimed by him or otherwise, it is subject to, and must not infringe, the rule "*sic utere tuo ut alienum non laedas*."

8 Kent, Com. 440; Angell, Watercourses, § 195; Shearn. & Redf. Neg. § 729, p. 618; *Tyler v. Wilkinson*, 4 Mason, 400; *Ferreira v. Knipe*, 28 Cal. 344; *Learned v. Tangeman*, 65 Cal. 334; *Arnold v. Foote*, 12 Wend. 331.

It must be a reasonable user taking into consideration all the surrounding circumstances.

Red River Rolling Mills v. Wright, 30 Minn. 249; *Lockwood County v. Lawrence*, 77 Me. 297; *Arnold v. Foote*, *supra*; *Davis v. Getchell*, 50 Me. 604; *Ferreira v. Knipe*, *supra*; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 772.

Why should the appellee be forced to obtain by condemnation that which it already has a right to without it, to wit: The right to pure water, which the appellant seeks to deprive appellee of by his action or the action of his cattle, whose nuisances he can easily obviate or guard against?

Lewis v. Stein, 16 Ala. 214.

Bryan, J., delivered the opinion of the court:

The Catonsville Water Company was incorporated by the Act of 1886, chap. 100. It was chartered for the purpose of enabling it to supply with pure water the inhabitants of Catonsville and the adjoining portion of Baltimore County. In pursuance of its charter, it has acquired a tract of land, and constructed at large expense a dam and reservoir, water-works, mains, and pipes, and is engaged in supplying a large number of people with water for drinking and other necessary purposes. A pure, clear, natural stream of fresh water flows through and along the land of Samuel D. Helfrich, and through the land of the Water Company, which is situate about 140 perches further down the stream, and is the principal source of supply

for the purposes of the Company's business.

A bill of complaint was filed by the Water Company, on the equity side of the Circuit Court of Baltimore County, in which it was alleged that Helfrich permitted a large number of his cows to enter said stream and stand therein, and that they dropped their excrement, dung, and filth into its waters, and greatly polluted and befouled them; and that in consequence of such deposits, when the stream flowed through the Water Company's land and supplied its works, the purity of the water was greatly impaired, and it was rendered unhealthy and unfit for drinking purposes. On these grounds an injunction was prayed and granted restraining Helfrich from permitting cows or other animals to enter or stand in the stream, and to drop or deposit therein any excrement, dung, or filth, or in any manner to pollute or befoul it. The injunction, as granted, also prohibited the erection of a hydraulic ram; but, as we shall see, this question is not now presented by the record. After answer and testimony, the court, on final hearing, made the injunction perpetual so far as it related to the pollution of the stream, and dissolved it as to the erection of the hydraulic ram. The defendant appealed to this court.

Helfrich's lot is on the south side of the Frederick Turnpike, about one mile west of the Village of Catonsville, and about half a mile from the Water Company's property. The lot has been used by the owner as a pasture for his cows, and, so far as the evidence shows, it seems to be well adapted for such a purpose, being well provided with shade, grass, and water. Helfrich, at the time the injunction was issued, owned six cows, and it appears that he used his lot for the purpose of pasturing them in the way a proprietor, under ordinary circumstances, might reasonably use his own property. The question seems to be whether his rights have been in any way abridged or diminished by the incorporation of the Water Company and the construction of its works.

The rights of riparian owners are well understood, and there is a general concurrence of opinion in the courts as to the manner in which they must be exercised. The law on this subject is strictly in accord with the common sense and general convenience of mankind. The owner of land has a right to the use of a stream of water which flows through it for all useful and reasonable purposes. This use is not an easement, but is an incident to his property in the soil; a necessary, inherent, and inseparable portion of his ownership. But there is an equality of right in other riparian owners above and below him on the same stream; and, from the necessary conditions of the case, they must not use the water to the prejudice of each other's rights. Hence difficult questions frequently arise; not as to the ascertainment of the principle of decision, but as to its application to interests which are in collision. It is laid down in general terms that every owner has the right to enjoy the stream of water which flows through his land in its

natural state, without diminution to its flow, quantity, or purity. It is also held with like generality of statement, that any defilement or corruption of the water which prevents its use for any of its reasonable or proper purposes is an infringement of the rights of riparian owners which will entitle them to a remedy suited to the nature of the case.

But all abstract rules are subject to considerable modification when they are applied to the exigencies of human life. The right to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights; it must certainly yield to those of a more absolute and unqualified character. The tillage of the soil and the tending of flocks and herds were the earliest occupations of the human race. The husbandman soweth his seed and gathereth the harvest to furnish us with food; and the flocks and herds bring forth their increase for our use. It would be most unnatural and unwise to put any unnecessary restrictions on those pursuits which furnish the world with the means of subsistence. We must confess that the right of a man to cultivate his own fields, and to pasture his cattle on his own land, is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure. And so the habits of cattle according to their natural instincts would lead them to stand in the water and befoul the stream. But, nevertheless, the owners of the land must not lose the beneficial use of it. The inconveniences which arise from the pollution of the water by these causes must be borne by those who suffer from them. The ordinary requirements of domestic life diminish the purity of the atmosphere; but as long as these causes are within the limits of reason and necessity the law recognizes no ground of complaint against them. The reasonable and proper exercise of acknowledged right by one man may, and often does, work annoyance and loss to another; but rights cannot be forfeited for this reason.

So far as we can see from the record, there was nothing unreasonable or unusual in the way in which the cattle were pastured in this lot. If Helfrich had wantonly or recklessly befouled the water of the stream, or had harassed the Water Company or injured its business by an immoderate and excessive exercise of his acknowledged rights, he would justly have been responsible for his conduct. But nothing of this kind can be justly attributed to him. He seems to have used his pasture as all men, time out of mind, have done in like cases. We are not unmindful of the vast number of cases where persons have been enjoined from committing nuisances in running streams, and from depositing or permitting to be deposited in them noxious, deleterious, or unwholesome matter, and from any unlawful or unreasonable thing which impairs the legitimate use

of the water by riparian owners. Nor have we overlooked the numerous cases where it has been held that certain kinds of manufacturing establishments have infringed the vested rights of such owners. Our opinion is placed on the distinct ground that Helfrich was using his pasture lot in a reasonable manner, and that he had a right so to use it. His right was not in any way abridged by the incorporation of the Water Company and

the establishment of its works. And it was not in the power of the Legislature to abridge it. It is a right of property protected by the declaration of rights. The Water Company has power, under its charter, to acquire the water-right by making due compensation to the owner, and not otherwise.

The decree of the Circuit Court must be reversed, and the bill of complaint dismissed.

ALABAMA SUPREME COURT.

Ex Parte W. P. HURN.

(....Ala.....)

1. **Mandamus cannot be issued** to compel a court to hear and determine a motion which it has already overruled.
2. **Money can be taken from a prisoner under arrest** only when there is probable ground for believing that it is connected with the offense charged or may be used as evidence on his trial.
3. **An officer may be garnished for money which he has taken from the debtor under arrest** where a statute makes property in his hands subject to legal process, if the arrest was made in good faith and there is probable ground for believing the money to be connected with the offense or useful as evidence on the trial of the prisoner.

(June 16, 1891.)

NOTE.—*Mandamus defined.*

The writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal to perform some duty required by law, where the party seeking relief has no legal remedy, and the duty sought to be enforced is clear and indisputable. *Knox County Comrs. v. Aspinwall*, 62 U. S. 21 How. 589, 16 L. ed. 208.

The office of the writ is to compel action—the doing of something which the public or some person is interested in having done, and which it is the duty of some other person to do; and it cannot be used as a preventive remedy. *Legg v. Annapolis*, 42 Md. 208.

The writ of mandamus is only issued to prevent a failure of justice, and where there is no other clear and adequate remedy to enforce the performance of the duty. *Arrington v. Van Houton*, 44 Ala. 284; *State v. Guerrero*, 12 Nev. 106; *Reading v. Com.* 11 Pa. 196; *Com. v. Allegheny County Comrs.* 16 Serg. & R. 317; *Fitch v. McDiarmid*, 28 Ark. 482; *State v. McCrillus*, 4 Kan. 250; *Runion v. Latimer*, 6 S. C. 126; *Rice*, Colo. Code Proc. § 307.

Its issuance is discretionary.

The writ of mandamus is a prerogative writ resting in the sound discretion of the court. Such a discretionary power will not be exercised by the court to accomplish injustice and wrong. *Tapping, Mandamus*, chap. 2, *5.

Though the granting or refusal of the writ of mandamus is said to be discretionary as distinguished from a writ of right, it is not an absolute or arbitrary discretion, but is controlled by well-defined legal rules, and its exercise is reviewable in this court. *People v. Syracuse Common Council*, 78 N. Y. 56; *People v. Rome, W. & O. R. Co.* 4 Cent. Rep. 197, 103 N. Y. 95.

13 L. R. A.

APPPLICATION for a writ of mandamus to compel the Montgomery City Court to hear and determine a motion made to procure the restoration to movant of certain money which had been removed from his person by an officer who arrested him on a criminal charge. *Denied.*

The facts are stated in the opinion.

Messrs. Moore & Finley for petitioner.

Messrs. Lomax & Tyson, for respondent:

Mandamus is not the proper remedy in this case, because the facts show that the respondent did hear and determine the motion, and the petitioner has an adequate remedy by appeal.

Ex parte Redd, 78 Ala. 548; *Ex parte Garland*, 42 Ala. 565; *Ex parte Echols*, 89 Ala. 700; *Ex parte Putnam*, 20 Ala. 592; *State v. Williams*, 69 Ala. 811.

Money in possession of the defendant in attachment may be levied on, if the levy can be made without a trespass.

Barnett v. Bass, 10 Ala. 951; 1 Wade,

The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon petition and affidavit on the application of the party beneficially interested. Cal. Code Civ. Proc. § 1096; N. Y. Code Civ. Proc. § 2067.

When mandamus will not lie.

Mandamus is the appropriate remedy to set the machinery of the courts to which it is addressed in motion, but it will not direct the performance of any particular judicial act. The subordinate tribunal will be left free to give its best judgment. The scope and province of the writ is to prevent a failure of justice from delay or refusal to act, when addressed to a court acting judicially. *State v. Lafayette County Ct.* 41 Mo. 222; *Trainer v. Porter*, 46 Mo. 338.

Nor will it lie to correct the errors of inferior tribunals by annulling what they have done erroneously. *Dunklin v. Dunklin County Dist. Ct.* 23 Mo. 453; *Ex parte Koon*, 1 Denio, 644; *People v. Judges of Dutchess C. P.* 20 Wend. 658; *Chase v. Blackstone Canal Co.* 10 Pick. 244.

Mandamus will not lie to compel an inferior court to declare an election void (*State v. Judge of 9th Judicial Circuit*, 13 Ala. 805); or to vacate an order suppressing a deposition (*Ex parte Elston*, 25 Ala. 72); or to compel a judge of a district court to try a cause transferred by him to the circuit court (*Francisco v. Manhattan Ins. Co.* 36 Cal. 288); or to compel a judge to sign a bill of exceptions, which is not in accordance with his judgment of the facts (*Shepard v. Peyton*, 12 Kan. 618; *People v. Jameson*, 40 Ill. 98; *Jamison v. Reed*, 2 G. Greene, 394; *State v. Noggle*, 13 Wis. 880); or to compel a court to correct errors of judgment by annulling what they have done, or to guide their discretion (*Dunklin v. Dunk-*

Attachm. § 261; *Dolby v. Mullins*, 8 Humph. 437, 89 Am. Dec. 180.

And by statute in Alabama, such money in the hands of a sheriff or other officer is subject to attachment.

Code 1886, § 2950; *Pruitt v. Armstrong*, 56 Ala. 306; 2 Wade, Attachm. p. 347.

The arresting officer had the right to search his prisoner and take the money from him; this being true, the separation of said money from the person of Hurn, the petitioner, was legal, and there was no trespass committed, and if the money was found in the possession of the sheriff after such legal separation, it was liable to attachment or garnishment.

Chastong v. State, 83 Ala. 29; *Terry v. State*, 90 Ala. 635; 1 Wade, Attachm. § 130; *Closon v. Morrison*, 47 N. H. 482; *Spaulding v. Preston*, 21 Vt. 9; *Drake*, Attachm. 6th ed. 198; *Reifensnyder v. Lee*, 44 Iowa, 101.

Motion made prior to return term of the writs of attachment and garnishment, addressed to the discretion of the court, was not the proper procedure, and was premature.

Ala. Code 1886, §§ 2929-2973, 2994, 2990, 2991, 2992, 2993. See also *Matthews v. Ansley*, 81 Ala. 20.

Coleman, J., delivered the opinion of the court:

The petitioner, Hurn, having been arrested on the criminal charge of fraudulently obtaining goods on a credit, was searched by the officer making the arrest, who took from him \$1,124.40 found concealed in his clothing. The prisoner and the money were delivered to the sheriff of the county. An attachment, having been sued out against the defendant, Hurn, was placed in the hands of the sheriff,

and by him levied upon the money in his possession. This was followed by a writ of garnishment executed by the coroner of the county upon the sheriff. The attachment and garnishment suits were made returnable to the City Court of Montgomery. The sheriff, as garnishee, filed his answer, setting up the facts and circumstances under which he came in possession of the money, paid the money into the court, and prayed "that all proper issues and orders be made up under the direction of the court, in order that it might be ascertained to whom the money should be paid."

The defendant Hurn moved the court for an order that the money be restored to him, "upon the grounds that his person had been searched in violation of law, and the money wrongfully, illegally, and violently taken from his person." The suit by attachment, and upon which the garnishment issued, was still pending and undisposed of at the hearing of the motion. The court refused to permit movant to introduce affidavits in support of the facts stated in his petition, and made the following order: "April 14, 1891. Motion overruled, (1) because the court is without jurisdiction; (2) because the facts set out in the motion present an issue to be decided by the jury in the trial of the attachment suit." From this order overruling the motion, the petitioner applies to this court for a mandamus "upon the grounds that the court refused to hear and determine the motion," etc.

In *Ex parte Redd*, 73 Ala. 549, it was declared that the coercive process of mandamus is proper when an inferior court refuses to proceed to judgment in a case in which the

lin County Dist. Ct. 23 Mo. 449; or to do an act lying entirely within its discretion (*Sinnickson v. Corwine*, 28 N. J. L. 311; *Louisville v. Kean*, 18 B. Mon. 9); or to secure a revision of the judgment of the court. *Little v. Morris*, 10 Tex. 233; *People v. Judge of Detroit Sup. Ct.* 32 Mich. 190.

Where a judge has determined that under the statutes of the State he is disqualified from hearing a cause, a mandamus does not lie to make him reverse that decision and to hear the cause. *State v. Van Ness*, 15 Fla. 317.

Some of the decisions in the foregoing cases rested upon the ground that there was other specific and adequate remedy for the relator, which is always, as we have seen, sufficient to defeat an application for a mandamus. On this ground a mandamus will always be refused. *Ex parte Newman*, 81 U. S. 14 Wall. 152, 20 L. ed. 877; *Mansfield v. Fuller*, 50 Mo. 338. See 4 Wait, Act. and Def. 373.

Mandamus will not control the discretion of public officers. *Dalton v. State*, 1 West. Rep. 733, 43 Ohio St. 652; *State v. Shaw*, 1 West. Rep. 221, note, 43 Ohio St. 324; *People v. Knickerbocker*, 1 West. Rep. 375, 114 Ill. 539; *Deobert v. Com.* 4 Cent. Rep. 700, 113 Pa. 229.

It will not lie to compel the performance of duties or acts necessarily calling for the exercise of judgment and discretion. *State v. Police Jury*, 39 La. Ann. 759.

Even though the judgment is plainly erroneous, the subordinate court having passed upon the question pending before it, its decision, if erroneous, is a judicial error, which is not the province of a mandamus to correct. *Judges of Oneida C. P. v. People*, 15 Wend. 77; *Carriaga v. Dryden*, 29 Cal. 807; *Ex parte Whitney*, 38 U. S. 13 Pet. 404, 10 L. ed. 221; 13 L. R. A.

Warren County Ct. v. Daniel, 2 Bibb, 573; *Stout v. Hopping*, 17 N. J. L. 471; *Reg v. Blanshard*, 13 Q. B. 318; *Foster v. Redfield*, 50 Vt. 235; *Ex parte Koon*, 1 Denio, 644; *Ex parte Ostrander*, Id. 679.

Nor will it be granted to reverse the decisions of inferior courts upon matters properly within their judicial cognizance. *Bank of Columbia v. Sweeney*, 28 U. S. 1 Pet. 537, 7 L. ed. 235; *Ex parte DeGroot*, 73 U. S. 6 Wall. 497, 18 L. ed. 887; *Ex parte Newman*, 81 U. S. 14 Wall. 152, 20 L. ed. 877; *Ex parte Perry*, 109 U. S. 133, 23 L. ed. 43; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 23 L. ed. 461; *Ex parte Gilmer*, 64 Ala. 234; *Ex parte South & North Ala. R. Co.* 65 Ala. 599; *Lewis v. Barclay*, 35 Cal. 213; *State v. Kenosha Circuit Ct. Judge*, 3 Wis. 809; *State v. Wright*, 4 Nev. 119; *Stout v. Hopping*, 17 N. J. L. 471; *Little v. Morris*, 10 Tex. 233; *Potter v. Todd*, 73 Mo. 101; *Williams v. Judge of Cooper County C. P.* 27 Mo. 225; *Blecker v. St. Louis Law Comr.* 30 Mo. 111.

While the writ is sometimes granted to compel the allowance of an appeal, it will not lie to compel subordinate courts to reinstate appeals which they have dismissed. Such dismissal, whether made in accordance with a rule of practice of the inferior court not unlawful in itself, or done in the exercise of a judicial discretion, is held equally beyond control by mandamus, and the party aggrieved will be left to his writ of error. *Sinnickson v. Corwine*, 28 N. J. L. 311; *Wells v. Stackhouse*, 17 N. J. L. 355; *Com. v. Philadelphia County Judges*, C. P. 3 Blinn. 273. But see, *contra*, *Freas v. Jones*, 16 N. J. L. 358; *Adams v. Mathis*, 18 N. J. L. 310; *Ten Eyck v. Farlee*, 16 N. J. L. 348; *Detroit & B. P. R. Co. v. Wayne Circuit Judge*, 27 Mich. 304; *High, Extr. Legal Rem.* 2d ed. § 247. See note to *State v. Kansas City Ct. of App. (Mo.)* 3 L. R. A. 476.

law makes it his duty to act. This court compels judgment, but will not control it. In *Ex parte Schmidt*, 62 Ala. 254, it was held that the writ would lie to compel the execution of ministerial duties in all proper cases, but would not be awarded to order or direct what judgment shall be rendered in any given case; nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. In such cases there is an adequate remedy by appeal. *Ex parte Echols*, 39 Ala. 700; *Ex parte State Bar Assn.* (Ala.) 2 L. R. A. 134.

In the case of petitioner, the court overruled the motion. The motion has been disposed of by judicial action of the court. Whether the court erred in the order overruling the motion, or in not receiving in evidence the affidavits offered in support of the petition, or whether the reasons assigned by the court for overruling the motion are sufficient, cannot be reviewed on an application for the writ of mandamus. Such questions are revisable only by appeal. The remedy by appeal seems to have been resorted to in the cases cited by appellant. Both parties have argued the case upon its merits, and in view of such intimation from counsel, it may not be improper to consider the real question involved in the case. It is the law that the levy of an attachment procured by trickery, fraud, or trespass will be held to be invalid, and the officer who makes a levy by such means exposes himself to an action in damages. *Waples, Attachm.* 180. An officer cannot forcibly take property from the person of a defendant, and if a levy is effected by force, fraud, or violence of any kind, it is generally held void. 1 *Wade, Attachm.* § 130; *Mack v. Parks*, 8 Gray, 517; *Folmar v. Copeland*, 57 Ala. 589; *Street v. Sinclair*, 71 Ala. 110.

In *Drake on Attachment* (§ 506) it is said: "An officer, under criminal process against a person, arrested and took from him money and property found in his possession. The officer was summoned to answer as garnishee of the prisoner. It was held that the officer was exempt from garnishment."

The text here quoted from *Drake on Attachment* refers to two decisions from Massachusetts: *Robinson v. Howard*, 7 Cush. 257, and *Morris v. Penniman*, 14 Gray, 220. An examination of these decisions shows that they were based upon a statute of the State which provided that no person should be adjudged a trustee "by reason of any money in his hands as a public officer, and for which he is accountable to the defendant as such officer." In another section of the Massachusetts Code it is declared that money collected by the sheriff by force of legal process in favor of the defendant in the trustee process could not be reached by trustee proceedings. These statutes have been brought forward, and may be found in the Massachusetts Statutes of 1882 (p. 1055). The case of *Zurcher v. Magee*, 2 Ala. 253, is to the same effect as the Massachusetts decisions holding money in the hands of the sheriff, collected by him, to be "in the custody of the law. Since the decision in 2 Ala., *supra*, was rendered, the law has been changed by statute (Code 1886, 18 L. R. A.

§ 2950), and now money in the hands of the sheriff or other officer may be attached, and as was held in *Pruitt v. Armstrong*, 56 Ala. 310, the law as declared in 2 Ala. no longer prevails. The law as cited from *Drake, supra*, and the cases cited from Massachusetts, being based upon a statute of that State different from the statute of this State, cannot be regarded as authority upon the question.

The case of *Closson v. Morrison*, 47 N. H. 483, is very much in point. In that case the deputy-sheriff, having arrested the plaintiff on a complaint for larceny, searched him, and took from his person a watch and chain and money; and on the next day, while this money was in his possession, it was attached by the party who had made the criminal charge, and also by another creditor. The New Hampshire statute provides that "any officer who shall find any implement, article, or thing, kept, used, or designed to be used in violation of law, or in the commission of any offense, in the possession of or belonging to any person arrested, or liable to be arrested, for such offense or violation of law, shall bring such implement, article, or thing before the justice or court having jurisdiction of the offense, who shall make such order respecting their custody or destruction as justice may require." The court held that a due regard for his own safety on the part of the officer, and also for the public safety, would justify a search and seizure of any deadly weapon he might find upon the prisoner, and hold them until he was discharged, or otherwise properly disposed of, and further held the sheriff might seize any money or other articles of value found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools or implements or weapons with which to effect his escape. The court further held that the validity of the attachment depended upon the bona fides or the mala fides of the search and seizure of the property; that, if this was done in order to effect a levy, it would be invalid; but if done with a due regard to the public safety, and to secure the safety of the prisoner only, then the separation of the property from the person of the defendant was lawful, and it would then be subject to attachment as property not found upon the person. Whether it was bona fide or not was a question for the jury, under all the evidence.

In the case of *Spaulding v. Preston*, 21 Vt. 9, the sheriff arrested one Russell on a charge of counterfeiting, and took from his person a lot of German silver, and held it under the order of the state attorney. He was sued by one Preston, who claimed to be the owner of the property by purchase. The court (*Redfield, J.*) held that the sheriff was not liable for a trespass. Much is said in this opinion not applicable to the case at bar, and is cited as an authority as to the right and duty of the sheriff to search and take from a prisoner property found on his person. In *Waples on Attachment and Garnishment* (p. 181) the principle is laid down that, if the plaintiff in attachment is not an instigator or co-worker with the officer in obtaining an unauthorized and illegal levy, he ought not

to lose the benefit of an attachment, and that the circumstances of each particular case must determine whether the official wrongdoing was such as to invalidate the levy.

In the case of *Gile v. Derens*, 11 Cush. 61, 2, the court recognized the distinction in cases where unlawful means were used for the purpose of seizing the property, and the seizure was effected by those means, and in cases where the levy was in no way connected with or effected through the unlawful act of the officer. In *Hitchcock v. Holmes*, 43 Conn. 528, the court recognized the rule that a levy could not be effected by a trespass, but held that an officer with a writ of attachment in his possession, who was invited by a servant, not knowing the purpose of the officer in calling, to enter a dwelling-house, was lawfully in, and authorized to make a levy upon such household goods as were liable to satisfy the attachment.

In the case of *Pomroy v. Parmlee*, 9 Iowa, 140, the facts as stated in the opinion were as follows: Plaintiffs sued out a warrant in Scott County upon a criminal charge against the defendant, and, at or about the same time, a writ of attachment. The sheriff, with E. S. Pomroy and a deputy, followed the defendant, and overtook him in Poweshiek County, and there arrested him, and took possession and control of a trunk of the defendant, and, against the objection of the defendant carried the defendant and the trunk back to Scott County. After getting back to Scott County, where the sheriff was authorized to levy the attachment, it was levied upon \$1,089 of money found in the trunk. The court held that it was settled that a valid seizure, service, or execution cannot be obtained through means rendered unlawful by fraud or violence. That, "under the shadow of the criminal process, the name and pretense of a civil writ was used to bring the property to a place where the letter might be levied upon it." It is clear that the court concluded from the facts in this case that the criminal process was used for the purpose of effecting a levy, and, in accordance with the general principle that a levy effected by fraud or violence will not be upheld, declared that the attachment, if thus obtained, was illegal.

In the case of *Reifsnnyder v. Lee*, 44 Iowa, 101, the facts were that Lee had stolen five head of cattle, and sold them to the plaintiff for \$162. The owner recovered the cattle, and plaintiff had Lee arrested for the larceny, and the officer making the arrest took from his person both money and a watch. Plaintiff then sued Lee, and had the officer who held possession of the property garnished. The defendant, Lee, moved the court to discharge the garnishee, and dissolve the attachment, on the ground that the money and the watch were unlawfully and forcibly taken from him. The trial court granted the motion; and, on appeal, the supreme court held that the object of the pursuit and capture of Lee was not to obtain possession of the money and watch in order to subject it to legal process, but for the purpose of bringing him to punishment for his crime. The conclusion of the court was that the money and watch were lawfully taken from the

possession of Lee, and, being rightfully in the possession of the officer, were subject to the process of garnishment. The court declared, in this case, it was usual and proper for officers, upon the arrest of felons, to subject them to search, and take from them articles found upon their persons, and suggested, as an additional thought, "that there was ample ground for holding that the money taken from Lee was the money received from the sale of the cattle." The principles of law declared in this case are directly applicable to the facts of the present case, but this decision seems to have been materially qualified by a later decision in the same State, in the case of *Commercial Exch. Bank v. McLeod*, reported in 65 Iowa, 666.

The Code of Iowa (§ 4212) provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." In construing this section of the Code, the court held that the officer making the arrest was not precluded thereby from taking from the person of the prisoner other property than "offensive weapons," but that he might search him and take from him all property which might be used by the prisoner in effecting his escape. The court held, however, in this latter case (65 Iowa, 666), that if the money and property found on the prisoner had no connection with the arrest or the crime charged, and was not to be used as evidence in the prosecution, "the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if it was in the prisoner's pocket;" and, on an application for rehearing, the court re-affirmed that "the possession of the officer was the possession of the defendant,—citing, in support of the principle: 1 Archb. Crim. Pl. 34, 35; Wharton, Crim. Pl. § 61; 1 Bishop, Crim. Prnc. §§ 210-212, and *Patterson v. Pratt*, 19 Iowa, 358. We have been unable to find the reference in 1 Archb. Crim. Pl. sustaining the proposition. In Wharton, Crim. Pl., *supra*, § 60, it is declared: "Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged. These articles are properly to be deposited with the committing magistrate, to be retained by him, with the other evidence in the cause, until returned to the prosecuting officers of the State. They should carefully be preserved for the purposes of the trial, and after its close be returned to the person whose property they lawfully are." Section 61: "The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offense with which the defendant is charged. Any wider license would be a violation of his personal rights. When money is taken in violation of this rule the court will order its restoration to the defendant. That where property is identified as stolen, or is in any way valuable as proof,

it may be sequestered, is plain." 1 Bishop, Crim. Proc., §§ 210, 211, is to the same effect, and in section 212 it is stated that the officer "holds all such property, whether money or goods, subject to the order of the court, and in proper circumstances he will be directed to restore it, in whole or in part, to the prisoner." Both these authorities, it will be seen, limit the right to take money from the prisoner to cases in which the money is in some way connected with the offense charged, or to be used as evidence on the prosecution. Whether the officer would be held guilty of a trespass if, on the trial, it appeared that the officer was mistaken in believing that the money was connected with the offense, or material as evidence, is not stated; or whether the money, while in the possession of the officer, was subject to attachment at the suit of creditors, is not discussed or declared.

The common-law rule declared by Wharton and Bishop, *supra*, seems to conflict with the state decisions which we have quoted, in so far as they declare it to be the duty of the arresting officer to search and take from the person of the prisoner money or other property which might be available in effecting his escape. It is stated by Mr. Wharton, and sustained by his references, that at common law, "if the property is identified as stolen, or is in any way valuable as proof, it may be sequestered, is nevertheless plain." If, under this rule, the property is sequestered, or deposited in court, or held by the officer, to be used as proof on the trial, and, while thus held, a creditor attaches it, what are the rights of the attaching creditor? At common law, and perhaps without statute, the money or property would be *in gremio legis*, not subject to attachment, and entirely under the control of the court. After the prosecution is ended, at common law, the court could and ought to direct "that it be restored, in whole or in part, to the prisoner, according to the circumstances." In many States, property thus held was regarded *in gremio legis*, and therefore not subject to attachment. See 2 Ala., *supra*, and authorities cited. We understand this to be the reason and extent of the rule as declared by Bishop and Wharton.

The facts of the case of *Patterson v. Pratt*, 19 Iowa, 358, are as follows: One Dunn, having lost \$200, sued out a search-warrant against Pratt. Under this warrant, Pratt was arrested, and \$485.12 found on his person, which was taken from him and delivered to the magistrate. While the money was in the hands of the justice of the peace, the plaintiff, Patterson, had it levied on by the sheriff to satisfy an execution in his favor, and also summoned the justice to answer as garnishee. The garnishee paid the money to the clerk of the court. The statute of Iowa in regard to garnishing money or a fund in the hands of an officer, or in court, is very similar to section 2950 of this State. The court (Dillon, J.) held: "The appellant argues that the statute contemplates a fund which has come into court legitimately by civil process, or by consent of the execution debtor. In our opinion, a fund may prop-

erly find its way into court without the consent or volition of the party from whom it was obtained. . . . Persons may not unwarrantably make use of the machinery of criminal law to accomplish private ends.

But we see no evidence of the abuse of the law, in the case at bar, by any party, much less by the appellee. . . . It is not shown that this was a scheme between Dunn and appellee to get hold of the money of the appellant. The charge against Pratt is not shown to have been false or fabricated." After distinctly recognizing the principle declared in *Ilsey v. Nichols*, 12 Pick. 270, and other authorities, that "no lawful thing procured upon a wrongful act can be supported," held that the fund was lawfully in court, and subject to garnishment.

Upon principle, property subject to the payment of a debt may be levied upon by the proper officer, if the levy can be effected without trickery or fraud, or a trespass calculated to provoke a breach of the peace. *Barnett v. Bass*, 10 Ala. 954, and authorities *supra*. The garnishment in this case was regularly executed by the coroner upon the sheriff, who had possession of the money. There is no evidence to show that the defendant was arrested for the purpose of obtaining a levy, or that the criminal charge against him was false or fabricated. The important question, then, is, Was the sheriff authorized to search the defendant, and take from his person the money, either for the purpose of using it as evidence on the criminal prosecution, or to prevent the prisoner from using the money to effect his escape?

Our Statute (Code, § 4745) provides: "When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and such weapon or other thing be retained, subject to the order of court in which the defendant may be tried." Section 4212 of the Code of Iowa provides that "he who makes the arrest may take from the person all offensive weapons which he may have on his person." It was held in the latter State that this section did not preclude the sheriff from taking from his person money or other property which might be used in effecting an escape. The Supreme Court of the State of New Hampshire, construing a somewhat similar statute, we have seen, declared the same rule; and the duty and right of the sheriff in this respect has been recognized in other States. The Constitution of the State of Alabama (art. 1, § 6) provides "that the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation."

In commenting on article 4 of the Constitution of the United States, which prohibits unreasonable searches and seizures, in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, Mr. Justice Bradley, deliver-

ing the opinion, quoted with approbation from Lord Camden, as follows: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing. . . . If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant. . . . According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is trespass." These are the principles which protect every citizen of this government in the enjoyment of his personal liberty, his home, and his property, and no other "can abide the pure atmosphere of a government of political liberty and personal freedom."

This court in *Chastang v. State*, 83 Ala. 30, referring to the opinion of Justice Bradley, declared: "We indorse and approve everything said therein." The statute law provides for the issuance of search-warrants, but specifies on what grounds they are to be issued, and only on probable cause, supported by affidavit, naming the person, and particularly describing the property and place to be searched. Code, §§ 4727-4729. The search and seizure in the present case were not made under these statutory provisions. Section 4745 of the Code we have quoted above, and which provides that when a person is charged with a felony, and is supposed to have a dangerous weapon, or anything which may be used as evidence of the commission of the offense, he may be searched, and such weapon or thing may be seized and retained subject to the order of the court in which the defendant is to be tried. The question as to the dangerous weapon does not arise in this case. That part of the statute which authorizes the seizure and retention of "anything which may be used as evidence" on the prosecution is a mere statutory enactment of the common law. At common law the arresting officer had the right to remove money from the defendant's person; but this right was limited to cases in which the money was connected with the offense, or to be used as evidence. See Wharton, *supra*; Bishop, *supra*, and the cases cited in support of the text.

We are aware of the responsibility of sheriffs for the safety of prisoners, and their liability for escapes suffered by them or their deputies; but we can find no warrant, either in the common law or statute, for taking money from the person of the prisoner, unless it is connected with the offense charged, or to be used as evidence on his trial. If this right exist in the officer, as an absolute right to prevent escapes, he could, upon the arrest of a person charged with a trivial misdemeanor or disorderly conduct, strip him

of all his personal effects. It is no answer to say the officer would not do it. The question is, Has he the right, by virtue of his authority to arrest, also to search and seize, except in cases authorized by the common law or by statute? "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

After a careful examination of the Constitution, prohibiting unreasonable searches and seizures, the common law, the statutes, and authorities, we hold that it is the duty of an officer, having no other authority than the right to make the arrest, to search the party arrested, and seize and remove from him any dangerous weapon found on his person; and he may also seize any money, or anything connected with the offense, or which may be used as evidence against him on the prosecution, and retain the money or thing until turned over to the State's attorney, or paid into court to abide the result of the trial; that an officer acting in good faith, in the execution of his duty, and proceeding upon probable grounds for believing that the money or thing is connected with the offense charged, or may be used as evidence on the trial, may search and take from the defendant arrested by him on a criminal charge money found on his person, and he will not be liable in damages for a trespass, although it may turn out that the money or thing was not in fact connected with the offense, or could not be used as evidence of the commission of the offense, that the money or thing seized by the officer, under the foregoing limitations, during the time it is in his hands, or if paid into court, is not in the possession of the defendant, but it is thereby sequestered, and subject to attachment or garnishment, under section 2950 of the Code; that if the arrest was made not in good faith, or if the money or thing is seized without probable grounds for believing that it is connected with the offense, or useful as evidence on the trial, the levy made, under such circumstances, is invalid; or, if procured by trickery or fraud on the part of the attaching creditor, the levy will be held invalid; and the officer making the levy, if he knows of the fraud, and person procuring it to be done by such means and for such purposes, will be liable to a suit for damages. We believe these principles consistent with the personal liberty of the person arrested, as secured to him by the Constitution of the State, and concede to the officer all the authority given to him by the common or statute law. We know of no law which will prevent a creditor from having the property of his debtor levied upon to satisfy his debt, when it can be done without committing a trespass, or by fraud or violence. At common law, the property in the hands of an officer was regarded *in gremio legis*, and not subject to process; but by statute it is subject to legal process. The return of the court to the rule *nisi* shows that the prosecution and attachment suits against the movant are undecided, and are pending in court. Whether, under the principles declared in the foregoing opinion the money is subject to the attach-

ment and garnishment, depends upon the evidence to be introduced on the trial and the garnishing creditor has a right to his day in court, and to have a jury pass upon the facts.

In any view we take of the case, the application for mandamus must be denied.

Mandamus denied.

MARYLAND COURT OF APPEALS.

Patrick O'BRIEN, *Appl.*,

v.

BALTIMORE BELT R. CO.

(....Md.....)

1. **Authority to construct a railroad** or any part thereof in a tunnel in a city street on the terms and conditions and in the mode fixed by ordinance, includes authority to construct portions of it in an open out where the ordinance so directs: and even without special authority the right to construct a tunnel would include the right to make properly graded approaches.
3. **The mere depreciation in the value of the lot of an abutting owner** who does not own the fee of the street, by the construction of a railroad therein and his deprivation of the full use of the street, but without any

invasion of or physical interference with his lot or any obstruction of his access thereto, is not a taking of his property within the meaning of the constitutional provision as to compensation for property taken.

(June 17, 1891.)

APPPEAL by plaintiff from a decree of the Circuit Court of Baltimore City dismissing his bill filed to enjoin defendant from laying its tracks in a street in front of his lots.

Affirmed.

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Robinson, Bryan, McSherry, Fowler and Briscoe, *JJ.* Messrs. Isidor Rayner, Thomas R. Clendinen and George R. Willis, for appellant:

NOTE.—*Implied grants.*

When the use of a thing is granted, everything essential to that use is granted also. Such right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement. *Prescott v. White*, 21 Pick. 841, 32 Am. Dec. 203; *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688; and cases cited; *Pomfret v. Ricroft*, 1 Saund. 823, note c; *Hammond v. Woodman*, 41 Me. 177; 65 Am. Dec. 219.

When a right is granted, either by an individual or by a statute, the means of securing the right are also granted by implication. *Carruth v. Grassie*, 11 Gray, 211, 71 Am. Dec. 707.

Easement.

Thus when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. Otherwise the grantee could derive no benefit from the grant. The same rule of construction would govern a reservation out of lands granted. *Co. Litt. 56 a.*; *Liford's Case*, 11 Coke, 52; *Lord Darcy v. Askwith*, Hob. 234; *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Frearson*, 8 T. R. 56; *Morris v. Edgington*, 3 Taunt. 23; *Gayetty v. Bethune*, 14 Mass. 55.

Nothing will pass, as incident to the grant, except it be necessary to the enjoyment of the principal thing granted. Hence the grantee of a close surrounded by the grantor's land is entitled to a convenient way over the grantor's land. He may select a suitable route for his way, but in doing it he must regard the interest and convenience of the owner of the land. *Nichols v. Luce*, 41 Mass. 102.

Nothing passes which is not appurtenant to the land granted and directly necessary to its enjoyment. *Leonard v. White*, 7 Mass. 6; *Coleman's App.* 62 Pa. 252.

Thus the grant of trees standing on land of the grantor gives the right to enter and take them, and a sale of personal property gives a right to enter and remove it. A grant of the right to lay pipes carries the right to enter and repair them. *Pomfret v. Ricroft*, 1 Saund. 821.

By the same principle a way of necessity is created over the grantor's remaining land when there is no other access to the granted premises. *Pierce* 18 L. R. A.

v. Selleck, 18 Conn. 321; *Lawton v. Rivers*, 2 McCord, L. 445; *Crossley v. Lightowler*, L. R. 2 Ch. App. 438; *Alley v. Carleton*, 39 Tex. 73; *Pingree v. McDuffie*, 56 N. H. 306.

The necessity which will raise an implied easement varies with the nature of the property and of the easement. *Covel v. Hart*, 56 Me. 520.

It is a question of presumed intention. If the servitude is a burdensome one, only strict necessity will raise the implication. Great convenience alone will not give a way of necessity (*Dodd v. Burchell*, 1 Hurst. & C. 121; *Brigham v. Smith*, 4 Gray, 297; *Smith v. Kinard*, 2 Hill, L. 642); and the way will cease when the necessity ceases. *Lide v. Hadley*, 36 Ala. 627; *Viall v. Carpenter*, 14 Gray, 126.

So, if the purposes for which the land is granted are inconsistent with the exercise of the easement, it will not exist. *Seeley v. Bishop*, 19 Conn. 128.

What is called necessity is only a circumstance called in to explain the intention of the parties. *Nichols v. Luce*, 24 Pick. 102; *Collins v. Prentice*, 15 Conn. 39; *American Co. v. Bradford*, 27 Cal. 306; 2 Wait, Act. & Def. 668.

The grant of power being in derogation of common right is not to be extended by implication, and the act conferring the power must be strictly complied with. Statutes granting these powers are not to be construed so literally or so strictly as to defeat the evident purpose of the Legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. *Re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546.

Whether a right of way is embraced in a deed, is always a question of construction, having reference to its terms not only, but to extrinsic facts also, and to the practical incidents connected with the grantor, and with the use of the land, at the time of the conveyance. The law gives such a construction to the conveyance, as an incident or appurtenance, that such incidents or appurtenances are included in it. In such cases the intention of the parties is to be learned from those facts. *Huttemeler v. Albro*, 18 N. Y. 51, 52; *Ordren v. Jennings*, 66 Barb. 301.

The taking and use of the street by appellee will take away the value of appellant's property, substantially, and inflict serious and permanent injury.

Beckett v. Midland R. Co. L. R. 1 C. P. 241, 3 C. P. 81.

This is forbidden by the Constitution. Md. Const. art. 3, § 40.

The right of the appellant as an abutting owner to the use of the street, and for access to and from his lot and house, is property within the meaning of the Constitution.

Baltimore & P. R. Co. v. Reaney, 42 Md. 117; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 L. ed. 332; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Baltimore v. Appold*, 43 Md. 442; *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325; *Phipps v. Western Maryland R. Co.* 66 Md. 319; *Cumberland v. Willison*, 50 Md. 188.

An injunction is a proper remedy.

Roman v. Strauss, 10 Md. 98; *Western Maryland R. Co. v. Owings*, 15 Md. 199; *Baltimore v. Gill*, 81 Md. 876; *Shipley v. Baltimore & P. R. Co.* 34 Md. 336; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *New Central Coal Co. v. George's Creek C. & I. Co.* 87 Md. 537; *Pumphrey v. Baltimore*, 47 Md. 153; *Piedmont & C. R. Co. v. Speelman*, 67 Md. 260; *Pratt v. Buffalo City R. Co.* 19 Hun. 30; *Abendroth v. New York Elev. R. Co.* 22 Jones & S. 417; *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Williams v. New York Cent. R. Co.* 16 N. Y. 109; *Dillon, Mun. Corp.* 661; *Thompson, Proper Remedies*, 245; *Union Pac. R. Co. v. Hall*, 91 U. S. 355, 23 L. ed. 432; *Kavanaugh v. Mobile & G. R. Co.* 78 Ga. 271; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190; *Foster, Fed. Prac.* p. 309, § 215; *Northern Pac. R. Co. v. Burlington & M. R. Co.* 2 McCrary, 203; *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.* 10 Fed. Rep. 497.

A steam railroad would be considered an additional servitude, easement or burden upon a street, because inconsistent with the ordinary and reasonable use of a street, while the use by a horse railroad is decided not inconsistent, because not permanent or exclusive.

Hiss v. Baltimore & H. P. R. Co. 53 Md. 251; *Hodges v. Baltimore U. P. R. Co.* 58 Md. 608; *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325.

The right of an abutting owner to use the street is property which is taken within the meaning of the Constitution, by the grant of such privileges as are claimed by defendant, and the injury and right to a remedy is the same whether the abutting owner owns the fee of the street or not, and cannot be taken without compensation.

Jefferson, M. & I. R. Co. v. Esterle, 18 Bush, 668; *Lackland v. North Missouri R. Co.* 31 Mo. 181; *Central Branch U. Pac. R. Co. v. Twine*, 28 Kan. 585; *Central Branch U. Pac. R. Co. v. Andrews*, 30 Kan. 590; *Theobald v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, 66 Miss. 279; *Burlington & M. R. Co. v. Reinacke*, 15 Neb. 279; *Haynes v. Thomas*, 7 Ind. 38; *Rensselaer v. Leopold*, 106 Ind. 29; *Crawford v. Delaware*, 7 Ohio St. 480; *Cincinnati & S. G. 18 L. R. A.*

A. St. R. Co. v. Cumminsville, 14 Ohio St. 524.

In New York it has repeatedly been decided that the interest of an abutting owner was property, and that it was a taking when the use was permanent.

Abendroth v. New York Elev. R. Co. 22 Jones & S. 417; *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Abendroth v. New York Elev. R. Co.* 11 L. R. A. 634, 122 N. Y. 1; *Kane v. Metropolitan Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Duyekink v. New York Elev. R. Co.* 125 N. Y. 710; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286; *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 268, 45 Minn. 7; *Pumpelly v. Green Bay M. Canal*, 80 U. S. 13 Wall. 166, 20 L. ed. 557.

Messrs. William A. Fisher, John K. Cowen, W. Irvine Cross and Hugh L. Bond, Jr., for appellee:

The rulings of the courts on this subject are not uniform, but the following may be stated as the result of the authorities:

1. The great weight of authority is that if the abutting owner does not own the fee of the street, then its occupancy by a railroad company, under legislative authority, is not the taking of any of his private property within the meaning of the constitutional provision, which requires condemnation proceedings to be instituted before such property can be taken.

2. Many authorities hold that a street can be used by a railroad company, although the fee of it may be in the abutting owner, and that such a use is not only not a taking of property within the meaning of the constitutional provision, but the abutting owner is not entitled to consequential damages for such occupancy of the street.

3. A very few authorities hold that a lot owner on a public street, whether he has the fee in the bed of the street or not, has such a peculiar interest therein that the construction of a steam railroad upon the street is a taking of his property within the meaning of the constitutional provision.

4. Other cases hold that the occupancy of a public street by a railroad company, under legislative sanction, is a legitimate and lawful use of the street, but it is not to be presumed that the railroad company is to be exempt from liability for special damage to the property of an abutting owner.

A rule of law opposed to and inconsistent with the "property doctrine," as stated in proposition 3, will be found stated in—

Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 81 Am. Rep. 306; *Fulton v. Short Route R. Transfer Co.* 85 Ky. 640, 7 Am. St. Rep. 619; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 206, 110 Ind. 542, 32 Am. & Eng. R. R. Cas. 220; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 158, 20 Am. & Eng. R. R. Cas. 26; *Spencer v. Point Pleasant, & O. R. Co.* 23 W. Va. 407, 20 Am. & Eng. R. R. Cas. 125; *Arbuz v. Wheeling & H. R. Co.* 5

L. R. A. 371, 38 W. Va. 1, 40 Am. & Eng. R. R. Cas. 284; *Central Branch U. P. R. Co. v. Andrews*, 80 Kan. 590, 14 Am. & Eng. R. R. Cas. 243; *Ottawa, O. C. & O. G. R. Co. v. Larson*, 2 L. R. A. 59, 40 Kan. 801, 36 Am. & Eng. R. R. Cas. 163; *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 284; *Iron Mountain R. Co. v. Bingham*, 4 L. R. A. 622, 87 Tenn. 522, 38 Am. & Eng. R. R. Cas. 444; *McQuaid v. Portland & V. R. Co.* 18 Or. 227, 40 Am. & Eng. R. R. Cas. 306; *Richardson v. Vermont Cent. R. Co.* 25 Vt. 465; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 49; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 14 Am. & Eng. R. R. Cas. 157; *Crowley v. Davis*, 63 Cal. 460, 20 Am. & Eng. R. R. Cas. 25; *Hamlin v. Chicago & N. W. R. Co.* 61 Wis. 515, 20 Am. & Eng. R. R. Cas. 70; *Higbee v. Camden & A. R. & Transp. Co.* 20 N. J. Eq. 435; *Philadelphia & T. R. Co's Case*, 6 Whart. 25; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Houston v. T. Cent. R. Co. v. Odum*, 58 Tex. 348, 2 Am. & Eng. R. R. Cas. 503; *Gulf, C. & S. F. R. Co. v. Graves* (Tex.) 10 Am. & Eng. R. R. Cas. 199; *Mulholland v. Des Moines & A. W. R. Co.* 60 Iowa, 740, 10 Am. & Eng. R. R. Cas. 99; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 36 Am. & Eng. R. R. Cas. 155; *Nottingham v. Baltimore & P. R. Co.* 3 MacArth. 517; *Dixon v. Baltimore & P. R. Co.* (D. C.) 3 Am. & Eng. R. R. Cas. 201; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

As to the general rule, compare *Ohio Northern Transp. Co. v. Chicago*, 99 U. S. 685, 25 L. ed. 836, with *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 688; *Currier v. New York West Side Elev. P. R. Co.* 6 Blatchf. 487.

The doctrine that the owner of a lot abutting on a street has an interest in the soil of the street, which amounts to property within the meaning of the constitutional provision that private property shall not be taken for public use without compensation, was first announced and adopted by the Supreme Court of Ohio in *Crawford v. Delaware*, 7 Ohio St. 459.

Minnesota has adopted the same rule in *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 498, 39 Minn. 286, 12 Am. St. Rep. 644.

New York in *Story v. Elev. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268, and *Abendroth v. New York Elev. R. Co.* 11 L. R. A. 634, 122 N. Y. 1, applied this doctrine to elevated roads; while in *Radcliff v. Brooklyn*, 4 N. Y. 196, the doctrine was held inapplicable to the case of a city changing the grade of the street. Moreover, and in *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 506, the court decided that a "steam railroad company, which, under license from the city authorities lays its tracks upon the surface of a street, is not liable for damages resulting from a reasonable use thereof to the easement of an abutting lot owner, who does not own the fee of the street."

In Maryland the court holds that an ordinary charter or enabling Act is not to be construed as conferring on a chartered company the State's immunity from liability for consequential damages.

Baltimore & P. R. Co. v. Reaney, 42 Md. 117.
18 L. R. A.

The distinction between the doctrine by which right of action is accorded for consequential damages and the rule of law under which the owner of property is protected by injunction from a taking of his property for public use, is illustrated by a comparison of the *Reaney Case* with *Baltimore v. Appold*, 42 Md. 442.

Even in Illinois, where the Constitution requires compensation to be made for property damaged as well as for that taken, the courts have been obliged to construe the provision as giving a right of action for damages merely, and not as entitling a landowner to an injunction to restrain the construction of the road, because consequential damages might thereby ensue to his property.

Stetson v. Chicago & E. R. Co. 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 36 Am. & Eng. R. R. Cas. 155. See also *Hutton v. London & S. W. R. Co.* 7 Hare, 259.

Alvey, Ch. J., delivered the opinion of the court:

The court below passed its order refusing the injunction upon consideration of the allegation, of the bill and the exhibits filed therewith, without reference to the answer of the defendant, which had been previously filed. The answer was properly before the court, and the defendant was entitled to have it considered, if material, in determining the question whether the injunction should issue. *Lynn v. Mount Savage Iron Co.* 84 Md. 624; *Adams, Eq.* 858, and *notes*. We entirely agree, however, with the learned judge below, that, without regard to the answer, the bill fails to present a case for an injunction.

The plaintiff is the owner of a lot of ground, with improvements thereon, situate on the east side of Howard Street, between Camden and Lee Streets, and conducts there the business of a livery stable. Howard Street, at this place, is 82½ feet wide, and the plaintiff is only an abutting proprietor on the street, with no estate in the bed thereof, but, as abutting owner of property on the east side of the street, he claims to be entitled to the full, free and unobstructed use of the entire width of the street as one of the public highways of the city. The defendant Company was incorporated under the General Railroad Incorporation Law of the State for the purpose of constructing and operating a railroad through parts of Baltimore City and parts of Baltimore County, and, finding it necessary to tunnel a part of the way through the city, the Company applied to the General Assembly of 1890 for authority to construct such tunnel, and that authority was given by the Acts of 1890, chap. 139. By the first section of that Act it is provided that the Company "shall be authorized to construct its railroad, or any part thereof, in such tunnel, under such ordinance or ordinances as may be passed by the mayor and city council of Baltimore relating to the route of said railroad through the City of Baltimore, and the mode, terms and conditions of the building and construction of said railroad within said city." Immediately after the passage of this Act the mayor and city council of Baltimore, by special ordinance, des-

ignated the route of the road, and made elaborate provisions in regard to the mode, terms and conditions of the construction of the road through the city. By the first section of the ordinance is defined the route of the road; and, as it affects Howard Street, it is provided that it shall run from a certain point "in a northerly direction to the western side of Howard Street, between Montgomery and Lee Streets; thence along, in, and occupying the western route half of Howard Street, parallel with the eastern line of said street, and distant therefrom forty feet, measured from said eastern building line to the eastern limit of said railroad, to the south line of Camden Street,—said railroad, from where it intersects the west line of Howard Street to its intersection with the south line of Camden Street, to be depressed within a wall cut; thence along and under Howard Street by a tunnel to the northerly side of Richmond Street; thence, etc. And in a proviso to the same section of the ordinance it is required "that all open cuts in any street, lane or alley in the city authorized to be built under the provisions of this ordinance shall be protected on both sides by a granite coping at least two feet high, with neat iron rail on top." The plaintiff charges in his bill that the defendant Company intends to proceed forthwith in the construction of its roadway, and to dig up the west half of the bed of Howard Street in front of his property on the east side of that street to a depth of from ten to twenty-four feet below the present surface of the street; that said plan is known as an "open cut;" and that, when said open cut is made, Howard Street, between Lee and Camden Streets, will be forever destroyed as a public highway, to the extent of said open cut, and will be devoted, to that extent, to the exclusive use of the Railroad Company. The plaintiff denies the authority of the mayor and city council to grant to the railroad company any such exclusive right to the use of the streets of the city, and insists that such use will create a new and additional servitude on the bed of the street, which the mayor and council have no right to impose; but, even if such new and additional servitude be rightfully imposed, it is insisted that the use of the bed of the street can only be availed of by the Railroad Company upon paying to the abutting lotowners just compensation for such use. The plaintiff further charges that no condemnation proceedings have been taken, and none are contemplated; nor is it contemplated by the Railroad Company that any compensation whatever shall be made to the plaintiff or other abutting lotowners who will be affected by this open cut in the bed of the street. He therefore charges that if the defendant Company is allowed to proceed in the manner it proposes, without first making just compensation, it will be in violation of section 40 of the third article of the Constitution of this State, and also in violation of the 14th Amendment of the Constitution of the United States; and he therefore prays that the defendant may be enjoined in the use of the street until just compensation is made for what he alleges will be a serious

injury to his property. It is not charged or in any way claimed that the plaintiff will be deprived of or seriously hindered in the right of access to his property from the street by the making of the cut; nor is it alleged or shown that the foundations of the plaintiff's buildings, abutting on the street, will be in any manner undermined or impaired by the cut proposed to be made in the street. The street, after the cut is made, will still remain, in front of the plaintiff's property on the east side of the cut, about forty-one feet wide. There is no question, therefore, presented here as to the right of the plaintiff to compensation for obstructing access to his property from the street; nor is there any pretense that there will be any physical invasion of his private property abutting on the street. The foundation of the right to relief asserted by the plaintiff is the fact that he is an abutting owner of property on the street, and the making of the open cut will deprive him of the use of that part of the street as at present enjoyed by him.

1. The first contention urged on behalf of the plaintiff is that the Acts of the General Assembly of 1890, chap. 139, in conferring special authority upon the defendant Company to construct its railroad in a tunnel within the limits of the city did not confer authority to construct any part of such road by way of open cuts in the streets; and that the mayor and city council exceeded their authority in attempting to confer power upon the Company, by ordinance, to construct any part of its road in the streets of the city by way of open cuts. But, if we recur to the terms of the grant of power by the Legislature to the mayor and city council, it will at once appear that the power granted was ample to justify the ordinance that was passed. The mayor and city council were authorized to designate by ordinance the route of the road, and also to prescribe the mode, terms and conditions of its construction. The right to prescribe the mode and conditions of its construction certainly embraced the power to authorize, by ordinance, the making of any part of the road by open cuts, if found to be proper and necessary in the construction of the road on the route designated. But, apart from the special terms of the Statute, the Company was authorized to construct such part of its road in a tunnel as should be found necessary; and the grant of that power carried with it, by reasonable implication, all that is necessary and proper for the exercise of the power. Properly graded approaches are indispensable to the use of a tunnel as part of a railroad, and therefore the power to make such approaches must exist. In *Ohio Northern Transp. Co. v. Chicago*, 99 U. S. 640, 25 L. ed. 388, the Supreme Court of the United States said that the grant of power by the Legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. And in the case of *Dodge v. Essex County Comrs.*, 3 Met. 380, *Chief Justice Shaw* laid down the principle as being unquestionable that "an authority to construct any public work carries with it an authority to use the

appropriate means. An authority to make a railroad is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth." It is plain, therefore, that there is no foundation for this first contention of the plaintiff.

2. The next question, and that which is the principal question of the case, is whether the plaintiff, being only an abutting owner on the east side of Howard Street, with no freehold or leasehold estate in the bed of the street, has such an interest therein, by reason of his abutting proprietorship, as to entitle him to be compensated therefor by the Railroad Company before using the street; such compensation to be ascertained and rendered in the manner and according to the provision of the fortieth section of the third article of the Constitution of this State; or, to state the question in a more concise form, whether the use of the street by the Railroad Company in the manner proposed, and under the conditions stated, would be such taking of the private property of the plaintiff as is forbidden by the Constitution of this State, except upon payment of just compensation first being made. The Constitution of this State (§ 40, art. 3) declares that the Legislature shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon by the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation. As will be observed, this constitutional provision does not profess to declare what rights shall be regarded as property; but the thing of which the party is deprived must be private property, and it must be taken for a public use. Nor does the Constitution declare what shall constitute a taking, within the meaning of the inhibition. These are questions of definition left to be fixed by a just construction of the terms employed. There would seem to be no question of the right and power of the Legislature of the State, through the agency of the municipal government, to change and alter the grades of existing streets from time to time, and as often as may be deemed proper, without liability being incurred by the agents doing the work, to the abutting owners of property, for the mere consequential damages that may be suffered by reason of the changed condition of the streets. In many cases the damage suffered from such changes in the grades of streets is very serious, and may even considerably affect the value of property; but yet, if the work be done with due care to avoid unnecessary injury to the abutting property, and there be no physical invasion thereof, the damage suffered is without remedy. In such cases, the work having been done by legal authority, and for municipal purposes, it is said the private damage or annoyance occasioned thereby must be suffered, in order to advance the public good. *Reaney's Case*, 42 Md. 117; *Willison's Case*, 50 Md. 138; *Ohio Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 836; *Vanderlip v. Grand Rapids*, 73 Mich. 522; 2 Dill. Mun. Corp. 3d ed. §§ 989, 990; *Cooley*, Const. Lim. 6th ed. pp. 666-668. But this

reasoning, applicable to the case of the change of grades and the improvements of streets for municipal purposes, does not apply in the case of the grant of power to change the grade of and occupy the street with steam-railroad tracks by a railroad company having no connection with the municipal government. In such case a different principle applies, and the rights of individual property owners are in no respect subordinated to the rights of the railroad company. While the right in the State to grant the power to a railroad company, to occupy the street is unquestionable, by virtue of its power to control all the public highways of the State, the adjoining lot-owners are not without redress for any substantial injury sustained to their property rights that may be produced by reason of the construction or operation of the railroad in the street. As said by the Supreme Court of the United States in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 331, 27 L. ed. 739, 744, when speaking of legislative authority to a railroad company to bring its tracks within the municipal limits of Washington City: "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private right of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred."

But, notwithstanding the Railroad Company may be liable on common-law principles, the question still remains to be answered, Will the cutting and use of the street, as proposed by the Railroad Company, be the taking of private property, in respect of the rights of the plaintiff as abutting lot-owner, within the meaning of the Constitution? As already stated, it is not charged that there will be any invasion of or physical interference with any part of the plaintiff's lot in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street as it now exists, and that his property will be depreciated in value by the construction of the road. This, however, is but an injury, to whatever extent it may be suffered, of an incidental or consequential nature. The construction of the railroad being authorized by competent authority, it cannot be treated as a public nuisance; and no right of action can arise against the Company before it is known whether, and to what extent, damage may be sustained by the construction of the road in the bed of the street. In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the Constitution of the State; and hence there is no ground for any preliminary proceeding by way of condemnation. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Cooley*, Const. Lim. 6th ed. chap. 15, pp. 666-681, and the cases there collated; *Elliot, Roads and Streets*, 155-162.

The counsel for the plaintiff have strongly pressed upon the court the propriety of adopting and following the principles applied in the *Elevated Railroad Cases*, decided by the Court of Appeals of New York. But without saying whether those decisions should be accepted or not in like cases occurring here, this case does not call for the application or rejection of the doctrine applied in those cases. The doctrine of the *Elevated Railroad Cases* of New York, as summarized by the Supreme Court of the United States in the recent case of *New York Elev. R. Co. v. Fifth Nat. Bank*, 185 U. S. 440, 84 L. ed. 234, is this: "An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of land abutting on a street have an easement of way and of light and air over it, and, through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement, but in an action at law cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action." It thus appears that the exercise of equity jurisdiction in those cases was founded largely upon the inadequate remedy at law, as administered in the courts of New York. But here there is no such ground for equitable interposition; the laws of this State furnishing adequate remedy by action at law for any injury that may be suffered by the plaintiff.

There can be no question as to the power of the Legislature of the State, in providing for the construction of the railroad of the defendant through the city, to require compensation to be made to persons whose property may be injuriously affected by changes made in the grades of the streets, or by any other appropriation of them, though the property affected may not be taken, within the meaning of the Constitution. Hence the Acts of 1890, chap. 189, authorized the mayor

and city council of Baltimore, by ordinance, to designate the route, and to prescribe the mode, terms and conditions of the construction of the road within the city. And by the special ordinance, passed in pursuance of the Statute, among the terms and conditions prescribed, in the second section thereof it is provided that the said Company shall also pay and be liable for the actual damage sustained by any and all property abutting on that part of any square, street, lane or alley of which the grade shall be so changed, by reason of any such change of grade in any of the squares, streets, lanes or alleys of the city occasioned by the construction of said railroad; said damages to be recovered in the same manner as provided by section 169, art. 23, of the Code Pub. Gen. Laws." And again, by section 12 of the Ordinance, section 169 of article 23 of the Code is thereby expressly declared to be applicable to the building of said railroad, for the injuries done to private property by the location and construction of said railroad, etc. Section 169 of article 23 of the Code Pub. Gen. Laws, referred to (codified from the Act of 1876), declares that "every railroad company laying down any such track or tracks upon any such public street, road, alley or other public ground shall be responsible for injuries done to private property by such location, lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners, at any time within two years from the completion of such track or tracks, before the proper court." By the acceptance of the Acts of 1890, chap. 189, and the ordinance passed thereunder, the Railroad Company became bound by the terms and provisions thereof; and the legal remedy thus provided would seem to be ample to protect the plaintiff in his rights, though his case be not within the provision of the Constitution, and that is made so, even if he were without remedy by the common law.

For the reasons assigned this court is of opinion that the order of the court below should be affirmed, and that the bill be dismissed.

Bryan, J., dissents.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

ELECTRIC IMPROVEMENT CO.

v.

CITY & COUNTY OF SAN FRANCISCO.

(45 Fed. Rep. 598.)

1. An ordinance prohibiting the suspension of electric wires over or upon

the roofs of buildings is within the legitimate police powers of a city, where such suspension of these wires is extremely dangerous, both as being liable to originate fires and as obstructing the extinguishment of fires otherwise originated.

2. Public officers may be authorized by ordinance to remove dangerous electric wires suspended over or above buildings where the owners fail to do so after notice to remove them.

NOTE.—The term "police power" defined.

It is much easier to perceive and realize the existence and sources of the police power than to mark its boundaries, or prescribe limits to its exercise. *Com. v. Alger*, 7 Cush. 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the

life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. *Slaughter-House Cases*, 83 U. S. 16 Wall. 83, 21 L. ed. 395.

It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; . . .

(March 30, 1891.)

SUIT to enjoin defendants from enforcing an ordinance providing for the removal of electric wires suspended over or upon the roofs of buildings in San Francisco. *Injunction denied.*

The ordinance was as follows:

"Order No. 2163. Prohibiting the suspension of electric wires over or upon the roofs of buildings, etc. The people of the City and County of San Francisco do ordain as follows:

"Section 1. It shall be unlawful for any person, company, or corporation to run or suspend or stretch over or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, any wire used for the purpose of conducting electricity, or an electric current, or for any purpose whatsoever.

"Sec. 2. It shall be unlawful for any person, company or corporation to keep or maintain over, or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, any wire used for the purpose of conducting electricity or an electric current, or for any purpose whatsoever, for more than ten days after such person, company or corporation shall have received notice in writing, signed by the chief engineer of the fire department of said City and County,

to remove the same; and each and every day subsequent to the ten days after such prescribed notice shall have been given, any maintenance or keeping of any wires hereinabove prohibited shall constitute a new and separate violation of this ordinance.

"Sec. 3. It shall be unlawful for any person, company or corporation to attach to, or suspend from, or support upon any building in the City and County of San Francisco any wire used for the purpose of conducting electricity, unless the same be attached, suspended, or supported for the purpose of supplying to the owner or the occupant of such building, or to the owner or occupant of some part thereof, electric light or electric power, or telephone or telegraph service.

"Sec. 4. It shall be unlawful for any person, company, or corporation to run or suspend or stretch or keep or maintain upon any pole or other support erected in or upon the streets or in or upon any street in the City and County of San Francisco any electric-light wire or any wire used to conduct electricity or an electric current for the purpose of producing electric light or motive power unless such person, company, or corporation shall have heretofore obtained, or shall hereafter obtain, permission of the board of supervisors of said City and County so to do.

"Sec. 5. The provisions of this ordinance shall not apply to any building occupied in his or its business, by any person, company,

and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149.

No exposition has been given of this power more thorough and satisfactory, or more often quoted with approval, than that announced in *Com. v. Alger*, 7 Cush. 53, 85, in which it is defined to be "the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."

It is the power by which the health, good order, peace and general welfare of the community are promoted. *Webber v. Virginia*, 106 U. S. 843, 26 L. ed. 568.

The States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 683, 27 L. ed. 445.

The police power of a State extends to all matters which concern its internal regulation. It embraces those which affect the lives, limbs, health, comfort and welfare of all in their persons and their property. It subjects both persons and property to those restraints and burdens which are necessary in order that the general comfort and welfare may be secured. It prescribes the modes in which it is reasonable that each shall use and enjoy his own property, in order that others may be guarded in the reasonable use and enjoyment of theirs, and thus prevents a conflict of rights, by determining what uses and enjoyments by each are consistent with 13 L. R. A.

those to which others are entitled. *Cooley, Const. Lim. chap. 16; Com. v. Barse*, 132 Mass. 542.

What is a legitimate exercise of this power.

No doubt it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed and put an end to such unsightly obstructions. There must be a power somewhere, to cause their removal, and to regulate and control the manner in which telegraph lines shall enter or pass through a city. *Mutual Union Tele. Co. v. Chicago*, 16 Fed. Rep. 309.

Notwithstanding telegraph lines may be an instrument of commerce, a municipal corporation has the right to determine how, in what manner, and upon what condition a telegraph company shall enter and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph one with another. *Mutual Union Tele. Co. v. Chicago*, 16 Fed. Rep. 309; 2 Dillon, Mun. Corp. § 693, note.

As illustrative of the general powers conferred upon municipal corporations, the courts decide that they may prohibit the throwing of heavy or dangerous articles from the upper stories of buildings into the streets or open spaces near them, where persons are in the habit of passing; and may, when not inconsistent with general or special legislation applicable to the municipality, establish fire limits, and prevent the erection therein of wooden buildings. *Charleston City Council v. Elford*, 1 McMull. L. 234; *Brady v. North Western Ins. Co.* 11 Mich. 425; *Douglas v. Com.* 2 Rawle, 262; *Wadleigh v. Gilman*, 12 Me. 408; *Vanderbilt v. Adams*, 7 Cow. 349, 352, per Woodruff, J., *arguendo*; *Charleston v. Reed*, 27 W. Va. 681; *King v. Davenport*, 96 Ill. 305; *Baumgartner v. Hasty*, 100 Ind. 575; *Klingler v. Bickel*, 10 Cent. Rep. 361, 117 Pa. 326; *Knoxville v. Bird*, 12 Lea, 121; *Pye v. Peterson*, 45 Tex. 312.

or corporation engaged in selling or furnishing or supplying electric lights or electric power, or engaged in conducting or carrying on a telephone or telegraph business; nor shall they apply to any wire erected and used exclusively for fire alarm and city and county purposes.

"Sec. 6. Any person violating any provision of this ordinance shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

"Sec. 7. If any person, who has heretofore run or suspended or stretched, or who shall hereafter run or suspend or stretch, over, or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, or who shall hereafter keep or maintain any such wire over or across or upon the top or roof, or any portion of the top or roof, of any building, in said City and County, shall fail to remove the same within ten days after the receipt of a written notice to do so, signed by the chief engineer of the fire department of said City and County, then it shall be lawful for the said chief engineer of the fire department, and he is hereby authorized and directed, to cause such wire to be removed."

Messrs. Haggin & Van Ness and George C. Gorham, Jr., for complainant.

Messrs. Estee, Wilson & McCutcheon, with **Messrs. Langhorne & Miller,** for defendant:

In order to hold a law to be unreasonable, the unreasonableness must appear upon its face, and must exclude the possibility of reasonableness.

Ex parte Shrader, 33 Cal. 281; *Ex parte Smith*, 38 Cal. 707; *Ex parte Delaney*, 43 Cal. 480; *Ex parte Moynier*, 65 Cal. 38.

But the question of reasonableness or unreasonableness is not before and cannot be considered by this court.

Barbier v. Connolly, 113 U. S. 28, 28 L. ed. 923; *Soon Hing v. Crowley*, 113 U. S. 708, 28 L. ed. 1145.

The cases cited by complainant, viz., *Atlantic City W. W. Co. v. Consumers W. Co.* 44 N. J. Eq. 427; *Gale v. Kalamazoo*, 23 Mich. 844; *Newton v. Belger*, 3 New Eng. Rep. 722, 145 Mass. 598; *East St. Louis v. Wehrung*, 50 Ill. 29; *Horn v. People*, 26 Mich. 231; *Re Frazee*, 6 West. Rep. 140, 68 Mich. 396, 6 Am. St. Rep. 310; *Hudson v. Thorne*, 7 Paige, 263, 4 L. ed. 148; *Tugman v. Chicago*, 78 Ill. 405,—do not support its contention.

The discretion which the ordinance vests in the chief engineer of the fire department is neither arbitrary nor unreasonable, nor does it vest him with the power to oppress one or to favor another.

Ex parte Bickerstaff, 70 Cal. 35; *Ex parte Fiske*, 72 Cal. 125; *Ex parte Hoover*, 30 Fed. Rep. 51; *Barbier v. Connolly*, *supra*; *Watertown v. Mayo*, 109 Mass. 315; *Ex parte Nightingale*, 11 Pick. 168; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Moynier*, *supra*; *Vanderbilt v. Adams*, 7 Cow. 351; *Gregory v. Bridgeport*, 41 Conn. 76; *Com. v. Robertson*, 5 Cush. 488; 13 L. R. A.

Brady v. Northwestern Ins. Co. 11 Mich. 425; *Alexander v. Greenville*, 54 Miss. 659; *Hine v. New Haven*, 40 Conn. 478; *Western Union Tele. Co. v. New York*, 3 L. R. A. 449, 38 Fed. Rep. 552.

If this court should hold that any person could run electric wires over the tops of houses, it would place the control of such wires beyond the reach of the municipality, and place in the hands of irresponsible persons the power to work almost untold injury.

The granting of such privileges as that which complainant claims the right to exercise is within the control of the municipality.

Jackson County H. R. Co. v. Interstate Rapid Transit R. Co. 24 Fed. Rep. 206; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Chicago Mun. Gas Light & F. Co. v. Lake*, 27 Ill. App. 346; *Citizens Nat. Gas & Min. Co. v. Elwood*, 14 West. Rep. 92, 114 Ind. 332; *Stilwell v. Buffalo Riding Acad.* 4 N. Y. Supp. 415.

No man may so use his own property as to endanger the life or property of another, and it would not only have been within the power, but it would have been the duty, of the chief engineer of the fire department, in the absence of any ordinance authorizing him so to do, to remove from the tops of houses the wires of complainant, and all other wires of a similar nature.

Omnibus R. Co. v. Baldwin, 57 Cal. 160; *Moore v. Board of Comrs. of Pilots*, 82 How. Pr. 184; *Hart v. Albany*, 9 Wend. 570; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Harcey v. De Woody*, 13 Ark. 252; *Wier's App.* 74 Pa. 280.

Sawyer, J., delivered the opinion of the court:

Without discussing the question at large, I shall content myself with a brief announcement of my conclusions in this case. After a careful consideration of the questions involved, I am satisfied that "Ordinance No. 2163, prohibiting the suspension of electric wires over or upon the roofs of buildings," etc., is a valid ordinance passed within the legitimate police powers of the city under the authority of the State. In *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 138, 21 L. ed. 932, *Mr. Justice Field* says that the dissenting judges in the *Slaughter-House Cases* "recognized the power of the State in its fullest extent (the police power), observing that it embraced all regulations affecting the health, good order, morals, peace and safety of society, and that all sorts of restrictions and burdens were imposed under it; and that when these were not in conflict with any constitutional prohibition, or fundamental principles, they could not be successfully assailed in a judicial tribunal." So, in *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 747, 28 L. ed. 585, the court, quoting from *Chancellor Kent*, says: "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building of combustible materials, and the burial of the dead, may all be interdicted by the law in the midst of dense population, on the general and rational principle that every person ought to so use his property as not to injure

his neighbors; and that private interests must be made subservient to the general interests of the community."

In *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923, and *Soon Heng v. Crowley*, 118 U. S. 703, 28 L. ed. 1145, the court distinctly holds, upon a much milder case of danger than this, that the Fourteenth Amendment in no respect interferes with or limits the exercise of this police power. The exercise of no other branch of this power is more important than that which protects, or seeks to protect, the public safety of a great city, like San Francisco. That the stretching of these wires over buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt after reading the affidavits, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gunpowder, or dynamite, in, under, upon or about our houses. Even if these wires can be so put up and insulated as to be safe, in the mode suggested by one of the complainant's witnesses, Prof. Keith, it has not been done. The professor himself does not claim that they are, now, safe. The danger is of a character cognate to that of gunpowder. There is doubtless a difference in the degree of the danger, but the consequences are liable to be far more widespread and calamitous. Should a raging fire occur, originated by the electric current or otherwise, these dangerous wires might so obstruct the efforts of the firemen, to extinguish it, as to result in the destruction of the entire city. It is certainly competent, under the police powers of the State, to suppress such dangerous erections, in the interests of the common safety of the community. Who can say, in view of the constant and perpetual menace, that the provisions of this ordinance are unreasonable? Is it unreasonable because the remedy against the great public and private nuisance is prompt, and efficient, when no other remedy is certain to be equally so? We know not how soon a calamity from this source may come upon us. It may be while

we are litigating the question. If one should store a large quantity of gunpowder or dynamite among the buildings in the midst of the city, would a like remedy be deemed unreasonable, or inadmissible, or void, as not being due process of law? The fact is, the gunpowder has no right to be there. It is a standing and dangerous menace to the neighborhood, which anyone affected by the nuisance has a right to abate. And when it is so extended as to become a public menace and nuisance, the public officers, especially, when specifically authorized to do so, can lawfully abate it. And such a constant and continuous menace and nuisance in a less degree, perhaps, it is manifest, these wires erected as they appear to be, are. They have no more right to be there than gunpowder. The only wonder is that owners of buildings in view of the recognized danger will permit their use for such purposes. True, the supervisors cannot make an article dangerous by simply declaring it to be so, when in fact it is not. But the practice, as it now prevails, against which this ordinance is directed, is shown to be dangerous, and, we, ourselves, all know it to be so. There can be no successful disputing of the fact. The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the chief of police declares his purpose to enforce it in all cases that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination in favor of another company, as claimed, or that it is intended to be so enforced. I do not think it violates any provision of the national Constitution. I regret to be obliged, by this decision, to affect, so seriously, the interests of the enterprising parties who are endeavoring to supply our citizens with electricity for the various purposes to which it is now applied. But I cannot decline to administer the law as I find it, for the safety and security of the lives and property of the citizens of San Francisco.

In accordance with the conclusions which I have reached, *an injunction must be denied, and it is so ordered.*

RHODE ISLAND SUPREME COURT.

Bartholomew FANNING;

v.

James H. CHACE.

(....R. I....)

Words which merely impute a criminal intention to another, such as, that "He is going

to start a house of ill-fame, so sign a protest against him," are not actionable.

(June 13, 1891.)

ACTION brought to recover damages for an alleged slander. On demurrer to the declaration. *Demurrer sustained.*

NOTE.—What constitutes criminal intent.

To constitute crime there must be a joint operation of act and criminal intent, or criminal negligence. *Desty, Am. Crim. Law, § 5, citing Allen v. State, 52 Ala. 388; Miles v. State, 58 Ala. 380; Yoes v. State, 9 Ark. 42; Ross v. Com. 2 B. Mon. 419; People v. Harris, 29 Cal. 673; People v. White, 34 Cal. 183; State v. Will, 1 Dev. & B. L. 121; Long v. State, 38 Ga. 507; Slattery v. People, 76 Ill. 218; Walker v. 13 L. R. A.*

State, 8 Ind. 290; Gates v. Lounsbury, 20 Johns. 427; Com. v. Morse, 2 Mass. 138; Torrey v. Field, 10 Vt. 353; Hopkins v. Com. 50 Pa. 10. See 1 Bishop, Cr. L. 6th ed. § 204; 3 Greenl. Ev. § 12.

And they must concur in point of time. *Morse v. State, 6 Conn. 9; State v. Weston, 9 Conn. 536; State v. Will, 1 Dev. & B. L. 121; State v. Roper, 3 Dev. L. 473; Long v. State, 12 Ga. 298; Kelly v. Com. 1 Grant, Cas. 484; People v. Cogdell, 1 Hill, 94; People v. An-*

The facts sufficiently appear in the opinion.

Messrs. James M. Ripley and George A. Littlefield, for defendant, in support of the demurrer:

It is not sufficient to prove words which amount to a mere intention to commit a crime not evidenced by any overt act.

Ogders, Slander & Libel, p. 120; 1 Starkie, Slander, pp. 20, 54.

"You will steal," or "I believe you will steal," were held not actionable, as being only an expression of the speaker's opinion and charging no crime committed.

Bays v. Hunt, 60 Iowa, 251.

It has been universally held not actionable to charge a nun with a mere intention to commit a crime.

Crafts v. Brown, 8 Bulst. 167; *Murray v. —*, 2 Bulst. 206; *Seaton v. Cordray*, Wright (Ohio) 101; *Cornelius v. Van Slyck*, 21 Wend. 70; *McKee v. Ingalls*, 5 Ill. 30; *Kirksey v. Fike*, 29 Ala. 207; *Harrison v. Stratton*, 4 Esp. 218; 1 Vin. Abr. 440, p. 9.

Words in order to be held slanderous *per se* as touching and concerning one in his office, business or occupation, must impeach either his skill or knowledge or his official or professional conduct in his own particular business.

Ogders, Slander & Libel, p. 65.

In order to hold words of this class actionable, they must have a direct tendency to injure the plaintiff in his particular business.

Angle v. Alexander, 7 Bing. 119; *Lumby v. Allday*, 1 Crompt. & J. 301; *Brayne v. Cooper*, 5 Mees. & W. 249; *Sibley v. Tomlins*, 4 Tyr. 90; *Ruel v. Tatnell*, 29 Week. Rep. 172.

If the imputation complained of is not a charge of crime or of business incapacity, then it is nothing worth considering. It does not appear that plaintiff's damage is the direct result of the defendant's words. The damage must be the natural, immediate and legitimate consequence of the words which the defendant uttered, and a consequence which the defendant knew, or ought to have known, would follow from his words.

derson, 14 Johns. 294; *State v. Ferguson*, 2 McMull. L. 508; *People v. Reynolds*, 2 Mich. 422; *State v. Braden*, 2 Overt. (Tenn.) 68; *State v. Smith*, 2 Tyler, 272. And see *Norton v. State*, 4 Mo. 461; *Ransom v. State*, 22 Conn. 153; *State v. Conway*, 18 Mo. 321.

An act unlawful in itself may sometimes be punishable because of a criminal intent connected with it. *Fairlee v. People*, 11 Ill. 1. See *Rex v. Horner*, Cald. 285.

Every crime contains two elements: the criminal act and the criminal intent; the former consisting of those external actions or omissions which the law prohibits; the latter of that evil and malicious will which finds expression in the criminal act. See *Bl. Com.* 20; *Broom, Com. Law*, 847; 1 *Bishop, Cr. L.* 6th ed. § 208; 1 *Hale, P. C.* 15.

Although the essence of every offense is the wrongful intent with which it is done, and without which it cannot exist (*Stein v. State*, 37 Ala. 123; *Roseberry v. State*, 50 Ala. 160; *People v. Lohman*, 2 Barb. 218; *Sturges v. Maitland*, Anth. 153; *Com. v. Ridgway*, 2 Ashm. 247; *Riley v. State*, 16 Conn. 47; *State v. Carland*, 3 Dev. L. 114; *Cummins v. Spruance*, 4 Harr. (Del.) 815; *Walker v. State*, 8 Ind. 290; *State v. Bartlett*, 30 Me. 132; *United States v. Pearce*, 2 McLean, 14; *State v. Gardner*, 5 Nev. 377; *The William Gray*, 1 Paine, 16; *State v. Hawkins*, 6 Port. (Ala.) 461; *State v. Nicholas*, 2 Strobb. L. 278; *United States v. Buzzo*, 85 U. S. 18 Wall. 123, 21 L. ed. 813; *Case of Le Tigre*, 3 Wash. C. C. 567; See 1 *Bishop, Cr. L.* 6th ed. § 287; 1 *Greenl. Ev.* § 18; 3 *Greenl. Ev.* 6th ed. § 12; 1 *Russell, Crimes*, 84; yet some overt act is necessary to constitute crime (*State v. Wilson*, 30 Conn. 600; *Com. v. Clark*, 6 Gratt. 675; *Randolph v. Com.* 6 Serg. & R. 398; *Lovett v. State*, 19 Tex. 174; *Torrey v. Field*, 10 Vt. 363; *Miles v. State*, 58 Ala. 390; *Slatterly v. People*, 76 Ill. 218; *Fowler v. Padgett*, 7 T. R. 509; as mere intent is not punishable. *Allen v. State*, 53 Ala. 388; *Yoes v. State*, 9 Ark. 42; *United States v. Riddle*, 9 U. S. 5 Cranch, 311, 8 L. ed. 110; *Ross v. Com.* 2 B. Mon. 417; *Com. v. Morse*, 2 Mass. 128.

It is the intent which determines the criminality of the act. See *Roseberry v. State*, 50 Ala. 160; *Reg. v. Prince*, L. R. 2 Cr. Cas. 154, 1 Am. Crim. Rep. 15; *Broom, Crim. Law*, 871.

And when acts are criminal only when performed with some specific design, this specific design enters into the nature of the act itself, and is called the specific intent (see 1 *Bishop, Cr. L.* 6th ed. § 238), and must be proved (*McKay v. State*, 44 Tex. 43; *Simpson v. State*, 59 Ala. 1; *White v. State*, 53 Ind. 596; *Roberts v. People*, 19 Mich. 401; *United States v. Learned*, 1 Abb. U. S. 483; *People v. Potter*, 5 Mich. 13 L. R. A.

1; *Whiteford v. Com.* 6 Rand. 722; *Bivens v. State*, 11 Ark. 456; *State v. Gillick*, 7 Iowa, 287; *State v. Dowd*, 19 Conn. 387; *People v. Sanchez*, 24 Cal. 17; *Hill v. People*, 1 Colo. 451; *Rex v. Woodfall*, 5 Burr. 2661. See 1 *Bishop, Cr. L.* 6th ed. § 736, beyond a reasonable doubt. *Mullins v. State*, 37 Tex. 337; *State v. Stanton*, 37 Conn. 421.

Charge of mere purpose to commit a crime is not actionable.

If the words only imply the purpose or intention on the part of the person spoken of to commit a crime, or describe him as possessing a disposition, or as wanting moral qualities which would prompt him to commit the crime, or amount to an allegation that, if opportunity offers, he would commit it, they are not actionable *per se*. *Bays v. Hunt*, 60 Iowa, 251.

To charge a person with intent to commit a crime is not actionable. *McKee v. Ingalls*, 5 Ill. 30; *Wilson v. Tatum*, 8 Jones, L. 300; *Seaton v. Cordray*, Wright (Ohio) 101; *Newell, Defamation, Slander & Libel*, 112.

The mere intention to commit a crime, without an attempt by some overt act, is no offense. *Weed v. Bibbins*, 32 Barb. 315.

It has been said the cases are uniform on the point that for an imputation of evil inclinations or principle no action lies, unless it affects the plaintiff in some particular character, or produces a special damage. 1 *Starkie, Slander & Libel*, 24; *Harrison v. Stratton*, 4 Esp. 218; *Townshend, Slander & Libel*, § 162.

Not every unfounded imputation of crime is actionable; and it is for the jury to determine whether the words were spoken in good faith in prosecuting an inquiry as to a suspected offense, and, if so, whether they were uttered in stronger language, or in a more public manner than was necessary. *Padmore v. Lawrence*, 11 Ad. & El. 680; *Tempest v. Chambers*, 1 Stark. 67; *Heming v. Power*, 10 Mees. & W. 564; *Harper v. Harper*, 10 Bush, 447; 5 *Wait, Act. & Def.* 732.

No action can be based upon a mere suspicion or opinion, which does not import any express or precise imputation of guilt (*Hodgson v. Scarlett*, 1 Barn. & Ald. 248; *Harrison v. King*, 4 Price, 46), nor accuses an individual of crime, no other person being present (*Foroc v. Warren*, 15 C. B. N. S. 806; *Sheffill v. Van Deusen*, 13 Gray, 304; *Desmond v. Brown*, 38 Iowa, 13; *Halle v. Fuller*, 5 Thomp. & C. 716, 2 Hun, 519), or none who understood the language in which the words were uttered. *Lyle v. Clason*, 1 Cal. 581; *Broderick v. James*, 3 Daly, 451; *Wait, Act. & Def.* 732.

Odgers, Slander & Libel, p. 308.

The special damage complained of, in order to ground an action of slander, must be the direct result of the defendant's words, not even the result of those words combined with other causes.

Odgers, Slander & Libel, pp. 321, 322; *Sterry v. Foreman*, 2 Car. & P. 592; *Miller v. David*, L. R. 9 C. P. 118; *Hoey v. Felton*, 11 C. B. N. S. 142; *Vicars v. Wilcocks*, 8 East, 1; *Haddon v. Lott*, 15 C. B. 411; *Ashley v. Harrison*, 1 Esp. 48.

Mr. George J. West for plaintiff.

Tillinghast, J., delivered the opinion of the court:

This is an action of trespass on the case for slander. The declaration, to which the defendant demurs, sets out that the plaintiff is a licensed retail liquor dealer in the City of Providence, and has been such for a long time. That, anticipating a renewal of his license for the year 1890-91, he made large purchases of liquors in advance, and also refitted and refurbished his saloon at large expense. That the defendant, well knowing the premises, but intending to injure him, the plaintiff, and prevent him from again procuring a license for the carrying on of his said business, in the presence and hearing of divers good citizens, uttered, declared and published the following false, scandalous and malicious words of and concerning the plaintiff, viz.: "He [meaning the plaintiff] is going to start a house of ill fame [meaning a house to be kept for the purposes of prostitution], so sign a protest against him [meaning the plaintiff];"—meaning and intending thereby that said plaintiff was going to start a house to be kept and maintained for the purposes of prostitution; and that said plaintiff ought not to be granted a license to carry on the business of retail liquor dealer as he desired, in accordance with his application on file in the office of the license commissioners in said city, and to therefore sign a written remonstrance protesting that said plaintiff ought to be refused a license, which said defendant then and there presented to said people. The declaration further sets out that, in consequence of the uttering and publishing of said words by the defendant, the majority of persons owning the greater part of the land within 200 feet of the said saloon, or who were occupants of it, signed a remonstrance protesting that license should not be granted to the plaintiff to carry on said business, whereupon said license commissioners refused to grant such license, and were rendered unable to grant the same; and alleging special damage.

The principal ground urged in support of the demurrer is that the words complained of, since they do not amount to an imputation of the commission of an offense, but only to a charge of an intention to commit one, are not actionable either *per se*, or from having caused special damage. The main question raised by the demurrer therefore is this, viz.: Are words actionable which merely impute a criminal intention to another? We think this question must be answered in the negative. Words which falsely charge a per-

son with the commission of a criminal offense are actionable upon the familiar ground that they may endanger him by subjecting him to the penalties of the law, and render him infamous in the community. But the charge, in order to be obnoxious to the law, must be of an offense actually committed or attempted,—a punishable offense,—and not of an offense existing in contemplation or intention merely; for the law does not take cognizance of one's intentions merely, however malicious or wicked they may be, but only takes cognizance thereof when coupled with and giving significance to his acts. So that, in order to render one's intent of any importance in the eye of the law, it must be combined with his act. It therefore follows that, as mere intent to commit a crime is not a violation of the law, and hence not punishable, to accuse one of having such an intent is not to accuse him of any crime or offense. The language which the plaintiff complains of as being slanderous is this: "He is going to start a house of ill fame." This language, if indeed it is anything more than the expression of an opinion on the part of the defendant, does not amount to a charge of any crime or offense, or even of an attempt to commit one. That such a charge is not actionable is one of the few things in the Law of Slander which is evidently settled beyond controversy. The law upon this point is well stated in the American Encyclopedia of Law (vol. 13, p. 353) as follows: "Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime. But as soon as any step is taken to carry out such intention, as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is, at common law, a misdemeanor, and in itself indictable. To impute such an attempt is therefore clearly actionable."

In *Cornelius v. Van Slyck*, 21 Wend. 70, 71, the court, in speaking of the sense in which the words should be taken, says: "Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable." In *Seaton v. Cordruy*, Wright (Ohio) 101, the court says: "An action may be sustained for charging another with being a thief, or with having stolen, but not for imputing a mere intention to steal, or with having an evil disposition. The foundation of the slander is that the charge, if true, would subject the accused to infamous punishment; an evil disposition, without act, cannot so subject anyone." See also *Townshend, Slander & Libel*, 3d ed. 161; *McKee v. Ingalls*, 5 Ill. 30; *Harrison v. Stratton*, 4 Esp. 218; *Wilson v. Tatum*, 8 Jones, L. 300; *Stoner v. Audley*, Cro. Eliz. 250; *Dr. Poe's Case*, cited in *Murrey v. —*, 2 Bulst. 206; 1 Vin. Abr. 440; *Odgers, Slander & Libel*, 57; *Sillars v. Collier*, 151 Mass. 50, 53, 54, 6 L. R. A. 680.

But the plaintiff contends, in support of his declaration, that any defamatory or disparaging words spoken of another, which cause special damage, are actionable. While we cannot subscribe to quite so broad a

statement of the law as this, yet we think that the proposition is substantially correct; that is to say, that false, defamatory words spoken of another are either actionable *per se*, or by reason of having caused special damage. We do not think, however, that the words relied on in the declaration are defamatory, within the legal meaning of that term. To defame another by language is to harm or destroy his good fame or reputation, or to disgrace or calumniate him. In order to have this evil effect, however, it is evident that the language used concerning him must relate to his conduct or character as they now are or have been in the past, and not be the mere opinion of the speaker as to what they will be at some indefinite period in the future. In other words, that language which amounts to a mere assertion of opinion as to

what will be the future conduct or character of another is not actionable; but that it is only actionable when it relates to what the person now is, or has been in the past, or to what he is doing or attempting to do, or has done or attempted to do in the past; that is, when it relates to something actual, instead of something which is merely imaginary or conjectural. The character of a man is what he now is, and not what he may be at some future time. Among the multitude of different forms of expression found in the books which have been held to be actionable we have been unable to find any case, nor have we been referred to any, in which language analogous to that relied on in the plaintiff's declaration has been held sufficient to maintain an action for slander.

Demurrer sustained.

CALIFORNIA SUPREME COURT.

Minnie SPECT, *Resp't.*,

v.

Lou G. SPECT, *App't.*

(....Cal.....)

A mortgagee in possession does not lose his rights as such by the fact that his right of action for his debt has become barred by the Statute of Limitations, and he can still resist any action to deprive him of his security.

(March 25, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Colusa County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. B. F. Howard and S. G. Tomkins, for appellant:

It should be imposed as a condition to plaintiff's obtaining relief that she first satisfy defendant's lien.

Booth v. Hoskins, 75 Cal. 271.

Messrs. H. M. Albery and W. G. Dyas, for respondent:

The mortgage does not provide for the possession of the land in controversy, by the mortgagee. A mortgage, to entitle a mortgagee to possession, must so provide.

Smith v. Smith, 80 Cal. 326; *Raynor v. Drew*, 72 Cal. 309; Civ. Code, § 2927.

Harrison, J., delivered the opinion of the court:

The defendant in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and, "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner

and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of \$2,200, and executed to her his promissory note therefor; that on the 2d day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained and is now in actual possession of the same, claiming them as her own: that no part of said \$2,200 has ever been paid, principal or interest, but the whole thereof is now due and unpaid, amounting to \$5,632;" and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason

NOTE.—*Mortgagee in possession, rights of.*

If a mortgagee obtains possession in any lawful or peaceable mode he may retain it as against the mortgagor, or any person claiming under him sub-

sequent to the mortgage, until the mortgage debt is paid, although no action is allowed by statute to recover possession. See *note* to *Cook v. Cooper* (Or.) 7 L. R. A. 273.

13 L. R. A.

for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in *Himmelman v. Henry*, 84 Cal. 104, had no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but, as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is therefore subject to whatever incumbrance was created by the foregoing facts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed, although it does not appear in the record that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the Statute of Limitations. The question to be determined is, "Can a mortgagor, who has placed his mortgagee in possession of the mortgaged premises, maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the Statute of Limitations?"

Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage, but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration." The right of the mortgagee to take possession of the mortgaged premises does not depend upon the Statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. *Fogarty v. Sawyer*, 17 Cal. 589; *Edwards v. Wray*, 11 Biss. 251. In taking such possession the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or 18 L. R. A.

dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage.

A mortgage is defined by section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, pledges to him the land also as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *cautum vivum*, as distinguished from the *cautum mortuum*. This is defined by Chancellor Kent to be: "When the creditor takes the estate to hold and enjoy it without any limited time for redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged the land by right of reverter returns to the original owner." 4 Kent, Com. 187, 2 Bl. Com. 157; Co. Litt. 205a. The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the Statute of Limitations has barred all right of action to recover the debt. *Jones v. Merchants Bank of Albany*, 4 Robt. 221. Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands." *Kortright v. Cady*, 21 N. Y. 364. "On the same principle that the party who holds goods in pledge for a debt may retain these goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt." *Henry v. Confidence G. & S. Min. Co.* 1 Nev. 622. In *Dutton v. Warschauer*, 21 Cal. 625, it is said: "When possession is taken by the mortgagee after condition broken by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to re-

ceive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor and all others until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles, when once established, become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord Redesdale: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 807, Code Civil Proc., declares: "There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the form of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title (*Booth v. Hoskins*, 75 Cal. 271), or to enjoin a sale under the power given by him in the security (*Grant v. Burr*, 54 Cal. 298), or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid. *Physe v. Riley*, 15 Wend. 248; *Hubbell v. Moulson*, 58 N. Y. 225; *Fee v. Svingly*, 6 Mont. 596; *Roberts v. Sutherland*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142; 7 L. R. A. 278; *Frink v. Le Roy*, 49 Cal. 314; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Signer*, 44 Barb. 614; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 82; *Den v. Wright*, 7 N. J. L. 212; *Wells v. Van Dyke*, 109 Pa. 335; *Duks v. Reed*, 64 Tex. 705; 1 Jones, Mortg. § 715.

The debt is not satisfied or paid by mere lapse of time. The Statute of Limitations

is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield and not as a sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation, operated either as an extinguishment or payment. Such a result cannot be derived from the language of our Statute, the reason or policy of the law, or the decisions of courts in this State or elsewhere." *Grant v. Burr*, 54 Cal. 301.

The mortgagee, after the mortgage debt has been barred by the Statute of Limitations, cannot, by any affirmative proceedings on his part, invoke the aid of the court for the collection of the debt; but, if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security.

In *Frink v. Le Roy*, 49 Cal. 314, a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon Le Roy, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870, Frink, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against Le Roy for their recovery. Le Roy, in his answer, by way of equitable defense, set up the mortgage, the judgment foreclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the Statute of Limitations. Upon an appeal from the judgment in favor of the plaintiff, the supreme court held that the Statute of Limitations had no application, and that Le Roy's right to remain in possession under the agreement was not affected by it, saying that "the equity of Le Roy to be maintained in possession until satisfaction of the debt is not lost from the fact that for upwards of ten years he has been in the actual possession of that of which he is now sought to be deprived." In *Hubbell v. Moulson*, 58 N. Y. 225, it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt; and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied. Section 846, Code Civil Proc., provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the

mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee, after the debt for which the mortgage was given had become barred by the Statute of Limitations, he would have no need to bring an action to redeem the mortgage; and, if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but, if the mortgagor could maintain

ejectment as soon as the right of action upon the debt was barred by the Statute of Limitations, the provisions of this section would be meaningless.

It follows, from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery; and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed; and it is so ordered.

We concur: **Beatty, Ch. J.; McFarland, J.; Sharpsteen, J.; Paterson, J.; De Haven, J.; Garoutte, J.**

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

George J. VOLLAND, *Plff. in Err.*,
v.

Joseph BAKER.

(....Neb.....)

- *1. In an appeal from the county court to the district court there may be claimed by an amended petition an amount of damages equal to that which could have been recovered in the county court.
2. The vendee of a chattel purchased by negotiable note, transferred to third party, may recover on vendor's warranty, though the note has gone to judgment at law, and not paid.
3. The instructions given and refused examined, and held properly given and refused.
4. Evidence examined, and held to support the verdict.

(July 1, 1891.)

ERROR to the District Court for Webster County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged breach of warranty of the soundness of certain horses. *Affirmed.*

The facts are stated in the opinion.

Meers, Dilworth, Smith & Dilworth for plaintiff in error.

Mr. J. N. Richards, for defendant in error:

It is no objection to a petition that the amount of damages has been increased, provided there is not a departure and provided the increase does not go beyond the jurisdiction of the court from which appeal was taken.

Union Pac. R. Co. v. Ogilvy, 18 Neb. 638.

Plaintiff in error filed his answer to the petition and thereby waived the objection if it was otherwise good.

School Dist. No. 36 v. McIntie, 14 Neb. 50; *Waters v. Reuben*, 16 Neb. 101.

If the note had been sold then the vendee could recover without paying it.

Aultman v. Jett, 42 Wis. 488; *Long v. Clapp*, 15 Neb. 420; *Dunbar v. Briggs*, 18 Neb. 835.

The insolvency of the vendee is immaterial.

*Head notes by COBB, Ch. J.

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Thoreson v. Minneapolis Harvester Works, 29 Minn. 841.

The fact that the buyer of a warranted article gives his note for it, which has not been paid when he brings his action upon the warranty, does not affect the extent of his damages, neither is the sum which the buyer is entitled to recover for breach of warranty limited by the price which he paid or agreed to pay for the article warranted.

Frohreich v. Gammon, 28 Minn. 476.

It was not necessary that the vendor knew the warranty made by him was false.

Dunbar v. Briggs, 18 Neb. 97.

Cobb, Ch. J., delivered the opinion of the court:

This action was originally brought September 10, 1886, in the county court of said county, by Joseph Baker against George J. Volland, claiming that on March 22, 1884, he purchased a team of horses of the defendant for \$350, which defendant warranted to be sound and free from disease; that he thoroughly relied on said warranty, and believed the same to be true, and alleged that said representation and warranty were false and untrue in that one of said horses had a disease akin to glanders, commonly called "button farcy," and was of no value, and to the damage of the plaintiff to the amount of \$175. That on account of the disease of said horse it was communicated to another horse of his, without any neglect or fault of his, and the same was damaged to the sum of \$100. That he lay out the use of said horses, and incurred necessary expenses in attempting to doctor and cure the same, in the sum of \$100; and that he has incurred damages in all to the sum of \$375. That he gave said Volland his note for the sum of \$350, payable March 1, 1885, and that before the maturity of said note the said G. Volland sold the same to Benjamin F. Smith, and that said Smith recovered a judgment in the County Court of Webster County for the sum of \$487.50 and \$11.50 costs, and that said judgment is in full force and effect. The case being appealed to the district court, the

defendant in error filed his petition, setting forth the same state of facts, but claiming \$200 damages by reason of the disease being communicated to other horses, and claimed \$100 damages for expenses in doctoring said horses. In the district court the plaintiff in error filed a motion to strike out of the petition in the second cause the sum of \$100, for the reason the same was not claimed in the county court; and also to strike out the fourth item of damages, for the reason that the same was not claimed in the county court,—which motion was overruled. The plaintiff in error also filed answer, admitting that the defendant in error purchased the horses for the sum of \$350, but denied that the horses were warranted in any manner; and further alleged that the note given for the horses was transferred to B. F. Smith, and that said B. F. Smith recovered a judgment in the County Court of Webster County for the sum of \$437.50 and \$11.50 costs; and that an execution was issued on said judgment and returned "No goods;" and that said judgment remains in full force and wholly unpaid; and that defendant in error had never paid anything on said note or the judgment; and that said defendant in error, Baker, and the party signing said note as surety, were insolvent, and nothing could be collected from them. The case was tried to a jury, who returned a verdict for the defendant in error and against the plaintiff in error for the sum of \$275, with interest at 7 per cent from March 24, 1885; total principal and interest, \$345.58. The motion for a new trial was overruled, and the cause brought to this court on the following errors: *first*, that the district court erred in refusing to strike out the fourth item of damage in the plaintiff's petition, for the reason that no such claim was tried in the county court; *second*, that the court erred in refusing to give instruction No. 1, asked for by the plaintiff; *third*, that the court erred in giving instructions Nos. 1, 2, 3, 4, and 5.

The first error assigned is overruled, for the reason that it has been held, and is a settled rule, that, "where an action is brought in the county court and appealed, an amended petition in the district court may claim an amount of damages equal to that of the jurisdiction of the county court." *Union Pac. R. Co. v. Ogilvy*, 18 Neb. 638. The amendment embracing the fourth item of damages is an extension of the original claim merely, and within the jurisdiction of the county court. It could have been made there, and was competent to be made on appeal.

The second error is that of the refusal of the court to instruct the jury that "the plaintiff could not recover unless they found that he had paid the value of the horse, or the agreed price thereof." The promissory note of the plaintiff having gone to a second holder, and having gone into judgment at law, it is not clear that the court should have enforced this rule. In the case cited as a precedent,—that of *Aultman v. Jett*, 42 Wis. 488,—there is a clear intimation that if the notes had been sold the vendee could have recovered. Cole, J., in the opinion, said: "There is, however, no evidence that the

notes have been transferred; and, in the absence of all proof upon the point, the presumption is that they are still held by the plaintiff. If the notes still belong to the plaintiff, they cannot be treated as payment of the contract price, unless it was so agreed at the time." This rule had been adopted in the courts of Wisconsin, and was adhered to; but Ryan, Ch. J., took occasion to say "that, if the question of payment were a new one in this court, he could not concur in the rule; and that his opinion was, when one contracts a debt, and presently gives his note or other obligation for the amount, it ought to be considered a payment, unless there be express agreement to the contrary."

In the case of *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210, cited as precedent, the reason the recovery must be limited to the amount paid is that the warranty was in writing, and by its terms the vendee's damages were limited to the amount paid on the contract of sale.

In the action of *Dunbar v. Briggs*, 13 Neb. 382, suit was brought in the District Court of Gage County on the defendant's promissory note for \$900 in payment for thirty-nine head of Texas horses, diseased, which infected other horses, and on which note there was a recovery in full. This judgment was reversed on error. The damages were not limited by contract, but the warranty of soundness was questioned, and testimony on that point improperly overruled.

In the case of *Long v. Clapp*, 15 Neb. 417, it was laid down that, "in addition to the general measure of damages, the law in some cases imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. Where this duty has been found to exist, the labor and expense involved in its performance are chargeable to the party liable for the injury thus mitigated." This rule seems to be directly apposite to the recovery by the defendant in error on the veterinary surgeon's account for services. Beyond this, there can be no contention as to the measure of damages in the court below, if the jury were not misled as to the price of the diseased horse and the value of the colt lost from infection. The testimony does not indicate that they were so misled. As to the general principle that the buyer of a horse, or the purchaser of a patented machine, both warranted, has right of action under the warranty, and a counterclaim for breach of warranty, whether the purchase was by cash or promise, or whether the vendee be solvent or insolvent, can hardly be questioned in this State. The assumption is that, an execution having been returned against a judgment debtor unsatisfied for want of goods and chattels, is not Q. E. D. that he would remain insolvent, and never pay his creditors; for by industry and good luck he may become solvent, and discharge his pecuniary obligations. That fact, of itself, was to be considered by the vendor preceding this transaction.

Nor is the proposition in this case confined to the judicial practice of this State.

In *Thoreson v. Minneapolis Harvester Works*,

29 Minn. 341, it was held: "In an action to recover damages for breach of warranty in the sale of a chattel a recovery may be had, although the vendee had not paid the purchase price, but had given his promissory notes therefor, which are still unpaid." Prior to this decision, the Supreme Court of Minnesota had held in the case of *Frohreich v. Gammon*, 28 Minn. 476, that "the fact that the buyer of a warranted article gives his note for it, which has not been paid when he brings his action upon the warranty, does

not affect the extent of his damage. Neither is the sum which the buyer is entitled to recover for breach of warranty limited by the price which he paid or agreed to pay for the articles."

From a careful reading of the evidence, and from the fair and impartial instructions of the court, we are not able to find reversible errors in the trial in the court below.

The judgment of the District Court is affirmed.
The other Judges concur.

WASHINGTON SUPREME COURT.

J. Gardner KENYON, *Appt.*,

v.

Robert KNIPE *et al.*

(.... Wash.)

A purchaser of lots according to a plat showing them bounded by a definite line at a specified distance from the front boundary acquires no riparian rights in lands covered by tide-water at the rear of such lots, at least where the plat shows an alley and other lots beyond such line.

(*Stiles, J., dissents.*)

(June 2, 1891.)

APPEAL by complainant from a decree of the District Court for King County in favor of defendants in a suit brought to enjoin the maintenance by defendants of a wharf in tide-water in front of complainant's premises. *Affirmed.*

The facts are stated in the opinions.

Mr. J. B. Howe, with *Messrs. D. O. Finch, E. C. Hughes* and *J. Gardner Kenyon*, *in propria persona*, for appellant:

A. A. Denny, as owner of a certain donation land claim abutting on the navigable waters of Elliott Bay, was exclusively possessed of the riparian rights incident to the bank.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Brunswick v. Union Depot & St. R. & Transp. Co.* 81 Minn. 297; *Hansford v. St. Paul & D. R. Co.* 7 L. R. A. 723, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 663; *Barlow v. Wingate*, 2d Jud. Dist. of Wash. Terr.; *Case v. Loftus*, 5 L. R. A. 684, 89 Fed. Rep. 784; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 504, 19 L. ed. 986; *Shirley v. Bishop*, 67 Cal. 543; *Musser v. Hershey*, 42 Iowa, 362; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 226; *Lackland v. North Missouri R. Co.* 81 Mo. 181; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21; *Hayden v. Long*, 8 Or. 244; Gould, Waters, §§ 142-149; Gould & Tucker's U. S. Rev. Stat. § 2396; *East Omaha Land Co. v. Jefferies*, 40 Fed. Rep. 866; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600; *Everson v. Waseca*, 44 Minn. 247; 2 Parsons, Cont. 7th ed. § 508, notes 2 and 3.

Appellant, by deed executed by said Denny and wife, in pursuance of said instrument of

NOTE.—*Map, when controlling in the description of a deed.*

Where a recital of the deed makes special reference to some particular map, plat, or tracing for the monuments, courses and distances of the realty conveyed, such map, plat or tracing becomes a part of the deed of conveyance by which the limits of the property conveyed may be determined. *Thomas v. Patten*, 13 Me. 329; *Kennebec Purchase Proprs. v. Tiffany*, 1 Me. 219; *Shirras v. Caig*, 11 U. S. 7 Cranch, 48, 3 L. ed. 265; *Farnsworth v. Taylor*, 9 Gray, 162; *Davis v. Rainsford*, 17 Mass. 207; *Stetson v. Dow*, 16 Gray, 374; *Fox v. Union Sugar Ref. Co.* 109 Mass. 292; *Chamberlain v. Bradley*, 101 Mass. 191; *Birmingham v. Anderson*, 40 Pa. 506; *McCausland v. Fleming*, 63 Pa. 36; *Spiller v. Scribner*, 36 Vt. 247; *Ferris v. Ocover*, 10 Cal. C22.

Where a plan is referred to in a deed, as containing a description of an estate, the courses, distances and other particulars appearing upon the plan are to be as much regarded in ascertaining the true description of the estate, and the intent of the parties in making it, as if they had been expressly recited and enumerated in the deed. *Morgan v. Moore*, 3 Gray, 319; *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, *supra*; *Parker v. Bennett*, 11 Allen, 388; *Murdock v. Chapman*, 9 Gray, 156.

Independent of statutory regulation, the law is well settled that "where a deed refers to a map or plan, its lines, courses, etc., are to be regarded as 18 L. R. A.

expressly mentioned in the deed, whether actually annexed or not." 2 Hiliard, Real Prop. 365, § 108; *Davis v. Rainsford*, 17 Mass. 211; *Lunt v. Holland*, *supra*; *Doe v. Cullum*, 4 Ala. 576; *Thomas v. Hatch*, 3 Sumn. 180; *Thomas v. Patten*, 13 Me. 329; *Blaney v. Rice*, 20 Pick. 62; *Harris v. Maxwell*, 4 Dev. & B. L. 242; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Taylor v. Parry*, 1 Man. & G. 604; *Otis v. Moulton*, 20 Me. 205; *Heaton v. Hodges*, 14 Me. 66; *Magoun v. Lap-ham*, 21 Pick. 135; 1 Greenl. Cruise, Real Prop. 223.

Where lots are conveyed with express reference to a recorded plat, evidence to control, or in any way affect the plat, is inadmissible in ejectment. If there was any error or mistake in this reference by way of description of the premises, the remedy was in chancery, to reform the deed. *Jones v. Johnston*, 59 U. S. 18 How. 160, 15 L. ed. 320.

So long as that remained unreformed, the description of the lot by reference to the plat was conclusive upon the parties. It is not material that the plat recorded did not conform to the requirements of the Statute. The title passed by the deed, whether the plat conformed or not. *Ibid.*

A map made for, and mentioned in, the deeds of the respective parcels from the former owner of the whole premises under which the plaintiff and defendants respectively derive their title, is properly received in evidence, for the purpose of showing the actual location of that line. *Kingsland v. Chittenden*, 6 Lans. 15.

sale, became owner of the legal title to said bank lots and possessed of all the riparian rights which said A. A. Denny, at the time he was owner of said bank lots, had as incident to said bank.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Brunswick v. Union Depot St. R. & Transp. Co.* 81 Minn. 297; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Barlow v. Wingate*, 2d Jud. Dist. Wash. Terr.; *Musser v. Hershey*, 42 Iowa, 362; *Phillips v. Rhodes*, 7 Met. 322; *Delaplatine v. Chicago & N. W. R. Co.* 43 Wis. 226.

Appellant, as owner of bank lots abutting on the navigable waters of Elliott Bay, is now exclusively entitled to the right of erecting and maintaining wharves, piers and other like structures upon his said lots and extending said wharves and piers to the deep waters of Elliott Bay.

Laws of Washington, 1854, p. 857; Wash. Terr. Code, § 8271; *Case v. Loftus*, 5 L. R. A. 684, 39 Fed. Rep. 784; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; *Brunswick v. Union Depot St. R. & Transp. Co.* 81 Minn. 297; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Barlow v. Wingate*, 2d Jud. Dist. Wash. Terr.; *Musser v. Hershey*, 42 Iowa, 362; *Phillips v. Rhodes*, 7 Met. 322; *Delaplatine v. Chicago & N. W. R. Co.* 43 Wis. 226.

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The title of Denny extended only to high-water mark of the waters of Elliott Bay, and his attempt to plat lots, blocks, streets and alleys below that line was a nullity and no one could acquire any right by such void act.

Lake Superior Land Co. v. Emerson, supra; *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Brunswick v. Union Depot St. R. & Transp. Co.* 81 Minn. 297; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Barlow v. Wingate*, 2d Jud. Dist. Wash. Terr.; *Musser v. Hershey*, 42 Iowa, 362; *Phillips v. Rhodes*, 7 Met. 322; *Delaplatine v. Chicago & N. W. R. Co.* 43 Wis. 226.

Neither appellant, appellees nor A. A. Denny himself could be bound by said plat except so far as the same was a part of said Denny's donation claim, because no person could be bound by such void and vain act.

Cleveland v. Choate, 77 Cal. 73; *Barlow v. Wingate*, supra; *Jones v. Johnston*, 59 U. S. 18 How. 150, 15 L. ed. 320; Gould, Waters, p. 541; *Ruge v. Appalachicola O. C. & F. Co.* 25 Fla. 656; *Ricard v. Williams*, 20 U. S. 7 Wheat. 109, 5 L. ed. 410; *Shively v. Parker*, supra.

Appellant is not estopped by said attempted platting of the sea by Denny from claiming as owner of bank lots all the riparian rights incident to such bank lots.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Barlow v. Wingate*, 2d Jud. Dist. Wash. Terr.; *Welles v. Bailey*, 4 New Eng. Rep. 841, 55 Conn. 292.

Appellees have not and could not have any title to alleged lots 5 and 8 because they are below the ordinary high-water mark of the waters of Elliott Bay, a navigable arm of the

sea, where there could be no presumption of title.

Pollard v. Hagan, 44 U. S. 8 How. 212, 11 L. ed. 565; *Barlow v. Wingate*, supra.

The obstructions complained of by appellant are situated in front of appellant's bank lots, below the line of ordinary high tide in the navigable waters of Elliott Bay, between the appellant's bank lots and the deep waters of said bay, and are therefore nuisances causing special and irreparable damage and injury to appellant and his said property.

Case v. Loftus, 5 L. R. A. 684, 39 Fed. Rep. 784; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Barlow v. Wingate*, 2d Jud. Dist. Wash. Terr.; *Musser v. Hershey*, 42 Iowa, 362; *Phillips v. Rhodes*, 7 Met. 322; *Delaplatine v. Chicago & N. W. R. Co.* 43 Wis. 226.

Mr. Andrew Woods, with **Messrs. Thomas Burke** and **C. H. Hanford**, for appellees:

The right of a shore owner to wharf out and build warehouses and to collect wharfage, etc., is a valuable franchise and may be sold like any other species of property, and is severable from the upland.

Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95; *Providence Steam Engine Co. v. Providence & S. S. B. Co.* 12 R. I. 848; *Simons v. French*, 25 Conn. 845; *State v. Sargent*, 45 Conn. 358; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199; *Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Norcross v. Griffiths*, 65 Wis. 599; *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582; *Storer v. Freeman*, 6 Mass. 435; *Porter v. Sullivan*, 7 Gray, 441; *Mayhew v. Norton*, 17 Pick. 357; *Barker v. Bates*, 18 Pick. 255; *Saltonstall v. Proprietors of Long Wharf*, 7 Cush. 195; *Com. v. Alger*, 7 Cush. 53; *Valentine v. Piper*, 23 Pick. 85; *Deering v. Proprietors of Long Wharf*, 25 Me. 51; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Fates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; Gould, Waters, § 169; 2 Dane, Abr. 699-701.

The riparian rights of the original owner of the upland can be transferred to any owner of upland, in connection with which the said riparian rights can be used and enjoyed, though the tide land does not directly abut upon the upland of the latter owner.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199; *Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Norcross v. Griffiths*, 65 Wis. 599; *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582; *Storer v. Freeman*, 6 Mass. 435; *Porter v. Sullivan*, 7 Gray, 441; *Mayhew v. Norton*, 17 Pick. 357; *Barker v. Bates*, 18 Pick. 255; *Saltonstall v. Proprietors of Long Wharf*, 7 Cush. 195; *Com. v. Alger*, 7 Cush. 53; *Valentine v. Piper*, 23 Pick. 85; *Deering v. Proprietors of Long Wharf*, 25 Me. 51; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Fates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; Gould, Waters, § 169; 2 Dane, Abr. 699-701.

When such a law as Act of 1854 is acted upon by the riparian owner or his grantee, it invests him with certain rights and with a license to erect and maintain wharves, warehouses, etc., to such an extent as does not interfere with public rights, and this license, when executed, becomes irrevocable.

New Jersey Z. & I. Co. v. Morris Canal & Bkg. Co. 1 L. R. A. 133, 44 N. J. Eq. 398; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95.

By platting the upland and the shore beyond the line of ordinary high tide, and by selling the same in lots, A. A. Denny showed his in-

tention to reserve his riparian rights, and to sever them from the land adjoining the shore.

Simons v. French, 25 Conn. 346; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Peck v. Providence Steam Engine Co.* 8 R. I. 353; *Barker v. Bates*, 13 Pick. 255; *Hall v. Whitehall W. P. Co.* 4 Cent. Rep. 222, 103 N. Y. 129; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199; *Norcross v. Griffiths*, 65 Wis. 599.

The effect of surveying and platting of land by the owner into lots, defining streets, alleys, etc., and the sale of lots under such plat, is equivalent to an immediate and irrevocable dedication to public use of all streets and alleys, binding upon both vendor and vendee.

2 Dillon, Mun. Corp. 2d ed. § 640; *Peck v. Providence Steam Engine Co.* 8 R. I. 351; *People v. Lambier*, 5 Denio, 1.

If the deed to the appellant is valid, it is merely a conveyance of two town lots, according to a plat; without the plat the deed is void and unintelligible, and the plat must be considered as a part of the deed.

3 Washb. Real Prop. 4th ed. pp. 428, 429, §§ 54, 55; Gould, Waters, p. 348; *Peck v. Providence Steam Engine Co. supra*.

When lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat.

Trustees of Schools v. Schroll, 9 West. Rep. 741, 120 Ill. 509; *McCormick v. Huse*, 78 Ill. 863; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95; *Providence Steam Engine Co. v. Providence & S. S. B. Co.* 12 R. I. 848; *Peck v. Providence Steam Engine Co. supra*; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Barker v. Bates, supra*; *Clarke v. Providence*, 1 L. R. A. 725, 16 R. I. 837; *Hall v. Whitehall W. P. Co.* 4 Cent. Rep. 222, 103 N. Y. 129; *Simons v. French*, 25 Conn. 346; *Wood v. Comrs. of West Boston & C. Bridges*, 122 Mass. 394.

The alley between lots 6 and 7 and lots 5 and 8, all his interest in which had been dedicated by A. A. Denny to the public, became a public street, and has been for years, and now is, used as such, and the center line of this alley bounds the land and all interest of the appellant to the westward.

Miller v. Mendenhall and Peck v. Providence Steam Engine Co. supra; *Codman v. Winslow*, 10 Mass. 146; *Banks v. Ogden*, 69 U.S. 2 Wall. 57, 17 L. ed. 818; *Parker v. Taylor*, 7 Or. 485; *Burbach v. Schweinler*, 56 Wis. 386.

Even if the appellant ever had any rights beyond the two lots purchased by him, he must, by his long-continued failure to assert any claim to the tide land to the westward, and by his silence for so long a time, be deemed to have acquiesced in the conveyance to and the possession of said land by the appellees and their grantors; and after many and costly improvements have been put upon said land, with his knowledge, and while he is silent, he is now estopped from setting up any claim in himself to such land, or to any interest therein.

8 Washb. Real Prop. 4th ed. p. 75; Bigelow, Estoppel, pp. 452, 453, 459; Herman, Estoppel, pp. 1062, 1068; *Brewster v. Baker*, 16 Barb. 618; *Carr v. Wallace*, 7 Watts, 894; *Adams v. Rockwell*, 16 Wend. 285; *Henson v. Westcott*, 82 Ill. 224.

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Hoyt, J., delivered the opinion of the court:

The discussion in this case has extended over a broad range. Nearly every question connected with the subject of tide or shore lands, and the rights of riparian or littoral proprietors thereto, has been ably briefed and argued by counsel for the respective parties. Also the questions growing out of the making and recording of town plats, and the effect of the same, have been likewise presented. The conclusions to which we have come as to this second matter will make it unnecessary for us to decide the questions presented by the former, and, as they have been lately considered by this court in cases where a decision thereof was necessary, we shall here say nothing in regard thereto.

The facts, so far as they are necessary to the decision of this case, are substantially as follows: Arthur A. Denny made and recorded his plat of an addition to the City of Seattle, upon which certain lots, streets and alleys appeared, and were sufficiently described to show the intention of the maker of the plat in regard thereto. It nowhere appeared upon such plat where the line of ordinary high tide was. On the contrary, so far as could be gathered therefrom, all the territory covered by said plat was upland. As a matter of fact, however, the line of ordinary high tide so crossed said plat that a portion of lots 6 and 7, hereinafter mentioned, were above the line of ordinary high tide, and the remainder of such lots, and all of lots 5 and 8, together with the alley dividing the same, were below such line. After the making and recording of said plat the said Denny sold and conveyed to plaintiff herein lots 6 and 7, in block B, of said plat, after which said Denny sold and conveyed lots 5 and 8, in said block, and said defendants, by mesne conveyances, became possessed of the title thereby conveyed. Under said last-named conveyance from Denny, possession was taken and improvements made on said lots 5 and 8, and the alley dividing those lots from the lots of plaintiff was planked over and used as a street several years before the commencement of this action. Under these circumstances we do not think it lies in the mouth of the plaintiff to object to such improvements as being an infringement upon his rights as a littoral proprietor. The effect of the plat made by Mr. Denny was to separate the tract thereby covered into distinct lots having definite, ascertained boundaries, and into streets and alleys as marked upon said plat, and to vest in the public such streets and alleys for the purposes therein designated. That such would be the effect as to such streets and alleys if the territory covered was upland, and owned by said Denny, is conceded, but it is contended that, as he had no title to the land below the line of ordinary high tide, his plat, so far as it purported to cover such lands, was absolutely void for any and every purpose. With this contention we cannot agree so far as Mr. Denny himself is concerned. It is perhaps true that as to anybody having rights adverse to him such would be the effect, but it does not lie in his mouth

to say that that which he has made of record is a nullity. He is estopped by the making of such plat from alleging its invalidity, and so far as he is concerned would not be heard to complain of the use by the public of the territory covered by streets and alleys, especially after the same had been taken possession of and improvements thereon made. This being the condition of Mr. Denny, and his relation to the title of the lots bounded and described in said plat, we think that one purchasing lots from him, by reference to said plat, could acquire no better title than he had. Of course, if one could acquire title independent of or adverse to that represented by Mr. Denny at the time of the making of the plat this reasoning would not obtain; but such is not the condition of plaintiff. Whatever title he has he obtained from Mr. Denny, and we think it elementary that under the circumstances of this case he could get no better title than that of his grantor. A deed conveying property by reference to a plat, or map thereof, adopts such plat or map as a part of such deed, and one purchasing thereunder becomes bound by the boundaries of the lot purchased as they appear on said plat or map. Applying this rule to the case at bar, it will be seen that the plaintiff herein did not purchase lots bounded by tide-water, but those bounded by a definite and defined line 120 feet from the front of said lots, so that the lots he purchased were bounded and concluded on the one side by Front Street, and on the other side by the alley next westerly thereof, and we think he is estopped by such fact from claiming any rights beyond such boundaries as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. Unaided by such plat, his deed is uncertain and void. Aided by it, it becomes a valid deed, but of a lot with definite boundaries, and he must be bound thereby. It follows that the plaintiff is not entitled to the relief prayed for, and the decision of the lower court in so holding must be affirmed, and it is so ordered.

Dunbar and Scott, J.J., concur.

Anders, Ch. J.: I concur in the result.

Stiles, J., dissenting:

Both parties in this case assumed that the riparian right of wharfage existed when the action was commenced. Substantially their only difference on that subject was that the appellant took the position that such rights were not severable from the ownership of the upland excepting by a conveyance clearly showing that to be the purpose of the grantor. The appellee, on the other hand, claimed that any deed describing upland, or upland and shore land, by metes and bounds, though the high-water mark in either case should be the actual boundary, was sufficient for the severance of the right of wharfage and access to the sea from the upland. From the opinion of the court it does not appear clearly, as the fact was, that the land owned by Denny constituted a mere strip of some forty feet in width between Front Street on the east and the line of mean high water on the west. This strip seems to have been a rem-

nant left after the original plat of lands owned by Denny had been filed, and which he thereafter undertook to subdivide into lots. His plat was in the usual form, and had nothing upon it which indicated that there was any navigable water embraced within its limits. To the westward of the line of high water, and 120 feet from Front Street, he noted on his plat what appeared to be an open strip, but without any designation upon it that it was to be an alley, and to the westward of that other lots were noted, and numbered the same as those which embraced the upland. Kenyon met Denny in Olympia, before the former had ever seen the plat, and spoke to him about the purchase of some of his "water lots." Denny told him he would reserve him two. Afterwards, in pursuance of this conversation, Denny executed to Kenyon a conveyance of lots 6 and 7 in one of these platted blocks. Across these lots, from north to south, the meander line extended. It does not appear whether Kenyon had at any time seen Denny's plat. Kenyon went into possession of the two lots by his tenant, and erected upon the lots, and extending therefrom over the shore some 60 feet, a building on piles, and used the building thus erected to the time of the commencement of this suit. The appellee took from Denny a quitclaim deed of lots 5 and 8 on the same plat, which lots were immediately to the westward and in front of the lots of the appellant. The appellee thereafter (and just when is not discernible) extended southward from other lots, in the same block which he had purchased from Denny in like manner, a wharf over the area of lots 5 and 8. This action was brought to abate what appellant conceived to be both a public and a private nuisance in front of his lots and of his building and premises. I am unable to understand upon what principle, in the light of the decision of this court in the case of *Eisenbach v. Hatfield*, 2 Wash. —, 12 L. R. A. 632, the position is now taken that the appellant's main contention was not a good one. In that case it was decided: *first*, that a riparian owner now has no rights whatever as against the State or its grantee or licensee beyond the boundary of his land; and, *secondly*, that the Act of 1854 was merely a permissive license which is not available unless it had been taken advantage of by the shore owner before the adoption of the Constitution. This ruling denies any claim that Denny might have had that he had any right whatever beyond his shore line, excepting as a licensee, under the Act of 1854. He took no advantage of that license, and had no title, interest or claim whatever in the waters or the soil beneath them beyond the line of his land at the time he filed his plat. His plat, therefore, was utterly void for every purpose as to all that part of it which extended beyond the upland: and now to say that, notwithstanding he was not the owner of any land beyond the water line, nevertheless he could, by the mere filing of a plat, exercise an authority which would not only dedicate a street or alley out in the water, but also reserve to himself a title or a right still fur-

ther in the water, which he could convey to a grantee by a quitclaim deed, is incomprehensible to me. It was not decided, nor do I think it was intended to be intimated, in the case of *Eisenbuch v. Hatfield*, that the owner of upland, who had availed himself of the Act of 1854 by erecting a structure in the nature of a wharf from his land into the water, could not prevent a mere stranger, such as was the appellee, who confessedly acquired no title whatever from Denny, from creating a nuisance in front of him towards the deep water. The effect of this decision is to say that Denny, by his mere plat, could set aside the Act of 1854, and, while giving to Kenyon more than the Act of 1854 contemplated up to the west line of his lots, could absolutely deprive him from going therefrom to the deep water. In a word, this court, having rejected all forms of riparian rights, now concedes to a shore owner prior to the Constitution rights which have never been conceded to him outside of Rhode Island and Minnesota, where he is said to have substantially the whole title to deep water.

I think the court is entirely mistaken as to the effect of such a plat. Section 2328 and following sections of the Code do not say who may make or file a plat of a town, but simply provide that whoever shall thereafter lay off any town shall, previous to the sale of any lots, record a plat, and that the effect of such a plat shall be to all intents and purposes the same as a quitclaim deed. Now, it is the first principle of platting, that the one who plats must be the owner in fee of the land platted. Says Angell on Highways (§ 182): "Dedication is an appropriation of land to some public use, made by the owner of the fee;" and in section 134: "A primary condition of every valid dedication is that it shall be made by the owner of the fee." Herman on Estoppel (§ 1148), says: "A primary condition of every valid dedication is that it shall be made by the owner of the fee, or of an estate therein." In *Lee v. Lake*, 14 Mich. 12, *Judge Cooley* said: "The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land, and if the execution [of the plat] had been in all respects in due form it could not have had the effect which the Statute gives to plats executed and acknowledged under its provisions. The Statute then in force provided for the making, acknowledging and recording of town plats by the proprietors, and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at the time had no title to convey, even though they may have afterwards become the owners. And as the Healing Act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made." This decision was concurred in by *Judges* Christiancy and Campbell.

The case of *Hoole v. Atty-Gen.*, 22 Ala. 190, is considered a leading case upon this subject, and therein the court held not only that it must be the owner of the fee who could

make a lawful dedication which the State even could take advantage of, but that if the land, at the time of the attempted dedication, was covered by a mortgage, the mortgagor could not dedicate without the acquiescence of the mortgagee.

In *Baugin v. Mann*, 59 Ill. 492, which was an injunction to prevent one who held title under Sprague, who, it was alleged, had dedicated an alley in the rear of appellee's premises, it was said: "The evidence fails to show title in Sprague. Unless he owned the fee he could make no dedication to public use. A primary condition of every valid dedication is that it must be made by the owner of the fee." In *Porter v. Stone*, 51 Iowa, 873, the court said: "The party who lays out a town-site, the effect of which is to donate to the public streets, alleys and public grounds, must of necessity have some title to the property to be affected by his act. A grant to the public is not established by simply showing that a town-site has been laid out. The party claiming benefits of a grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant." In *Leland v. Portland*, 2 Or. 47, where the question was whether a dedication of land in front of the City of Portland, between the Willamette River and the westerly side of the street, which was made before September 27, 1850, was of any validity, the court said: "The next question presented is, Did the court below err in refusing to instruct the jury that a dedication of the property in question, to be binding, and to divert the title from the donor to the public, must have been since the 27th day of September, 1850? I regard this question as settled by the case of *Lonsdale v. Parrish*, 62 U. S. 21 How. 290, 15 L. ed. 80, which case arose on the question of the dedication of the levee in the same City of Portland, and by these same proprietors of a town-site, and was governed by the same considerations in this respect as govern this case, where it was held that a dedication made prior to Act of September 27, 1850, was void for want of any title in the donors at the time of dedication, the title then being in the United States." In England the rule has been the same, the leading case being *Wood v. Veal*, 5 Barn. & Ald. 454, where it was held that a tenant for ninety-nine years could make no dedication to the public, nor could anyone else excepting the owner in fee.

The latest case upon this subject, and one which is almost exactly the same as the case at bar, is that of *Ruge v. Apalachicola Oyster C. & F. Co.*, 25 Fla. 658. It seems that the original plat of the City of Apalachicola, located on the bay of that name, showed an open space, which was denominated on the plat "Florida Promenade," and it was contended by the owner of land in the neighborhood that the dedication of the promenade carried with it the right to the public to have the waters of the bay in front kept clear of all obstructions. The court said: "The dedication of the promenade by the Apalachicola Land Company was more than fifty years ago. What right had the company to make a ded-

ication extending into the bay? Even if the promenade reached the bay, the company had no right in the submerged lands thereof, and could not dedicate these. Admitting that accretions to the soil of the promenade had become a part of it, that was a contingency which did not authorize the dedication of lands under the water in front of the promenade."

Denny's plat was good to the water's edge. Beyond that it was void. Even Denny himself was not estopped to say as much. In such cases there is no question of estoppel. The real question is, Do the facts show a dedication either statutory or common law?

Hayes v. Livingston, 84 Mich. 394. Having had absolutely no title, or shadow or claim of title, the maker of the plat was free to deny it at any time, and so could any of his grantees of the upland, although their deeds purported to convey something which had an existence. Perhaps, on the whole case, the judgment of the court is right, however, as there was evidence tending to show laches on the part of Kenyon in prosecuting his suit for injunction until the structures he complained of had been erected and used for a considerable period, and on this ground I can concur.

INDIANA SUPREME COURT,

Board of SCHOOL COMMISSIONERS of the City OF INDIANAPOLIS *et al.*, *Appts.*,

STATE of Indiana, *ex rel.* Theodore SANDER.

(....Ind....)

The teaching of the German language in "any school of a township, town, or city," which is required by Rev. Stat. 1881; § 4497, on demand of the parents or guardians of twenty-five or more children, cannot be restricted by the board of school commissioners of a city to schools of certain grades, but may be compelled in any place in the city where a public school is taught with its complement of teachers and scholars.

(*McBride and Olds, JJ., dissent.*)

(June 23, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of relator in a proceeding instituted to compel the making of provision for the teaching of the German language in School No. 22, in the City of Indianapolis. *Affirmed.*

The facts are stated in the opinion.

Messrs. Duncan & Smith for appellants.

Messrs. L. B. Swift and W. P. Fishback for appellee.

Miller, J., delivered the opinion of the court:

This was a proceeding by mandate to compel the Board of School Commissioners of the City of Indianapolis to introduce the German language as a branch of study into School No. 22, upon the demand of parents and guardians of children in attendance upon that school.

The action was predicated upon § 4497, Rev. Stat. 1881 (Acts 1889, p. 40), which reads as follows: "The common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and such other branches of learning and other languages as the advancement of pupils may require and 18 L. R. A.

the trustees from time to time direct. And whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town or city shall so demand, it shall be the duty of the school trustee or trustees of said township, town or city to procure efficient teachers and introduce the German language as a branch of study into such schools; and the tuition in said schools shall be without charge: provided, such demand is made before the teacher for said district is employed."

The verified petition for the alternative writ alleges, in substance, the following facts: That one of the schools of the City, under the management of said Board of School Commissioners, is a school known as Public School No. 22. That the school year of the City extends from September in each year to June of the following year. That before any teachers for said school were procured or employed for the coming year, the parents and guardians of one hundred and twelve children in attendance at said school petitioned and demanded of the appellant Board that it procure and employ efficient teachers and introduce the German language, as a branch of study, into said school for the coming school year. That said Board refused to grant said demand, but went on and employed teachers to teach all the other branches required by law in said school, and still other branches not required by law; but all the time refused to provide for teaching the German language in said school. The petition to the Board was set out in full with the names of the children and wards. This suit was begun June 21, 1890.

To this the appellants answered, that, prior to the filing of the demand for the teaching of German, said Board, having considered the grading of the Indianapolis schools and the course of instruction therein, and the teaching of German therein, and the employment of teachers therefor, and what branches required by the advancement of pupils should be taught in addition to the statutory branches, all, in connection with the revenues, had determined that German should be taught, and could be efficiently taught for the last seven years of the twelve years' course of said Indianapolis schools;

that the revenues of the Board would not permit the teaching of German to a greater extent, and the Board had determined to employ teachers for the last seven years of the course; that the Board had graded the schools; that it had erected buildings in various parts of the City convenient of access to pupils, and had so arranged that pupils in lower grades could attend school nearer home, while those in higher grades, being older and fewer in number, attended at buildings more remotely located; that the number of pupils attending in the last seven years of the course was 5,846, and would be greater the coming year; that the estimated revenue for the coming year would be \$252,973, of which amount \$210,000 would be required for tuition under the present plan of the Board; that Public School No. 22 had been erected upon these principles, and that for many years no pupils advanced beyond the fifth year of the school course have attended or been taught in said school building; that none of the pupils mentioned in the petition for teaching German in said school No. 22 have advanced to the sixth grade, and therefore they are not entitled to enter classes where German is taught; that as soon as said pupils reach the sixth year they will go to buildings where German is taught, and may there study it; that with the revenue at command there is no other feasible method of grading the schools of Indianapolis.

To this answer the appellee replied, that for many years the City has been subdivided for general school purposes by the Board by erecting school buildings throughout the City to which children living near have been assigned for attendance according to the grades taught; that whatever have been the grades taught it has been the custom of parents and guardians to file petitions for the teaching of German like the petition filed with the complaint for the teaching of German in public school No. 22; that the Board has complied with said petitions and has introduced the German language accordingly; that until the recent refusal of the Board, it was supposed by the community that it would continue such compliance; that at a meeting of the Board in June, 1890, it had, on motion, refused to provide for any teaching of the German language in any of the schools of said City during the coming school year; that 2,000 children desired to study the German language, but under the plan of the Board, as described in the answer, only 800 of these could do so; that the Board, while refusing to provide for teaching the German language, proposed to provide for teaching the following branches not required by law, at an expense out of the school revenues, as follows:

Music, \$13,000; drawing, \$16,000; manual training, \$1,800; physical training, \$3,000; chemistry, \$1,000; physics, \$2,000; Greek, ; book-keeping, \$500; geometry, \$1,000; English literature, \$2,000; general history, \$500; algebra, \$3,000; Latin, \$1,000; training school for teachers, \$1,500; civil government, \$800; rhetoric, \$2,000; botany, \$500.

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That physical training is a new branch of study which the Board intends to introduce for the coming school year; that if the teaching of German were provided for by the Board wherever demands like the one in the complaint have been made, the same would cost not to exceed \$10,000 for the coming school year; that the number of pupils in the grades comprising the first five years of the schools during the past year was 11,941, and will be greater during the coming year.

To this reply the appellants demurred for want of facts; the demurrer was overruled and exception taken. After trial a judgment was entered directing the mandamus to issue. The appellants appealed, and the only error assigned is that the court erred in overruling the demurrer to the reply.

The claim is made by the appellee that the only question presented by the record is as to the power of the appellants, in their discretion, to refuse to introduce the study of the German language into any of the public schools of the City, notwithstanding the filing of a proper petition therefor by the requisite number of parents and guardians. This claim is founded upon the allegation in the reply, that at the meeting of the Board held in June, 1890, a motion, providing for the teaching of German in all the schools of the City in which proper petitions were filed for the same, was voted down, and a motion made to provide for the teaching of the language, as set forth in the defendant's answer, was not finally acted upon; followed by the averments that "said defendants have refused to provide for any teaching of the German language in any of the schools of said City during the coming school year."

The appellee insists that the reply shows that the appellant refused to comply in any manner with the mandate of the Statute to introduce the language as a study into the public schools; and that therefore the court did not err in overruling the demurrer to the same.

To give the language quoted the force and effect claimed for it by the appellee would be to eliminate from the case the only question about which the parties litigant disagree; for the appellants admit that, upon the filing of a petition by the parents and guardians of the requisite number of children, the Statute imperatively requires the language to be taught in the schools.

The answer to which this reply was filed alleges that, in May, 1890, the Board determined to provide for the teaching of German in some of the grades and schools in the City; and that they would do so without any order of the court. The meeting of the Board, at which the motion was made to employ teachers and provide for the introduction of the language into the public schools, was held in June. This action was commenced in the same month and the reply filed on the 11th of July; the schools were not to begin until September following. There is no express negation of the facts alleged in the answer, that the Board intended to make provision for German in the schools before the opening of the school year.

We understand the allegations of the reply referred to, when read in connection with the answer, to mean that the Board had at that meeting refused to provide for its introduction; and not that they would not do so prior to the opening of the schools in September, in the manner determined upon at their May meeting. The purpose of the action was to compel the defendants to introduce the study in a particular school; all the allegations of the petition for a mandate referred to that school; the theory of the relator confined him to that position. The judgment of the court was in accordance with that theory, and by it the defendants were commanded to employ efficient teachers and introduce the language as a branch of study into that particular school, no order being made with reference to the other schools of the City.

This case is to be determined by the answer to the question: What did the General Assembly mean by the use of the words "any school" when it said, in the Act approved May 5, 1869: "And whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town or city shall so demand, it shall be the duty of the school trustee or trustees of said township, town or city to procure efficient teachers and introduce the German language as a branch of study into such schools."

The position of the appellee is, that the parents and guardians of more than twenty-five pupils in attendance upon public school No. 22, having at the proper time filed the requisite petition, it became the duty of the Board of School Commissioners to provide for its teaching in that particular school, no matter what arrangements may have been made to have it taught in other schools and to other scholars.

The position of the appellant is, that while the filing of the petition makes it incumbent upon the Board to have the language taught in the schools of the City, they may, in their discretion, determine in what schools, to what grades of pupils, and for what length of time it shall be taught; and that when they have provided for its teaching in some of the schools of the City, convenient of access to the grades in which the language is assigned, they have fully complied with the law, and cannot be compelled to have it taught in public school No. 22.

In arriving at a correct solution of the question involved, it is instructive to note, in a general way, the origin and growth of the legislation upon the subject under consideration. For many years prior and subsequent to the adoption of our present Constitution, the selection of teachers and designation of the studies to be taught in the public schools were under the exclusive control of school meetings, composed of the patrons of each school. The first legislative recognition of specific studies was in the Act of March 4, 1853, which provided that no person should be licensed to teach in the public schools unless they possessed "a knowledge of orthography, reading, writing, geography and English grammar."

In section 150 of the Act of 1853, which 13 L. R. A.

is the rudiment of the section under which this action was brought, it was enacted that "the common schools shall be taught in the English language: provided, however, that schools may teach other languages in addition to the English as a branch of education."

In the Act of March 6, 1865, it was provided that "the common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar and good behavior; and such other branches of learning and other languages as the advancement of the pupils may require and the trustee from time to time direct. And the tuition in said school shall be without charge."

This remained the law until the Act of May 5, 1869, *supra*, was enacted.

The first question is, omitting for the present all consideration of the effect of subsequent legislation, to determine if possible the legislative intent in the enactment of this Amendment of May 5, 1869, in which, after adding physiology and history of the United States to the required studies, the conditional provision was made for the teaching of the German language.

The Act of 1865, which was amended, required seven named branches of learning to be taught, and other studies and languages, at the option of the school trustees. It was, under that Act, within the power of the school trustees, if they so desired, to have physiology, history of the United States and the German language taught in the public schools. The object of the Amendment was to compel the teaching of physiology and history of the United States, and to withdraw the German language from the list of purely optional languages that might be taught at the discretion of the trustees, and place it conditionally in the list of required studies. By this legislation, the law-making power discriminated in an emphatic manner in favor of the teaching of the German over that of any other language. This Amendment was doubtless brought about by the fact that we had then, as now, a large population speaking the German language, who desired that their children should receive instruction in that language. Taking into consideration the course of legislation and the circumstances under which it was enacted, we are, if possible, to determine from the reading of the Act in what schools the Legislature intended the language should be taught.

The rule of construction to be adopted is provided by Statute, and is as follows:

Rev. Stat. 1881, § 240: "The construction of all statutes of this State shall be by the following rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute.

"First. Words and phrases shall be taken in their plain or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import."

As the Act under consideration does not contain technical words or phrases, relating

to the disputed question, having a peculiar meaning in law, we must take the words used in their "plain, ordinary and usual sense." In townships, towns and cities in which but a single school is taught, the solution of the question is easy; the trouble arises in towns and cities in which the schools are taught in many schoolhouses placed in different localities, the whole being under one management and control.

While the question may not be entirely free from doubt, we have arrived at the conclusion that the words "any school," as used in this Statute, mean and designate any place where a public school is taught, with its complement of teachers and scholars. Such we believe to be the ordinary and usual meaning of the word "school;" and that this construction is necessary to give effect to the object intended in its enactment. Such, indeed, seems from the reply to have been the construction placed upon the Act by the appellants and their predecessors in control of the city schools for many years prior to the year 1890. By the terms of this Act, the introduction of no other study into the public schools is made to depend upon the demand or request of the patrons of the school; but on the contrary, it has been the evident design of the Legislature to establish, as far as possible, a uniform course of study throughout the whole State.

We take it that the exception to the course of legislation was, primarily, for the benefit of parents and guardians who desired their children and wards to receive instruction in this language; and that a construction that would defeat this purpose ought not to be entertained if it can be avoided. We are of the opinion that the Legislature contemplated that the parents and guardians of the children in attendance upon a school who would demand the introduction of the German language would do so for the purpose of enabling their children and wards to engage in its study, and not for the purpose of enabling some other children and other wards of another grade and in attendance upon a school taught in some other schoolhouse to receive such instruction. In this case, the parents and guardians of 112 pupils in attendance upon public school No. 22 asked to have the German language taught in that school, with the undoubted motive of having their children and wards engage in its study. In answer to this request the appellants say, in effect: "We will not have this language taught in this school and to your children and wards attending it, but will introduce the study in some other school in some other part of the City, and to some other pupils." We regard this as a strained and unnatural construction of the words of the Act, utterly subversive of the purpose of its enactment. If the position of the appellants is the correct one, a petition by the parents and guardians of twenty-five pupils in attendance upon any one of the many public schools in the City of Indianapolis will cause the introduction of the German language into the schools of the City, as effectually and fully as if it had been petitioned for in each school by the requisite number of parents and guardians. We need

not characterize a construction that leads to such a result.

Four years after the passage of this Act providing for the introduction of German into the public schools, when petitioned for, the Legislature passed the Act of March 3, 1871, which is in force only in the City of Indianapolis. By this Act, the control of the public schools, which prior to that time had devolved upon the school trustees, was transferred to the Board of School Commissioners. Among the other duties of their office, they were authorized: "First. To district the City for the purpose of electing school commissioners therein; and also to subdivide the City for general school purposes. Seventh. To establish and enforce regulations for the grading of, and course of instruction in the schools of the City, and for the government and discipline of such schools." Rev. Stat. 1881, § 4460.

Section 8 of this Act (Rev. Stat. 1881, § 4468) continues in force within the City all of the general school laws of the State which are not inconsistent with the provisions of this Act. Among the general provisions of the school laws thus continued in force is the following: "The persons listed in each of such towns and cities shall be considered as forming but single school districts therein, distinct from the townships in which they are situated."

It is earnestly contended by the appellants that, inasmuch as all the schools of a town or city form but a single school district, in which the school commissioners may assign the pupils to such school as they choose; and as they are given authority, in their discretion, to "establish and enforce regulations for the grading of and course of instruction in the schools of the City," they may determine in what schools and to what grades of the pupils the German language may be taught. We do not think that the Act of 1871 either repeals or modifies the sections of the Act of 1869 under consideration. In fact, we do not regard the provision authorizing the grading of the pupils as greatly enlarging the authority of the school officers in that respect. The power of the School Commissioners to establish and enforce regulations for grading the schools and regulating the course of study must be exercised subject to the dominant law of the State. The grant of a power which is a mere permission, not a command, to grade the schools or establish a course of study cannot be held to authorize the school commissioner to disregard a positive and specific law of the State.

While the City of Indianapolis does, for the purpose of the enumeration and listing of school children, and for many other purposes, constitute a single school district, it can hardly be said to have but one school. The mere statement of the proposition would seem to be sufficient. The Act of 1871 authorizes the School Commissioners to subdivide the City for general school purposes. The pleadings show that they have subdivided the City for school purposes and erected school buildings in different parts of the City, and assigned pupils to, and numbered them as, different schools. This makes

them as effectually and distinctly different schools as those in a country township.

The appellants say in their answer that they have considered the subject of the study of German in connection with their resources; and that with their available resources they cannot provide for the teaching of German for any greater length of time than seven years out of the twelve-year course.

We are of the opinion that the allegations contained in the answer showing want of funds are fully met by the reply. The answer shows that the appellants had on hand, unappropriated, over \$40,000 more than would be required for tuition upon the system of grading and plan of employment of teachers as adopted by the Board. The reply says that it will cost only \$10,000 to provide for instruction in the German language wherever demanded. This is a complete reply to this portion of the answer. But the reply goes further and shows that in the estimated expense of running the schools, as set forth in the answer, there is included a sum in excess of \$60,000 for teaching music, drawing, manual training, physical training, chemistry, physics, Greek, book-keeping, geometry, English literature, general history, algebra, Latin, training school for teachers, civil government, rhetoric and botany. None of these studies are named in the Statute as required studies; but their teaching is provided for under the general direction for the teaching of "such other branches of learning and other languages as the advancement of pupils may require and the trustee from time to time direct." Under this Statute, we hold that it is incumbent upon the school authorities to provide for the teaching of those studies that are expressly named and provided for, and that they cannot appropriate the school funds for the teaching of optional studies, and then say that they cannot comply with the requirements of the Statute for want of funds. We do not desire that this construction of this section of the Statute shall be understood as a curtailment of the enlarged discretion given the Board of School Commissioners in the control, grading and management of the public schools, except in so far as it may be necessary to give full force and effect to the legislative enactment.

The Board of School Commissioners is a quasi corporation possessing by necessary implication such powers as are, or may be, necessary to carry out the purpose for which it was created; but these powers must be exercised subject to the paramount laws of the State. With reference to the Act under consideration, we are of the opinion that when the requisite demand is made, it becomes the duty of the Board of School Commissioners to introduce the German language, as a study, into the particular school where it is demanded, and that, upon their refusal, they may be compelled by mandate to act in the matter; that they have no discretion to refuse, but must act. When they have introduced the study, they are, while acting in good faith and in the reasonable discharge of their official duties, the exclusive judges of the manner in which it is taught, and the extent

to which it shall be studied; whether, for instance, by the teachers in charge of the school, or by some other efficient teacher who gives instruction in a number of schools. They are the judges who are to decide how much or how little instruction is given, provided it be taught simply as a branch of study. The Statute says, in a manner so positive and emphatic that it cannot be misunderstood, that the common schools of the State shall be taught in the English language, and any board of trustees or school commissioners or other school officers who, under guise of the provisions of this Act, should have a school taught in the German language would be guilty of misappropriating the school funds, and become liable therefor on his official bond.

We are met with the argument that by this construction, the German language, as a study, has an advantage over every other study, and that to do so is inexpedient and unjust. We did not enact this Statute, and it is no part of our duty to pass upon its expediency. That was for the Legislature. Our duty is to construe, not to criticise. We are not, however, apprehensive that the fears expressed in argument will be realized. We have no doubt but that the Board of School Commissioners, in its wisdom, will be able to devise means by which the law will be carried out in good faith, without serious interference with the grading of the schools.

We are, in this case, not called upon to decide, and do not decide, that the language shall be taught in each school-room, and it would be improper to express an opinion upon that subject. Neither can we judicially take notice that the German language may not, like good behavior, which is one of the required studies, or like music or physical training, which are optional ones, be taught in any grade without interference with other studies.

In our opinion, the court did not err in overruling the demurrer to the reply.

Judgment affirmed.

McBride, J., dissenting:

In my opinion, a fair statement of the precise question involved and decided in this case is as follows:

The necessary preliminary steps having been taken, the German language was introduced as a branch of study into the schools of the City of Indianapolis. The Board of School Commissioners of the City (corresponding to the boards of school trustees of other cities and towns in the State) assuming that this branch of study was thereafter to be dealt with precisely as any one of the other nine required branches, graded the schools accordingly, and assigned it its place in the course of study, as they assigned a place to English grammar, to arithmetic and to other branches. By the course of study thus fixed, the study of the German language commenced with the beginning of the sixth year, and continued thereafter during the remaining seven years of the course.

None of the pupils in School No. 22 were advanced beyond the fifth year; and were con-

sequently not sufficiently advanced to be assigned to the grades in which German was taught.

The answer, or return to the alternative writ of mandate, avers that the Board had taken under consideration the subject of teaching the German language, and had decided that "the last seven years of the course of instruction was the period in which the German language, as a branch of study, could be most efficiently taught, with the means under the control of said Board of School Commissioners; . . . that it is the intention, and has at all times been the intention of said Board of School Commissioners, to provide for the efficient teaching of the German language as a branch of study for all pupils attending the schools of said City, who have advanced in their studies to the beginning of the sixth year of the course of instruction, and to provide efficient teachers to that end; . . . that as soon as said pupils" (in school No. 22) "have advanced to the beginning of the sixth year in the course of instruction, as prescribed by the Board of School Commissioners, and thus entitled to be admitted to classes or grades wherein the German language is taught, they will be admitted into such grades in other buildings in which such grades and the German language are taught; which buildings have been provided convenient of access to such pupils."

These facts do not seem to be controverted. The appellee in this case, assuming that the Board had no discretion in the matter, as to that study, at least, but must provide for teaching it in that particular school, and to that particular grade regardless of the system of grading and course of study, and regardless of the age and acquirements of the pupils attending there, brought this suit to compel them to break up their system of grading and teach the German language to the particular pupils who were instructed in School No. 22. The contention of the appellee cannot be sustained without adjudging that, while the Legislature has assumed to intrust the management of the schools of the City to certain officers, elected by the people because of their assumed fitness, and acting under the sanction of an official oath, and has said in express terms that they are authorized "to establish and enforce regulations for the grading of, and course of instruction in the City," as to at least one study they have given to those officers no independent authority whatever; and although their deliberate judgment may be, that the best interests of the schools require the teaching of that study only to certain grades, and to pupils who have reached a certain degree of proficiency, they may be compelled by the strong arm of the courts to change the course of study at the demand of persons who are charged with no duty or responsibility; and who, while they may be as well or better informed and qualified to pass on such questions as the members of the Board, may, on the other hand, know as little of the management of schools as a babe does of logarithms.

With all due respect to my associates, this is a fair statement of the interpretation
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given to the law by the majority opinion herein, after giving due weight to every attempted limitation. Indeed, by every rule of logic, notwithstanding the attempt to limit the question decided, it goes much further; and, as I will hereafter show, undermines every vestige of authority to grade and to establish and maintain any systematic course of instruction in graded schools.

Counsel for appellee, in their brief, denounce the power which the Legislature has intrusted to school officers, to grade schools and regulate their course of study as: "the pretended bulwark behind which the pedagogic martinet exercises his petty tyranny, and school boards here and there carry a high and unlawful hand."

The decision of this case leaves but little if anything remaining of that "bulwark," although, under its shelter, the public schools of Indiana have reached a degree of efficiency second to the schools of no other State, and of which the people of the State are justly proud. It involves the determination of questions of the highest importance to the people of the State, not because it is of special importance to the people generally what is done in school No. 22, in the City of Indianapolis, but because its decision involves the determination of principles which cannot be confined in their application to school No. 22, nor alone to the schools of that City, but reach and affect every graded school in the State. If the effect of the opinion of the majority of the court could be limited to that particular school, or even to that City, I would hardly feel justified in dissenting. But in this country few questions concern more nearly the common interests of all the people than those affecting our common-school system, and anything, the tendency of which is to impair its efficiency or seriously imperil any of its essential features, demands earnest protest and opposition from all who are placed where they may be held responsible therefor.

The law gives to the school officers of every school corporation in the State authority to establish and maintain graded schools. The powers thus conferred upon school corporations outside of the City of Indianapolis do not differ in any material particular from those possessed by the school corporations of that City. At all events, it will not be claimed that less extensive powers are conferred upon that City than upon other cities and towns in the State.

The statute prescribing the studies which shall be taught is precisely the same as applied to all the public schools of the State. That which the Board of School Commissioners of Indianapolis may be compelled to do by mandate, by way of changing its course of study and system of grading, the board of school trustees of every city and town in the State may be compelled to do.

It may be well to consider, first, the nature of the power conferred upon school officers where they are authorized to establish and maintain graded schools.

What is a graded school? The Century Dictionary defines it: "A school divided into different departments, taught by differ-

ent teachers, in which the children pass from the lower departments to the higher as they advance in education."

At page 225 of the Annual Report for 1877 of the United States Commissioner of Education, such a school is defined as "an arrangement of pupils according to their age and capacity to study certain things."

The establishment and maintenance of a graded school, therefore, involves not only the grading of the pupils according to age, capacity or acquirement, but the adoption of a course of study and of rules for the advancement of pupils from grade to grade as they advance in acquirement. The nature and extent of the power possessed by school officers to direct and control the course of study in the schools in their charge has been many times considered by this court and the courts of other States.

The case of *State v. Webber*, 108 Ind. 81, 6 West. Rep. 249, was a case involving the power of the school board to add music to the list of prescribed studies, and to suspend from the school those who refused to pursue that study. The court held that the making of a rule of that character was an exercise of the discretionary power possessed by the board, and denied mandamus to compel the re-admission of a pupil suspended for refusal to comply with it. In the course of the opinion, the court said: "It was competent, we think, for the trustees of the school City of Laporte to enact necessary and reasonable rules for the government of the pupils of its high school, directing what branches of learning such pupils should pursue, and regulating the time to be given to any particular study, and prescribing what book or books should be used therein. . . . The power to establish graded schools carries with it, of course, the power to establish and enforce such reasonable rules as may seem necessary to the trustees in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein. Where such trustees may have established a system of graded schools, or such modification of them as may be practicable within their respective corporations, they are clothed by law with the discretionary power to prescribe the course of instruction in the different grades of their public schools. The important question arises, Which should govern the public high school of the City of Laporte as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question. The arbitrary wishes of the relator in the premises must yield, and be subordinated to the governing authorities of the school City of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school."

Upon the question of the discretionary power possessed by the school officers in the management of the schools placed in their

charge, the authorities overwhelmingly support the doctrine above laid down.

In *Guernsey v. Pitkin*, 82 Vt. 224, the following language is used by Redfield, Ch. J.: "But in regard to these branches which are required to be taught in the public schools, the prudential committee and the teachers must of necessity have some discretion as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught. If this were not so, it would be impossible to classify the pupils."

In *Ferriter v. Tyler*, 48 Vt. 444, the court says: "It stands out so plain as not to be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the Constitution in their behalf, must be subjected to system and order under established rules."

In *Donahoe v. Richards*, 88 Me. 879, it is said: "If the right to direct the course of instruction and the books to be used is given, the right to enforce obedience to the determining power must manifestly exist, or the determination will be ineffectual. It would be more than idle to grant this power to direct if anyone can set at naught the action of the committee."

In *Roberts v. Boston*, 5 Cush. 198, it is said: "The power of general superintendence vests a plenary authority in the committee to arrange, classify and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."

In *Hodgkins v. Rockport*, 105 Mass. 475, the Supreme Judicial Court of Massachusetts says of a statute which says that school officers "shall have the general charge and superintendence of all the public schools in town," that "this general power by necessary implication includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools."

To the same effect are the cases of *Sevrell v. Board of Education*, 29 Ohio St. 89; *Fertich v. Michener*, 111 Ind. 472, 9 West. Rep. 894; *King v. Jefferson City School Board*, 71 Mo. 628, 86 Am. Rep. 499, and many other cases that might be cited.

The case of *Trustees of Schools v. People*, 87 Ill. 308, 29 Am. Rep. 55, is one of a line of cases opposing the principle laid down in *State v. Webber*, *supra*, in so far as affects the right of the parent to elect what studies in the prescribed course may, and what may not, be pursued by his child, it being there held that the parent may thus elect. To the same effect are *Morrow v. Wood*, 35 Wis. 59 (which is probably the leading case taking that view); *Rulison v. Post*, 79 Ill. 567, and some other cases. These cases, however, while holding that a pupil cannot be compelled to pursue a certain study against the will of the parent, expressly recognize and declare the right to classify and grade, and that there can be no interference by the parent with that right. While the parent may say that his child shall not be required to pursue certain studies, as to such studies as the child does pursue, he must conform to the established rules, and must take them in

the order, in the classes and in the manner prescribed by the school officers.

In *Trustees of Schools v. People, supra*, it is said: "Under the power to prescribe necessary rules and regulations for the management and government of the schools, they may, undoubtedly, require classification of the pupils with respect to the branches of study they are respectively pursuing, and with respect to proficiency and degree of advancement in the same branches."

All regulations or rules to these ends are for the benefit of all, and presumptively promotive of the interests of all. No parent has the right to demand that the interests of the children of others shall be sacrificed for the interests of his child, and he cannot, consequently, insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in the advancement they would otherwise make; or that his child shall be taught studies not in the prescribed course of the school. The rights of each are to be enjoyed and exercised only with reference to the equal rights of all others."

And in *Morrow v. Wood, supra*, it is expressly stated that "the parent did not propose to interfere with the gradation or classification of the school, or with any of its rules and regulations, further than to assert his right to direct what studies his boy should pursue that winter;" that is, that he should be allowed to omit a certain study and thus stay out of certain of the established classes. If the opinion of the majority of the court in this case should stand as declaratory of the law, it will be unique, as being the first and only case under a statute which confers on school officers general power over and control of the public schools to declare the right of the parent instead of the school officer to control the gradation and classification of the pupils. It is against all the authorities, and, in principle expressly overrules *State v. Webber, supra*.

Power to establish and maintain graded schools has been possessed by the school officers of this State for more than thirty-five years; the Act of March 5, 1855 (1 Gav. & H. Stat. 542), containing this provision: Sec. 8. . . . They may also establish graded schools, or such modification of them as may be practicable."

The Act of March 6, 1865 (1 Davis, Stat. 778), contains the following: "Section 14: The trustees shall take charge of the educational affairs of their respective townships, towns and cities. . . . They may also establish graded schools, or such modification of them as may be practicable; and provide for admission into the higher departments of the graded school from the primary schools of their township such pupils as are sufficiently advanced for such admission."

The law which authorizes the establishment of graded schools by necessary implication carries with it the power to establish and enforce all necessary and reasonable regulations for grading such schools, and for establishing a course of instruction therein; to assign to each study its place in the course and to prescribe reasonable rules for

the progression of pupils from grade to grade. In addition to this, the Act of March 8, 1871, confers express authority in the following terms: "To establish and enforce regulations for the grading of and course of instruction in the schools of the City, and for the government and discipline of such schools." Rev. Stat. 1881, § 4460, cl. 7.

The Statute authorizing the introduction of the German language as a branch of study was enacted May 5, 1869. It declares in express terms that when introduced, it is "as a branch of study." Rev. Stat. 1881, § 4497.

This was necessarily done in view of existing laws, authorizing the establishment of graded schools, with the attendant power to regulate the course of study, assigning to each branch of study its appropriate place. As a branch of study, it is like the other branches of study prescribed by the same Act, subject to similar regulation by the school officers. To hold otherwise would be to hold that by the Act of May 5, 1869, there was an implied repeal of the Statute giving power to grade to school officers in so far as this one branch of study is concerned. It is, of course, too well settled to require citation of authorities that repeals by implication are not favored, and that the two statutes must, if possible, be construed *in pari materia* so that full force and effect can be given to each. Again, by what rule of construction can it be said that when the Legislature two years later conferred power to establish regulations for the grading and course of instruction in the schools of the City, it intended to and did except one branch, and deny to the school board any control over it? Indeed, as I understand the position and argument of appellee's counsel, it is that the duty is imperative to provide for the teaching of all of the studies prescribed by the Statute in each grade. In this they are at least logical, and if they are right, the power to grade schools and establish a course of study is reduced to a very attenuated shadow, as each person whose children are attending a given school, who wishes them to be taught in any one of the required studies placed in grades in advance of that to which they belong, can compel a change in the course of study for his accommodation. The separate and individual opinion or caprice of the parents will be substituted for the judgment of the officer, while the order and system of the school-room will give place to anarchy.

The attempt to limit the application of the principle declared to the one study is ineffectual. It is made to turn on a question of verbal criticism, by which process the conclusion is reached, that by the words "any school" as used in section 4497, *supra*, is meant the particular building or room, with its complement of teachers, pupils, etc., which chances at the time to be occupied by the pupils whose parents have presented the petition, whether the building contains those belonging to only one out of many grades, or, like the ordinary district school, contains those of all grades in one room.

The further conclusion is also reached, that school No. 22, although shown to contain only certain pupils belonging to certain of

the lower grades in the city school system, is a separate and distinct school within the meaning of the law. This process of examination of the Statute is entirely too microscopic to afford a solution to the problem. The Legislature, in the enactment of this law, was prescribing a general rule, intended to govern all the schools of the State. In perhaps the majority of the towns of the State one large building, containing many rooms, accommodates all the grades; the pupils starting in the primary room and passing in time from room to room, as they pass from grade to grade. Suppose, while we find this condition existing in a given town, that in a neighboring town we find, instead of one large building, many small ones, each separate from the others; each with its complement of teachers and pupils, and each accommodating a single grade. With promotion, its pupils pass from building to building, as they pass from grade to grade. By the rule of construction thus adopted one town has a single school and the other has many schools. In the town with the single large building, the parents of twenty-five children attending that school can, upon petition, have the German language introduced as a branch of study, while in the other, although the parents of many times that number petition for it, unless at least twenty-five of them are in one of the buildings they cannot have it. If the requisite number of children are found only in one of the buildings, they can have the study introduced into that building and grade, and in none of the others. Did the Legislature intend any such thing? It was evidently the intention that a much broader view should be taken. The child, when it enters a graded school, does not enter it with a view to completing its education in a single grade; but expecting that, as intellect develops and additional acquirement comes, it shall pass from grade to grade, from room to room or, if you please, from school to school. It is, of course, unfortunate that many pupils are unable to complete the course, and in that way are deprived of the instruction which can only be given to them in the later years of the course. For this, no remedy can be devised. It is true of all studies which in the course prescribed lie beyond the point where they drop out. Under any system of grading which will give time for efficient instruction, some studies must wait while others are being taken. To require children of primary grades to pursue simultaneously all of the required studies would be to impose on their untrained intellects an unreasonable and unjustifiable tax. It is upon this that all systems of grading are based, with a view to the gradual development and unfolding of the child's mental powers. There can be no forcing of this development. The task of devising the best means of accomplishing this end the law has entrusted to the school board. It was undoubtedly the legislative purpose, in authorizing the introduction of this branch of study, to give opportunity to acquire a practical knowledge of it. How could this be accomplished if, when it was petitioned for by the requisite number of persons, it was

not thereupon to be placed in the course with other studies and provision made for continued and progressive instruction in it? In this case is it expected that the pupils in school No. 22 will acquire a practical knowledge of that study in the brief time they will remain in that grade?

It is manifest that in that short time they could at best acquire but a slight and superficial knowledge of the rudiments of the language, which could be of no practical value whatever. We cannot think that this is what the Legislature had in view.

In the course of instruction prescribed by the appellant seven years are devoted to that study. That is, the course of instruction in that study extends over that time. When the parents of school No. 22 asked to have it introduced in that room did they expect that when, in a few months promotion carried their children to other grades, instruction in that language would end? When the Legislature provided for the admission of that study into schools on petition, it certainly meant that it should come in as a branch of study not in a given grade, but in the school, viewing the school as an entirety from the time the pupil entered it until he left. It certainly meant to leave the question as to when and where it could be most efficiently taught to the officers entrusted with the management of the schools, as they entrusted to them similar discretion with reference to all other studies. And when these officers show the adoption of a plan, providing for the thorough teaching of this study to all the school children as soon as they reach a certain grade, and that to this end they have provided buildings convenient of access to all, is it just or fair to characterize this as a proposition to teach the study only to some other children in some other part of the City?

Much false reasoning in this case comes from considering it as a question of adding a particular study to the course instead of adding an additional study. Suppose this statute, instead of providing for the introduction of the German language, provided for the introduction in precisely the same manner of some of the higher branches of mathematics; strike out the words "German language," and insert instead, algebra, or trigonometry or geometry, would anyone seriously insist that the Legislature meant that when a petition was presented by the requisite number of persons for its introduction as a branch of study, the Board would not only be required to admit it, but might, on demand, be compelled to provide for teaching it to the primary grades? Suppose the last Legislature had amended the law by additional proviso in precisely the same words, except that it had called for the introduction of the Hebrew language; a large, intelligent and useful class of our citizens would have special interest in such a law. Indeed, the great mass of our people, believing that the Hebrew Scripture is the Word of God, would have special interest in such a law. If the reasoning in the opinion of the majority of the court is sound, the Board of School Commissioners would not only be compelled to admit it as a branch of study,

but would be powerless to determine where in the course of study it should be taught, and might on demand be compelled to provide for teaching it in the primary grades. All the reasoning as applied to the German language would apply with equal force to the Hebrew language, or to the Italian or French, or the language of Sweden.

I do not question the power of the Legislature to limit the control of school officers in the management of schools. It has created these officers and conferred such powers as they have. Notwithstanding the fact that time has demonstrated the wisdom of their course, and that the large measure of discretion vested in those officers has been a potent factor in the magnificent development of our school system, the power which created can destroy them, or may in any manner curtail their power. It is not here a question of legislative policy, but of the construction of a legislative Act. Although, indeed, if one interpretation given to this Act by counsel for appellee in argument could be correct, there might be a question of legislative power. I refer to the construction which would view this law as enacted for the benefit of Germans. As a branch of study, there can be no objection to the introduction of the German language into our schools. It is a noble language, of a great people. It is not only commercially advantageous to our children to be able to use it, but it introduces them to a literature singularly rich and strong. But neither Germans, French, English, nor those of any other foreign nationality can, as such, have any rights in our public schools; and any legislation attempting to recognize or confer any such right would be void.

Our Constitution, providing for a system of common schools, contemplates a school system for the education of the children of American citizens only, and such an education as will fit them for the duties of American citizenship. That which has made the German emigrant so welcome an addition to our population is the readiness with which he becomes Americanized, and the sincerity of their devotion to their adopted country has been sealed in blood on many battle fields. As American citizens, their rights in our common schools are the same as if they were native born. But the doors of the common school can only legally open to those of foreign blood when they renounce their alien allegiance and pledge fidelity to the United States. I cannot think that the Legislature intended by this action to introduce the race question into our schools, or to recognize the principle that any other key than that of American citizenship should, under any pretense, open the schoolhouse door. Sound public policy demands the emphatic declaration that in this country and under our flag

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there is room for but one nationality,—where all have common interests and should have one common language.

In my opinion, the German language is, by virtue of the petition presented and the demand made, one of the required studies in the City of Indianapolis; but that, as such, it stands upon precisely the same footing as all the other required studies, and should be given its proper place and fair proportion of the time in the course of instruction; that while the Board of School Commissioners could be compelled by mandate to admit it to the course, if they refused, their discretion could not, and cannot be further controlled.

Mandate will not lie to control or direct the exercise of a discretionary power by a public officer. *State v. Demaree*, 80 Ind. 519; *Madison v. Smith*, 88 Ind. 502; *Jelley v. Roberts*, 50 Ind. 1; *Burnet v. Wabash & E. Canal*, 50 Ind. 251; *Mitchell v. Wiles*, 59 Ind. 864; *Fort Wayne v. Cody*, 43 Ind. 197; *Brinkmeyer v. Evansville*, 29 Ind. 167; *Michigan City v. Roberts*, 84 Ind. 471.

Mandate will lie to compel an officer to act, but not to control the manner of his acting except to discharge a duty specifically enjoined by law. See cases above cited, and also *State v. Demaree*, 80 Ind. 519; *Indianapolis v. Patterson*, 83 Ind. 157.

This is the rule as applied to school officers equally with other public officers. *State v. Andrews*, 108 Ind. 81, 6 West. Rep. 249; *Fertich v. Michener*, 111 Ind. 472, 9 West. Rep. 894; *Braden v. McNutt*, 114 Ind. 214, 18 West. Rep. 798.

If the discretion of the School Board can be controlled in the matter of this particular study, it can be as to all of the prescribed studies; and there is necessarily subordination of the power of the School Board in grading, to the will of each individual parent who has a child in attendance in the school. This practically destroys it.

The difference between the views entertained by the majority of the court and my opinion, briefly stated, is this: As they construe the law, a petition and demand will only require the admission of the study of the German language to the particular building in which the petitioners' children are at the time instructed, and to no other part of the school; and the Board of School Commissioners are powerless to say where that shall be; while, as I construe the law, when the petition is presented and the demand is properly made, that language must be placed in the course with the other required studies for the equal benefit of all, and that the school officers have the same power to assign it its place in the course that they have over any other study.

For the foregoing reasons, I cannot concur in the opinion of the majority of the court. *Olds, J.*, concurs in this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Inhabitants of EASTHAMPTON

v.

HAMPSHIRE COUNTY COMMISSIONERS.

(....Mass.....)

Express authority is not absolutely necessary to justify the taking of a strip of land from a schoolhouse lot for a townway.

(September 24, 1891.)

PRESERVATION by the Supreme Judicial Court for Hampshire County (Knowlton, J.) for the opinion of the full court of a petition for a writ of certiorari to quash proceedings of the County Commissioners in laying out a townway. *Petition dismissed.*

The case sufficiently appears in the opinion.

Mr. David Hill for petitioners.

Mr. W. G. Bassett for respondents.

Holmes, J., delivered the opinion of the court:

The short question before us is whether county commissioners can take a strip of land from a schoolhouse lot for a townway. Taking the strip will injure the lot considerably for school purposes, but will not prevent its use, so far as appears. We must assume that the way is necessary, and, if it be material, we must assume that taking this strip is reasonably necessary for the way, whoever may be the final judge on the latter question when it is raised.

The case thus presented lies in the doubtful region between two extremes which are free from doubt. Ordinarily a highway or railroad could not be laid out longitudinally over a previously established railroad or highway by virtue of general statutory powers or without special authority from the Legislature. *West Boston Bridge v. Middlesex County Comrs.* 10 Pick. 270, 272; *Springfield v. Connecticut River R. Co.* 4 Cush. 63, 71; *Boston & M. R. Co. v. Lovell & L. R. Co.* 124 Mass. 368, 371. On the other hand, in the absence of special regulations and by virtue of a general authority to lay out such roads, necessary crossings could be made. When we come to more difficult cases we draw little aid from the varying statements of general principles under which authority will be implied to take land for a second public use. *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 89, 1 New Eng. Rep. 94; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277, 279; *Boston & M. R. Co. v. Lovell & L. R. Co.* 124 Mass. 368, 370; *Wellington Petitioner*, 16 Pick. 86, 105.

We must consider the relative importance and the necessities of the two uses generically, the extent of the harm to be done, accept any light that history may throw, and make up our minds under all the circumstances of the particular case as best we can. To put cases nearer to the present and lying between the two extremes which we have mentioned, it would be a strong thing to say that without

special circumstances county commissioners or other like officers acting under general powers could lay out a highway through a public reservoir so as to ruin it. See *State v. Montclair R. Co.* 35 N. J. L. 328; and as further examples on this side, *Re Boston & A. R. Co.* 53 N. Y. 574; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552. On the other hand, if a tract of land were held for public purposes, which was so broad that it was impracticable to go around it and which could be crossed without serious harm by the edge of a stream that flowed through it, it well might be held lawful for the way to cross it. See *Wood v. Macon & B. R. Co.* 68 Ga. 539.

The proviso of our Act of 1834, chap. 187, § 1, the original of Pub. Stat., chap. 82, §§ 29, 30, implies very clearly that any "railroad or other public easement already located" through a graveyard was located lawfully. The law seems to be different in Connecticut. *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234. When it is considered that very large tracts of land often are appropriated to school purposes (see Statute October 3, 1782, 1 Mass. Spec. Laws, 33, 34; March 23, 1784, 1 Spec. Laws, 72; March 11, 1791, 1 Spec. Laws, 303; November 17, 1792, 1 Spec. Laws, 399; March 8, 1801, 2 Spec. Laws, 423), it is impossible to accept an unqualified rule that no part of such land can be taken for a way under any circumstances without an express enactment. In the only case which we have found precisely parallel to this it was held that the strip was lawfully taken from the school lot. *Rominger v. Simmons*, 88 Ind. 453. See also *Indiana Cent. R. Co. v. State*, 3 Ind. 421, 425.

The converse case of an attempt to place a schoolhouse within the limits of a highway is by no means so strong. Apart from any comparison of the two public uses, usually there can be no necessity for the selection of such a place, since there is a much greater freedom of choice as to where a schoolhouse shall be put than where roads shall run. But to show the views which have prevailed in Massachusetts we quote the following:

"November 9, 1702. The motion presented in writing by Nathl. Byfield and Ebenezer Brenton, Esqrs., for a resolution of this question, viz.: whether the setting up a court-house or schoolhouse in the street of any town within this Province where the street is so wide as to leave not less than twenty-five feet clear for passage on each side of sd. edifice, be not allowable within the true meaning and intent of the Act entitled 'An Act to Prevent Incroachments upon Highways, Streets, etc.' and of the proviso in the said Act,—was returned from the representatives with the concurrence of that House to the Resolve past thereon by the board on the 4th curr. to wit,—

"Resolved, that the above building, being a public use, and within the reason of the proviso in the said Act, and that the erecting of the same shall be accounted by this court no breach of the said Act which resolve is

consented to J. Dudley. From Records of the governor and council, VII., 291, in 1 Prov. Laws, 863."

The Act in question was the Act of 1698, chap. 2. Very plainly schoolhouses were not

saved by the proviso, but they were read in by the foregoing resolve. If the present case had been presented we think the answer would have been more unhesitating still.

Petition dismissed.

OREGON SUPREME COURT.

George W. HAHN, *Respt.*,

v.

BAKER LODGE, No. 47, A. F. & A. M.,
Appt.

(....Or....)

*1. Grants of rooms or apartments in a building, like leases of the same, must be construed according to the intention of the parties, and with reference to the subject matter upon which they operate.

2. Where the language of the grant does not purport to convey an estate or interest in the land or building, or any portion of it, but only a certain room located in such building, namely, "the middle room or hall of the upper story," carefully distinguishing by its provisions the room granted from other rooms, and contains no stipulation as to rebuilding in case of fire or other casualty, and such building is destroyed by fire, and the identity and existence of the room as such were extinguished, there was nothing remaining upon which the conveyance could operate, and the rights of the defendant terminated.

3. If an easement for a particular purpose is granted, when the purpose no longer exists there is an end of the easement.

(June 24, 1891.)

A PPEAL by defendant from a decree of the Circuit Court for Baker County in favor of complainant in a suit brought to enjoin

*Head notes by LORD, J.

NOTE.—Conveyance, sale of part of building conveys a mere easement.

When a building is so constructed that one part of it is made tributary to the other, on a sale of that part of it which is tributary the natural presumption will be, in the absence of an express agreement to the contrary, that the purchaser takes the part he buys subject to such use by the other part as the mechanical arrangement of the building imposes. *Mayo v. Newhoff*, 13 N. J. L. J. 179.

Where the owner of two stores containing but one flight of stairs sold the store in which there were no stairs, and described it by metes and bounds, the conveyance did not carry with it the right of way of necessity over the flight of stairs. *Stillwell v. Foster*, 6 New Eng. Rep. 649, 80 Me. 333.

When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises. *National Exch. Bank v. Cunningham*, 46 Ohio St. 575.

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defendant from interfering with complainant's property, and to recover damages for such interference. *Affirmed, except as to so much of the decree as awarded damages.*

The facts are stated in the opinion.

Messrs. Hyde, Johns & Olmstead and T. C. Hyde for appellant.

Messrs. Williams & Wood, for respondent:

The conveyance by deed or demise of an upper story in a building vests in the grantee no interest in the soil, and with the destruction of the premises his estate terminates.

Harrington v. Watson, 11 Or. 145; *Stockwell v. Hunter*, 52 Mass. 448-455; *Graves v. Berdan*, 26 N. Y. 499; *Winton v. Cornish*, 5 Ohio, 478; *Shawmut Nat. Bank v. Boston*, 118 Mass. 127-131; *Ainsworth v. Ritt*, 38 Cal. 90; *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Thorne v. Wilson*, 9 West. Rep. 45, 110 Ind. 325.

When the estate is destroyed to which an easement is appurtenant the easement is extinguished.

Gayetty v. Bethune, 14 Mass. 49; *Ballard v. Butler*, 80 Me. 94; *Mussey v. Union Wharf Proprs.* 41 Me. 34; *Hancock v. Wentworth*, 46 Mass. 446; *National G. M. W. Co. v. Donald*, 4 Hurlst. & N. 8, 16; *Allen v. Gomme*, 11 Ad. & El. 759; *Henning v. Burnet*, 8 Exch. 187; *Washb. Easem. & Serv.* 8d ed. pp. 654-657; 3 *Toullier*, *Droit Civil*, 522.

A mutual easement, as a party-wall, is extinguished if the wall be destroyed without any act of either party, as by fire.

Grants of apartments in a building must be construed according to the intention of the parties and with reference to the subject matters, which are rooms or apartments, specifically designated by numbers or otherwise. *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 15, 6 L. ed. 672, followed in *Austin v. Field*, 7 Abb. N. S. 34, 1 *Sheld.* 218; *Hilliard v. New York & C. G. C. Co.* 41 Ohio St. 668.

A cellar, room, etc., may pass by their own terms and nothing more, and where land is not mentioned no land passes. *Doe v. Burt*, 1 T. R. 701; *Penruddock's Case*, 5 Coke, 100.

The owner of land can convey it, or the profits of it, in such parcels as he thinks proper; he can grant the right to occupy a room in the third story, to occupy a second story, a room in the first story, or the cellar or part of the cellar; but by such grants the land does not pass, although the land is necessary to sustain those parts of the house. *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Rowan v. Kelsey*, 4 Abb. App. Dec. 127, 2 *Keyes*, 697.

An annexation to the freehold, impossible of separation from the building erected thereon,—as a second story erected upon the building,—must be regarded as the right to a mere use, and not of an interest in the land; and upon such a grant the mere proprietary interest in the real estate cannot

Sherrerd v. Oisco, 4 Sandf. 480; *Partridge v. Gilbert*, 15 N. Y. 601; *Heartt v. Kruger*, 9 L. R. A. 185, 121 N. Y. 886.

Lord, J., delivered the opinion of the court:

This is a suit in equity, brought by the plaintiff to restrain the defendant from interfering with certain alleged rights in certain premises claimed by the plaintiff. The facts out of which the question presented for our consideration arose are substantially these: The plaintiff was the owner of a certain lot in Baker City, upon which was erected a two-story building, the middle room or hall in the upper story of which was owned by the defendant, and used as a lodge hall, and, as appurtenant thereto, it owned an easement as a means of ingress and egress. The room owned by the defendant, being a middle room, had front and rear walls and two lateral walls. A fire occurring, the whole building was substantially destroyed. The roof, floors, joists, windows and doors were totally consumed by the flames; and at the same time the rear and front walls were entirely destroyed to their foundation, and only a portion of the lateral walls remained, which were fire-cracked, shaky, and unfit for use. So far as relates to the second story, only a portion of the lateral walls were left above the second story, and as they stood they were unsafe, and practically useless for rebuilding purposes. The other walls were destroyed, so that the middle room in the second story, used as a hall by the defendants, and its foundations, were practically destroyed by the conflagration, and its identity lost or extinguished. While there is some conflict in the evidence, there is none upon which to base the contention that there was any sufficient portion of the lateral walls remaining to preserve the identity of the middle room, or that such portions as remained were sufficiently safe for rebuilding purposes as they stood. The practical de-

duction from the evidence, considered as a whole, leaves no doubt that the middle room in the upper story, owned by the defendant, was wholly destroyed, and that the building itself was substantially destroyed. Upon this state of facts, the inquiry is, Had the defendant the right which it undertook to exercise, and which this suit is brought to enjoin, of rebuilding the walls for the purpose of reconstructing an upper story, and recreating a middle room, to be used as a lodge hall in the place of the one destroyed by the fire? By its conveyance the defendant had granted to it what was known and styled as the middle room of the upper story of the building, and an easement of ingress and egress. There is no provision in it, or right given to the defendant, in case of the destruction of the upper story by fire, or of the building, itself to rebuild it. It does not, in terms, grant or convey the land, and does not purport to grant or convey the building, but only the middle room or hall in the upper story, and without any stipulation as to rebuilding in case of fire. It seems to us that conveyances of this kind, like leases of apartments in buildings, must be construed according to the intention of the parties, and with reference to the subject matter upon which they operate. As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased. *Harrington v. Watson*, 11 Or. 148. The application of this doctrine is well illustrated in the case of *Stockwell v. Hunter*, 11 Met. 448, in which this question was carefully considered. In that case the lessor of a three-story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants; but the lease contained no stipulation as to rebuild-

be recovered. *Thorne v. Wilson*, 9 West. Rep. 45, 110 Ind. 385; 2 Washb. Real Prop. 25.

The right which one proprietor has to some profit, benefit or lawful use out of or over the estate of another proprietor, is merely an easement. *Ritger v. Parker*, 8 Cush. 145.

So the grant of a right to have and to hold a second story to a building for the use of a lodge is an easement. 2 Washb. Real Prop. 25.

No estate can be created of mere space of air above ground; and though property in a room may be conveyed (*Brooke, Abr. Demand*, 20; Year Book 5 Hen. VIII., p. 9); yet, if the foundation fail, the property goes; it ceases with the thing itself. *Jackson v. Buel*, 9 Johns. 298; *Jackson v. May*, 16 Johns. 184.

So if a church is burned, the right to a pew therein is gone. *Freligh v. Platt*, 5 Cow. 494.

A distinction is made between the lease of a house and the lease of an apartment therein. In the former case the lease carries with it the land whereon the house stands; in the latter case it does not. Thus, where a cellar was leased, and the building was destroyed by fire, it was held that the lessee had no right to roof in the space he had formerly occupied. *Winton v. Cornish*, 5 Ohio, 477.

The interest of the occupier of a room in a building is peculiar; he has simply the right of 18 L. R. A.

occupation, and a destruction of the building ends that right. *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Graves v. Berdan*, 29 Barb. 100; *Smith v. St. Philips Church*, 10 Cent. Rep. 473, 107 N. Y. 610; *Tenant v. Goldwin*, 1 Salk. 360.

A destruction of the house in the absence of covenants to repair terminates the tenancy. *Ainsworth v. Ritt*, 28 Cal. 90; *Chamberlain v. Godfrey*, 50 Ala. 534; *McMillan v. Solomon*, 42 Ala. 356; *Rowan v. Kelsey*, 13 Barb. 490.

If the building is destroyed, no right of possession in any part of the lot remains in any of the former occupants. *Pearce v. Colden*, 8 Barb. 527.

At the expiration of a lease of land, an action of ejectment for the lot alone, by metes and bounds, lies against parties occupying separately the different stories of the building, as joint trespassers on the land, in using it to uphold the building, and plaintiff is not bound to elect against which one he will proceed. *Pearce v. Ferris*, 10 N. Y. 285.

Extinguishment of easement.

An easement is one of the rights of property which may be extinguished or destroyed. See *Hancock v. Wentworth*, 5 Met. 448; 1 Rolle, Abr. 984; 2 Fournel, *Traité de Voisinage*, 405; 3 Toullier, *Droit Civil*, 522; Washb. *Easem.* 701.

ing in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such lease of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased; and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, as it must be in the case at bar, is whether the intention of the parties, collected from the whole instrument, was to grant any estate in the land. The language in the conveyance precludes the idea that it was the intention to grant the building, or any portion of it, but only a certain room located in that building ("the middle room or hall of the upper story"), which is the principal thing granted, and which is identified by description to distinguish it from other rooms.

As the conveyance does not purport, in terms, to grant any estate or interest in the land, and as the provisions of the conveyance carefully distinguish the room granted from other rooms of the building, and as it contains no stipulation to rebuild in case of fire or other casualty, there is nothing to be taken by implication to justify us in holding that any grant of an estate in the land was intended. It is not doubted that there may be a freehold interest in a part of a building. 1 Washb. Real Prop. 18. Nor do we wish to be understood as holding that the sale of an interest in a building may not be a sale of an estate or interest in the subjacent soil. What we are trying to indicate is that, by the terms of the interest, it is the middle room or hall of the upper story which was granted to the defendant, and not a part of the building; that the defendant did not acquire any right of ownership in the building, or any part of it, but in the room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story. This it owned; and so long as it existed, and its identity was preserved, the defendant had the right to its enjoyment. But when the fire destroyed the building, and the identity of the room and its existence as such were extinguished and at an end, there was nothing remaining upon which the defendant's conveyance could operate, and its rights at once terminated. In *Thorne v. Wilson*, 110 Ind.

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325, 9 West. Rep. 45, where a committee on behalf of the order of freemasons had granted the right to construct a second story upon a building erected by the owner of the land, "to have and own said second story for their use perpetually," it was held that they did not acquire any proprietary interest in the freehold of which such second story became a part. In construing the instrument, the court says: "It is evident that the instrument relied on by the appellant does not convey an interest in the land;" and then adds: "For it is quite clear that, if the buildings should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once terminate." As the instrument grants the defendant no estate in the land, and contains no stipulation of the right to rebuild in case of destruction by fire or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject matter, that the agreement, and the relation created by it, should terminate with the destruction of the building.

The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case, the general rule, as stated by Mr. Washburn, is that, "if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement." Washb. Easem. pp. 654, 657. When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement.

For these reasons we think there was no error upon the legal questions presented by this record, but that *the damages awarded are not justified by the facts under the circumstances, and that the decree awarding them must be disallowed, but in all other things affirmed*, and so it is ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

John D. YALE

v.

WEST MIDDLE SCHOOL DISTRICT.

(59 Conn. 489.)

A child living with a domiciled resident and taxpayer of a school district as a member of his family, with the expectation on the part of all parties interested that this relation will continue permanently, although she has never been formally adopted and may not have a domicile in the technical sense of that term in the district, has a "residence" in that district for school purposes and cannot be compelled to pay tuition as a non-resident.

(November 19, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County restraining it from interfering with the attendance of a certain child upon the public schools of the district. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles E. Gross for appellant.

Mr. T. M. Maltbie, for appellee:

It is the undoubted right of a father or guardian to fix the residence of a minor at some place other than his own residence or domicile.

A guardian has the same power over his ward that a parent has over his child. He has the custody of his person, and may appoint the place of his residence.

Holyoke v. Haskins, 5 Pick. 26. See also *Kirkland v. Whately*, 4 Allen, 462.

Residence for school purposes differs entirely from that fixed and permanent residence necessary to gain a settlement.

Milton School Dist. No. 1 v. Bragdon, 28 N. H. 507; *Brentwood School Dist. No. 2 v. Polard*, 55 N. H. 508; *State v. Thayer*, 74 Wis. 48.

NOTE.—Common-school privileges are regulated by statute.

The right to be educated in the common schools of the State is one derived entirely from legislation, and as such is subject to such limitations as the Legislature may, from time to time, see fit to make. It is not a constitutional right. *Dallas v. Foedick*, 40 How. Pr. 249.

An inhabitant cannot claim for his children the absolute right to select such a school for them as he pleases, in disregard of the regulations of the board of public instruction. *People v. Easton*, 13 Abb. Pr. 159.

The board of public instruction have the power, in their discretion, to adopt regulations for the admission of pupils, by which the assignment of children between schools affording equal advantages shall be determined; but if they should unlawfully exclude a child from a school, the remedy would be by action. *Ibid.*

Domicil, how determined.

The domicile is the habitation fixed in any place with an intention of always staying there, while simple residence is much more temporary in its character. *New York v. Genet*, 4 Hun, 487.

A minor may have, for school purpose, a residence other than that of his parents. *State v. Thayer*, 74 Wis. 48.

Domicil is but the established, fixed, permanent

In determining questions of residence and domicile and changes therein, the intention of the parties concerned is the all-important consideration.

Clinton v. Westbrook, 38 Conn. 12.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiff is, and has been since May, 1887, a domiciled resident and taxpayer in the defendant School District. Ada Austin, a child of thirteen years, has been during all that time living with him as a member of his family. She attended school in said District. The defendant presented to the plaintiff a bill for her tuition, and threatened to exclude her from attending the school unless such bill was paid. The plaintiff thereupon preferred the present complaint to the superior court, praying that the District be enjoined from interfering in any manner with the attendance of the said Ada Austin at the school. The superior court granted the injunction, and the defendant has appealed to this court.

The defendant insists that it has the right to require tuition to be paid for the schooling of the said Ada, for the reason that she did not so reside in or belong to the School District that she could be enumerated as a person within school age residing therein. This claim implies—what was directly admitted by the counsel for the defendant—that if she might lawfully be enumerated in the District then she was entitled to attend school there without paying tuition. The said Ada is a niece of the plaintiff's wife. She was born in the State of Illinois, where her parents then resided. Her parents now reside in Missouri, and have never resided in this State. The plaintiff and his wife have no

or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. *Salem v. Lyme*, 29 Conn. 74; *Black, Law Dict.* title, *Domicil*.

Every person must have a domicile somewhere; and he can only have one domicile at one and the same time. Every person has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained until he acquires a third domicile. The existing domicile always continues until another is acquired. So by the acquisition of another, the former domicile is relinquished. *Abington v. North Bridgewater*, 53 Pick. 170; *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Met. 199.

The domicile of origin arises from birth or connections. The domicile of a minor follows that of his father, and remains until he acquires another, which he cannot do until he becomes an adult. *Andrews v. Herriot*, 4 Cow. 518, note 2.

A domicile is defined to be the place where a person has fixed his habitation, without any present intention of removing therefrom. *Putnam v. Johnson*, 10 Mass. 488; 1 *Bouvier, Law Dict.* 480.

It is defined by Webster to be a place of permanent residence either of an individual or a family.

children. In 1882 the child, then being six years old, came to live with the plaintiff, who then resided in Winchester in this State, upon an arrangement between the plaintiff and his wife on the one hand and the parents of the child on the other, that she should live with the plaintiff and his wife so long as they should live, unless she should sooner by marriage or otherwise make a home for herself. Pursuant to that arrangement she has ever since resided with the plaintiff, and he has had the entire actual control over her, caring for her in all respects as though she was his own child. In May, 1887, the plaintiff removed from Winchester to Hartford, purchased a lot within the school district, built a house thereon, and has since that time resided there with his family, which consists only of himself, his wife, and the said Ada; and he has no intention of changing such residence. It is the expectation and the intent of the said Ada, and of her parents, and of the plaintiff and his wife, that she shall continue to live with the plaintiff and his wife as their own child so long as they shall live. The plaintiff and his wife have never formally adopted her according to the Statute regulating the adoption of children.

It is the claim of the defendant that no child can be properly enumerated in any school district as belonging thereto, so as to be entitled to instruction in its schools without tuition, unless such child has a legal residence in the sense of domicile therein, or is an apprentice to a master residing there, or is a pauper and so a ward of the public. It is not pretended that the child Ada is an apprentice and she certainly is not a pauper.

It is quite possible that the facts in this case do not show that the minor child in question had a domicile in the defendant District in the technical meaning of that term. Domicile in that sense is the actual or constructive presence of a person in a given place, coupled with the intention to remain there permanently; and as a minor cannot

exercise an independent intent in this matter, a minor can have no domicile other than that of the parent or guardian. But the facts do show that she had a residence there in the ordinary and popular meaning of the word. She is and has been for some time actually there. Her own intent is to remain there permanently. The intent of her parents and of Mr. and Mrs. Yale is that she shall remain there permanently; so that the will of all the persons who have any authority to control the intent of this minor concurs with her own in this respect. All the elements necessary to constitute residence are present. The house of the plaintiff is her home. She did not come into the District for the purpose of obtaining instruction in its schools. She came there because her home was with the plaintiff and he removed to Hartford from Winchester; and because her home is with the plaintiff she expects to remain in Hartford permanently. We think this is residence sufficient for school purposes, and that Ada Austin belongs to the West Middle School District and ought to be enumerated there.

A construction so narrow and technical as is claimed by the defendant would seriously impair the usefulness of the School Laws and would defeat various provisions of the Statute. The State is interested to have all the children educated in order that they may become good citizens. Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy the State cannot afford to permit any child to grow up without being sent to school. The School Laws recognize this fact and their provisions are framed accordingly. If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age, not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school. Section 18 of the General Statutes provides that "public

Chancellor Kent says, the place where a man carries on his established business, or professional occupation, and has a home and permanent residence, is his domicile. 2 Kent, Com. 24 ed. 431, note c.

Domicile is defined to be "a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." A person being at a place is prima facie evidence that he is domiciled there; but it may be explained and the presumption rebutted. *Re Wrightley*, 8 Wend. 142; 2 Kent, Com. 431, note c; *Marsh v. Hutchinson*, 2 Bos. & P. 220, note, per Lord Thurlow.

To effect a change of domicile there must be intention and act united. The *forum originis* or domicile of nativity, remains until a subsequent domicile is acquired *animo et facto*. 2 Kent, Com. 431, note c.

If a party removes from his domicile, with an intention of returning, he does not lose his domicile; as he can have acquired one nowhere else. 1 Bouvier, Law Dict. 490.

So if a person leaves the place of his domicile temporarily, or for a particular purpose, and does not take up a permanent residence elsewhere, he does not change his domicile. *Granby v. Amherst*, 13 L. R. A.

7 Mass. 5; *Lincoln v. Hapgood*, 11 Mass. 352; *Harvard College v. Gore*, 5 Pick. 370; *Sears v. Boston*, 1 Met. 250; *Cadwalader v. Howell*, 18 N. J. L. 138; *Wilton v. Falmouth*, 15 Me. 479; *Thorndike v. Boston*, 1 Met. 242.

To constitute domicile there must be actual residence and personal presence in a place, and an intention of making it the home of the party. *Thorndike v. Boston*, 1 Met. 245; *Sears v. Boston*, 1 Met. 251; *Wayne v. Greene*, 21 Me. 357; *Leach v. Pillsbury*, 15 N. H. 137; *State v. Daniels*, 44 N. H. 353; *Boardman v. House*, 18 Wend. 512; *Hegeman v. Fox*, 31 Barb. 475; *Henrietta Twp. v. Oxford Twp.* 2 Ohio St. 32; *McClerry v. Matson*, 2 Ind. 79; *McKowen v. McGuire*, 15 La. Ann. 687; *Horne v. Horne*, 9 Ired. L. 99; *Foster v. Hall*, 4 Humph. 346; *McIntyre v. Chappell*, 4 Tex. 187.

But residence and domicile are not interchangeable terms, as a man may reside in one place and have his domicile in another. *North Yarmouth v. West Gardiner*, 58 Me. 207; *Hampden v. Levant*, 59 Me. 557; *Alston v. Newcomer*, 42 Miss. 186; *Briggs v. Rochester*, 16 Gray. 337; *Bell v. Pierce*, 61 N. Y. 12; *Tazewell County Supra. v. Davenport*, 40 Ill. 197; *Hallett v. Bassett*, 100 Mass. 170; *Fleld, Lawyer's Briefs*, 506. See note to *Warren v. Board of Registration (Mich.)* 2 L. R. A. 203.

schools shall be maintained, . . . and such schools shall be open to all children over four years of age in the respective districts, without discrimination on account of race or color." Section 2102 that "all parents and those who have the care of children, shall . . . cause such child to attend a public day school regularly during the hours and terms while the public schools in the district wherein such child resides are in session, or elsewhere to receive thorough instruction during said hours and terms in the studies taught in said public schools." And section 2103, that "each week's failure on the part of any person to comply with the provisions of the preceding section shall be a distinct offense punishable with a fine not exceeding five dollars." In other sections particular provisions are made that the conduct of parents, or others having the care of

children, shall be inspected, so that all children shall attend school; that children whose parents do not send them to school may be removed from the care of their parents; and that truant children shall be arrested and sent to school, and that habitual truants may be sentenced to any house of reformation or to the reform school. All through these sections the expression "those having the care of children," is used as exactly equivalent to parents or guardian. And nowhere is it indicated that the duty to send children to school, or the duty of the district to furnish instruction, depends on anything other than the residence of the child. All distinction between domicil and actual residence seems to be carefully excluded.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

MICHIGAN SUPREME COURT.

PEOPLE of the State OF MICHIGAN

v.

John JOHNSON, *Appt.*

(....Mich....)

1. Being intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquillity is a breach of the peace.

2. An officer has no authority to make an arrest without a warrant, for a breach of the peace committed when he was out of sight on another street 150 feet away, although the disturbance was heard by him.

3. A conviction for resisting an officer in arresting the defendant for breach of the peace without a warrant cannot be sustained on appeal by the claim that defendant was liable to arrest for being intoxicated in a public street.

NOTE—"Breach of the peace" defined.

In *Desty's American Criminal Law*, § 91, the rule is laid down that every person who, without authority of law, disturbs the peace and security of the public, or who commits any act which tends to provoke or excite others to a breach of the peace, is guilty of a misdemeanor; and all acts tending to disturb the public peace are indictable at the common law. It is not necessary that the peace be actually broken to lay the foundation to such a proceeding. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. *Way v. Loveridge*, 75 Mich. 488.

A breach of the peace is "a violation of public order—the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace." *Galvin v. State*, 6 Coldw. 294.

The term "breach of the peace" is generic, and includes riotous and unlawful assemblies, riots, affray, forcible entry and detainer, the wanton discharge of fire-arms so near the chamber of a sick person as to cause injury, the sending of challenges and provoking to fight, going armed in public without lawful occasion, in such manner as to alarm the public, and many other acts of a similar character. The wanton discharge of fire-arms in the public streets of a city is well calculated to alarm the public, and cause them to be apprehensive of individual safety; and I think the judge was entirely correct when he instructed the jury that such act constituted a breach of the peace. *People v. Bartz*, 58 Mich. 486.

By "peace," as used in the law in this connection, is meant the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is "a breach of the 13 L. R. A.

peace." It is the offense of disturbing the public peace, or violation of public order or public decorum. Actual personal violence is not an essential element in the offense. *Davis v. Burgess*, 54 Mich. 514.

Examples of the offense.

The following examples of the offense are from *Desty's American Criminal Law*, § 91: "Riding or going armed with dangerous or unusual weapons (*State v. Huntly*, 3 Ired. L. 418. See 4 Bl. Com. 149; 2 Bishop, Cr. L. 6th ed. § 540); driving a carriage through a crowded street at a rate of speed such as to endanger the safety of pedestrians (*United States v. Hart*, 3 Wheel. C. C. 304, Pet. C. C. 390); entering on land by force, and throwing out a person who has a naked possession (*Higgins v. State*, 7 Ind. 549. See 2 Bishop, Cr. L. 6th ed. § 536; 2 Archb. Crim. Pr. 330; 4 Bl. Com. 148); spreading false news to create discord between persons high in office (see Bl. Com. 149; 2 Inst. 226; 3 Inst. 98); false and pretended prophecies, with intent to disturb the peace and terrify the people. See 4 Bl. Com. 149. The offense of a common brawler may be committed by mere epithets used in the heat of private quarrel, if so public as to disturb the peace of the neighborhood. *Com. v. Foley*, 99 Mass. 497. Counseling or advising a breach of the public peace is a misdemeanor. *Com. v. Willard*, 89 Mass. 476. So, conspiring to make a breach of the peace is an offense. *Clifford v. Brandon*, 2 Campb. 358. An infant over fourteen years of age may be guilty of a breach of the peace. *Bullock v. Babcock*, 3 Wend. 91. See 4 Bl. Com. 22; 1 Hale, P. C. 20. All parties engaged in a breach of the peace are principals."

To a complaint for beating a drum within the compact part of the town, without orders from a military officer, it is no defense to show that the act was done in the performance of religious worship, in accordance with a sense of religious duty

(May 21, 1891.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Mackinac County made during the trial of a prosecution against him for resisting an officer, which resulted in a verdict of guilty. *Reversed.*

The facts are stated in the opinion.

Mr. James J. Brown, for appellant:

There was no breach of the peace committed.

People v. Bartz, 58 Mich. 495; *Davis v. Burgess*, 54 Mich. 514; *Ware v. Loveridge*, 75 Mich. 492; *Robison v. Miner*, 13 West. Rep. 471, 68 Mich. 549.

The offense was not committed in the presence of the officer, so as to authorize him to arrest respondent without a written warrant from a magistrate.

People v. Burtz, *supra*.

The law does not look with favor on arrests made without a warrant, and it cannot be justified if the person arrested was not engaged in a breach of the peace, as for example, in fighting, or in a riot, or about to escape after having committed a felony.

Pinkerton v. Verberg, 7 L. R. A. 507, 78 Mich. 589.

Messrs. Adolphus A. Ellis, Atty-Gen., and P. N. Packard, Pros. Atty., for the People.

Champlin, Ch. J., delivered the opinion of the court:

Main Street, in the Village of Naubinway, Mackinac County, runs east and west. A street runs north from Main Street, upon which is located the house of one Bruce. Between 9 and 10 o'clock of the 28th day of December, 1890, as the respondent, John Johnson, and one McAllister were walking along Main Street, Johnson "shouted" or "whooped" in a loud voice twice. The shout was heard by Frank Murray who was marshal

of the village, and who was at the time standing upon the door-step of Mr. Bruce's house. He started towards Main Street, and proceeded down that street until he came to Johnson and McAllister, and asked, "Who done that hollering?" and McAllister replied that it was Johnson, and he then arrested him for it, and attempted to take him to the jail or lockup. Johnson resisted, and Murray used his club, and sent for Deputy Sheriff Lull, whereupon they handcuffed Johnson, and dragged him to the jail. It is not necessary in this action to describe or comment upon the conduct of Murray while taking his prisoner to the jail, and after they arrived there. The prosecuting attorney filed an information against Johnson "for resisting the officer, Frank Murray, while in the lawful execution of the duties of his office in attempting to arrest him, the said Johnson, for then and there being drunk, intoxicated, disorderly, and yelling, and disturbing the public peace, in the public streets of the Village of Naubinway, in the presence of him, the said Frank Murray, he, the said Frank Murray, being then and there engaged in his lawful attempts to maintain, preserve, and keep the peace," etc. Upon trial Johnson was convicted. There was a conflict of testimony as to what occurred at the time of the arrest, but in the rulings here made we have taken the testimony of the people as that upon which the conviction must stand if it can be supported. By Murray's testimony he was over 150 feet away, and upon another street, when he heard the shout. There is no testimony showing that he was in sight of Johnson and McAllister, nor that he knew who it was who shouted, but based his arrest upon the statement of McAllister that it was Johnson. There was not any riot, noise, or disturbance when he reached them. No other persons are shown to have been upon

and that no actual disturbance of the public peace resulted from it. *State v. White*, 2 New Eng. Rep. 867, 64 N. H. 48; *State v. Priest*, 2 New Eng. Rep. 867, 64 N. H. 48.

An ordinance prohibiting any person or association from marching through the streets with musical instruments, or singing or shouting, without first having obtained consent of the municipal authorities, is null and void as interfering with equal rights of citizens and not being a reasonable regulation of streets. *Re Frazee*, 6 West. Rep. 140, 68 Mich. 366.

A city ordinance imposing a penalty of fine and imprisonment when any person shall make any noise, riot, disturbance or improper diversion is construed to mean unreasonable noise of a nature disturbing to the community. *State v. Cantieny*, 34 Minn. 1.

A charge of the court instructing the jury as follows: "When the natural and legitimate consequences of obscene or vulgar language, or of cursing or swearing, would be to disturb the inhabitants of a place, then you are instructed that, in law, it would be used in a manner calculated to disturb the inhabitants of such place," is erroneous, as it is an invasion of the province of the jury. *McCandless v. State*, 21 Tex. App. 411.

Where evidence was held insufficient to support conviction for disturbing peace by cursing in public place, see *Williams v. State*, 21 Tex. App. 256.

An indictment for disturbing religious worship "by talking and laughing" and by indecent gesture,

is not bad for duplicity. It charges but one offense, the words "by talking and laughing" being mere surplusage. *State v. Bledsoe*, 47 Ark. 233.

A complaint for drunkenness must specifically state the place where the defendant was seen intoxicated. To state the name of the city or town is not sufficient. *State v. McLoon*, 3 New Eng. Rep. 172, 78 Me. 420.

The averment, in an indictment, that the defendant did "unlawfully engage in a prize fight with the said J. K.,—to wit, did then and there enter a ring, commonly called a 'prize ring,' and did then and there, in the said ring, strike and bruise the said J. K.," does not show that both parties engaged in the fight, and is not a sufficient allegation of the offense to sustain a conviction. *Sullivan v. State*, 67 Miss. 345.

Two or more persons fighting by agreement in a public place are guilty of an affray. An affray is distinguished from a riot in not being premeditated. *Supreme Council O. C. F., v. Garrigus*, 1 West. Rep. 861, 104 Ind. 153.

A complaint that a person applied to another a profane epithet at the latter person's residence does not charge a violation of a municipal ordinance providing for the conviction of all persons who shall make, aid, etc., any improper noise, riot, or breach of the peace on the streets, highways, or elsewhere within the city. *State v. Camden*, 52 N. J. L. 280.

A count in an indictment is deemed sufficient

Main Street when Murray first accosted Johnson and McAllister. He had no warrant for the arrest of either Johnson or McAllister. Under the facts above stated two questions are raised: (1) Did Johnson, by the act of "shouting" or "whooping" in the public street of the village when on his way home, accompanied by McAllister, at the time of night stated, commit a breach of the peace? (2) If yes, was the offense committed in the presence of the officer, Murray?

We have had occasion to define the substance and nature of this offense in the following cases: *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Mich. 299; *People v. Bartz*, 53 Mich. 495; *Davis v. Burgess*, 54 Mich. 514; *Robison v. Miner*, 68 Mich. 549; *Ware v. Loveridge*, 75 Mich. 492.

In general terms the offense is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. Each case where the offense is charged must depend upon the time, place and circumstances of the act. The circuit judge instructed the jury that "to be intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquillity of that village would be an act of open violence, and would be a breach of the peace, which, if committed in the presence of an officer, would justify him in making the arrest." This was a correct statement of the law, and was applicable, under the testimony in this case. *Hawley, Arrest*, p. 38; *Moseley v. State*, 23 Tex. App. 409; *State v. Lafferty*, 5 Harr. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *State v. Freeman*, 86 N. C. 683; *City Council v. Payne*, 2 Nott & McC. 475; *State v. Bowen*, 17 S. C. 58.

2. Was the offense committed in the pres-

ence of the officer, Murray, so as to authorize him to make the arrest without a warrant? To restate the facts: Johnson was not in the view of the officer. He did not know who it was that raised the shout. He arrived at the place after the occurrence, and inquired, "Who done that hollering?" and was told by McAllister that it was Johnson, and he then arrested him. At that time Johnson was not engaged in making any noise or disturbance. At the time the officer heard the shout he was over 150 feet away, upon another street. It was not in his presence, and when he arrived there was perfect tranquillity. To authorize an arrest without a warrant the offense must be committed in the presence of the officer, and the arrest must be made immediately. The officer did not act upon his own knowledge, but upon information he had gained by inquiries from McAllister. If he could make the arrest under such circumstances without a warrant, then there is no reason why he could not have made it the next day, or a week after, upon inquiry and information that Johnson was the person whom he heard shouting. *People v. Bartz*, 53 Mich. 498, is cited as supporting the proposition that the offense was committed in the presence of Murray. The facts in that case were different from the facts in this. In that case the officer who made the arrest saw the flash made when the pistol was discharged, heard the report, and saw the respondent Bartz, and pursued and arrested him. Bartz had not been out of sight of the officer from the time he discharged the pistol until the officer overtook and arrested him.

It is claimed by counsel for the people that Johnson, being intoxicated in a public street, was liable to be arrested therefor without warrant, under section 1, Act No. 4, Pub. Acts 1887, and section 2893, How.

which charges that respondent "quarreled . . . by cursing . . . and calling . . . opprobrious names, . . . which carriage . . . had the effect . . . to disturb the public peace," although there was no allegation of malicious or criminal intent. *State v. Archibald*, 4 New Eng. Rep. 112, 69 Vt. 548.

Under a statute providing that a person who disturbs the public peace by tumultuous and offensive carriage, etc., shall be punished, etc., the sufficiency of a count charging that respondent broke the public peace "by his tumultuous carriage" is doubted. *Ibid.*

A conviction may be had for approaching the dwelling-house of another, and using abusive, insulting, or obscene language in the presence or hearing of his family, although defendant was at the time on his own premises and used the words in ordinary conversation, without the intent of being overheard by others. *Mullens v. State*, 82 Ala. 42.

A conviction may be had for disturbing religious exercises on proof that defendant willfully and intentionally engaged in a fight, without justification or necessity, at or near a place where people were engaged in worship, even though he did not provoke the difficulty or strike the first blow. *Goulding v. State*, 82 Ala. 48.

A conviction for disturbing a religious congregation cannot be had upon a special verdict that defendant engaged in a fight near a church, and that the audience was not disturbed except by the sensational report that there was a fight. *State v. Kirby*, 108 N. C. 772.

Threatening in an angry manner to "slap hell out 13 L. R. A.

of a person" if he did not "dry up," and to kill him if he got up out of his chair, is not tumultuous or offensive conduct when not done in the immediate presence or hearing of such person's family. *Brooks v. State*, 67 Miss. 577.

The uttering, by a speaker at a public meeting, of expressions of sympathy for the condemned anarchists who had been executed for murder, with a glorification of their deeds and an incitement to murder the officers for discharging a public duty, is a misdemeanor under the New York Unlawful Assembly Act. *People v. Most*, 29 N. Y. S. R. 97.

An indictment charging that defendant "unlawfully did make use of violent, abusive and insulting language towards and about one . . . in his presence and hearing, which language, in its common acceptance, was calculated to arouse to anger him, the said . . . and cause a breach of the peace,"—sufficiently charges the offense without particularizing the abusive language. *Moore v. State*, 60 Ark. 25.

The fact that a woman, in whose hearing obscene language is used, is herself in the habit of using such language can in no case constitute a justification, but may mitigate the offense. *Golson v. State*, 86 Ala. 601.

Insulting and abusive language used towards one in the immediate presence of his family may be a breach of the peace at common law. *Ware v. Loveridge*, 75 Mich. 488.

For recent decisions on the subject of "arrest for misdemeanors without warrant," see note to *State v. Hunter* (N. C.) 8 L. R. A. 529.

Stat. But this position is one taken in this court for the first time. The case was tried below upon the charge and theory that Murray made the arrest for a breach of the peace. The officer made the arrest for that offense, as is apparent from his inquiry of Mr. McAllister. He did not inform Johnson that he arrested him for being intoxicated, and does not testify that he was intoxicated. McAllister is the only one who testified that Johnson was intoxicated, and that he was

taking him home. The judge put the case to the jury upon the theory that the arrest was made for committing a breach of the peace, and the people will not be permitted, after trial and conviction of respondent upon that theory, to change ground, and claim that he was arrested for being intoxicated under the Act cited.

The judgment must be reversed, and the prisoner discharged.

The other Justices concurred.

VERMONT SUPREME COURT.

Austin T. FOSTER

v.

D. C. STEVENS.

(... Vt.)

1. A corporation of another State "is taxed by such State for all its stock" within the meaning of Rev. Laws, § 270, so as to relieve stockholders in Vermont from a tax on their shares, when it is subject to an annual tax assessed according to the amount of its paid-up capital.

2. A foreign country is "another State," within the meaning of Rev. Laws, § 270, exempting stockholders in Vermont from a tax on their shares of a foreign corporation if the stock is taxed where the corporation is situated.

(May 9, 1891.)

EXCEPTIONS by plaintiff to rulings of the Orleans County Court, made during the trial of an action brought to recover damages for the alleged conversion of certain personal

property, which resulted in a verdict in favor of defendant. *Reversed.*

Defendant justified as collector of taxes for the Town of Derby under a tax warrant, issued to him by the town treasurer. Plaintiff claimed that the tax list was invalid because certain shares of stock in the Eastern Townships Bank of Sherbrooke, in the Province of Quebec, were listed against him, when such shares were exempted from taxation by Rev. Laws, § 270.

Further facts appear in the opinion.

Mr. Laforrest H. Thompson, with Mr. C. A. Prouty, for plaintiff:

To justify the taking of plaintiff's property by defendant as tax collector, he must have a legal warrant and a legal tax.

Clove Spring Iron Works v. Cone, 56 Vt. 604; Rowell v. Horton, 57 Vt. 31; Hughes v. Vail, Id. 42.

The Eastern Townships Bank stock owned by plaintiff was exempt from taxation, and plaintiff's grand list was rendered illegal by putting this stock into it by the listers.

Rev. Laws, § 270.

NOTE.—Taxation of capital of corporation.

The capital of a corporation means all the property belonging to it, whether tangible or intangible, which must be valued as capital for the purpose of taxation. *Porter v. Rockford, R. I. & St. L. R. Co. 78 Ill. 561; Pacific Hotel Co. v. Lieb, 83 Ill. 602.*

The term "capital stock," as used in the Statute, does not refer to or embrace shares, but is intended to embrace the property of the corporation subject to taxation. *Ottawa Glass Co. v. McCaleb, 81 Ill. 561.*

It is the aggregate sum paid in or to be paid in by the shareholders, with the addition of the profits after deduction of losses. *People v. Tax Comrs. 23 N. Y. 219.*

The Legislature may rightfully provide for taxing the capital stock of a corporation instead of the shares, and require the corporation to pay the tax, leaving it to deduct the same from the dividends. *Ottawa Glass Co. v. McCaleb, 81 Ill. 566.*

The capital of a corporation and its shares of stock are distinct properties, and a tax levied upon the property of one is not in a legal sense levied upon the property of the other. *Belo v. Forsyth County Comrs. 82 N. C. 415; Jones v. Davis, 35 Ohio St. 474.*

When the capital stock is taxable, the shares of stock are exempt from taxation in the hands of stockholders. *Republic L. Ins. Co. v. Pollak, 75 Ill. 293.*

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The exemption of the one will not necessarily exempt the other. *Memphis v. Farrington, 8 Baxt. 539.*

The capital stock is usually the representative of the property of the corporation, and such property is the representative of the capital stock, and for purposes of taxation it is represented by whatever it is invested in. *New London Sav. Bank v. New London, 20 Conn. 117; New Haven v. City Bank, 31 Conn. 106; Bridgeport v. Bishop, 33 Conn. 187; Toll Bridge Co. v. Osborn, 35 Conn. 7; Rome R. Co. v. Rome, 14 Ga. 275; Augusta v. Georgia R. & Bkg. Co. 26 Ga. 651; Auditor of Floyd County v. New Albany & S. R. Co. 11 Ind. 570; Conwell v. Connorsville, 15 Ind. 160; Cumberland M. R. Co. v. Portland, 37 Me. 444; Bangor & P. R. Co. v. Harris, 21 Me. 538; Gordon v. Baltimore, 5 Gill, 231; Baltimore v. Baltimore & O. R. Co. 6 Gill, 238; Tax Cases, 12 Gill & J. 117; Salem Iron Factory Co. v. Danvers, 10 Mass. 515; Amesbury W. & C. Mfg. Co. v. Amesbury, 17 Mass. 461; Boston & S. Glass Co. v. Boston, 4 Met. 181; Boston W. P. Co. v. Boston, 9 Met. 199; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 568; Mutual Ins. Co. of Buffalo v. Erie County Suprs. 4 N. Y. 442; Smith v. Exeter, 37 N. H. 556; Fitchburg R. Co. v. Prescott, 47 N. H. 62; Bank of Cape Fear v. Edwards, 5 Ired. L. 516; Jones v. Davis, 35 Ohio St. 477; Bank of Commerce v. McGowan, 6 Lea, 708.*

The capital stock of a foreign corporation doing business within the State is liable to taxation. *Com. v. Gloucester Ferry Co. 98 Pa. 105.*

When this section speaks of the corporation being taxed in such State for all its stock, by stock it must mean the capital or capital stock of the corporation, which is entirely distinct from the shares of stock.

Cooley, Taxn. 169; 1 Desty, Taxn. 353.

The word "State" is sufficiently broad in its meaning to include the States of our Union and all foreign States.

2 Rapalje & Lawrence Law Dict. title *State*.

Act 45 Vict., chap. 22, imposes a tax upon the capital of banks, and hence upon their capital stock.

Meess. Dickerman & Young, for defendant:

The shares of stock in the Eastern Townships Bank, owned by residents of Derby, are taxable in Derby.

Rev. Laws, §§ 287, 288.

The tax assessed against and paid by said bank under the Law of the Province of Quebec, chap. 22, p. 106, Acts of 1882, is a franchise tax.

Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 880-832; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 415; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 560.

This tax imposed by the Statute of Quebec is neither imposed upon the shares of the individual stockholders, nor upon the property of the corporation, but is a tax upon the corporation itself.

See *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 206, 21 L. ed. 896; *Provident Sav. Inst. v. Massachusetts*, 73 U. S. 611, 18 L. ed. 912; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298; *Com. v. New England S. & T. Co.* 18 Allen, 391; *Pratt v. Street Comrs. of Boston*, 139 Mass. 559; *Monroe County Sav. Bank v. Rochester*, 87 N. Y. 385.

Even if this tax is held to be a tax upon the capital owned and controlled by the corporation, it does not then become a tax on the shares owned by the stockholders.

Van Allen v. The Assessors, 70 U. S. 3 Wall. 578, 18 L. ed. 229; *People v. New York Tax Comrs.* 71 U. S. 4 Wall. 244, 18 L. ed. 344; *Provident Sav. Inst. v. Massachusetts*, 73 U. S. 6 Wall. 611, 18 L. ed. 913; *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 853, 19 L. ed. 702; *Bradley v. Illinois*, 71 U. S. 4 Wall. 459, 18 L. ed. 433; *Lionberger v. Rowse*, 76 U. S. 9 Wall. 468, 19 L. ed. 724; *Van Slyke v. Wisconsin*, 78 U. S. 11 Wall. —, 20 L. ed. 240; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 18 Wall. 206, 21 L. ed. 895, 896.

The shares held by stockholders are distinct from the capital stock of the corporation, and the taxation of both is not double taxation.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240-243; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 880; *Farrington v. Tennessee* and *New Orleans v. Houston*, *supra*.

This distinction was not created by Congress in the National Banking Acts. These Acts and the decisions above cited only carry out the law as promulgated by the United States Supreme Court in 1819 in the case of *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 519-609.

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This distinction, for the purpose of taxation, between the capital of the corporation owned and controlled by it and the interest of the shareholder owned and controlled by him, is also clearly made in—

Springfield v. Springfield First Nat. Bank, 4 West. Rep. 853, 87 Mo. 441; *Lionberger v. Rowse*, 43 Mo. 67-79; *St. Louis Bldg. & Sav. Assn. v. Lightner*, 42 Mo. 421; *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500; *State Bank of Virginia v. Richmond*, 79 Va. 113; *New Orleans v. State Nat. Bank*, 84 La. Ann. 892; *New Orleans v. New Orleans Canal & Bkg. Co.* 82 La. Ann. 104; *New Orleans v. New Orleans & St. L. R. Co.* 27 La. Ann. 414; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. 164; *Pittsburgh's App.* Id. 374; *McKeen v. Northampton County*, 49 Pa. 519; *Whitesell v. Northampton County*, Id. 526; *Lycoming County v. Gamble*, 47 Pa. 106; *Dwight v. Boston*, 12 Allen, 816; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298-310; *Pratt v. Boston Street Comrs.* 139 Mass. 559; *Davenport Nat. Bank v. Equalization Board*, 64 Iowa, 140; *Raleigh & G. R. Co. v. Wake County Comrs.* 87 N. C. 411; *Utica v. Churchill*, 83 N. Y. 161-287. See also *Queen v. Arnaud*, 9 Q. B. N. S. 806; *Glenn v. Dodge* (D. C.) 3 Cent. Rep. 283; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 655; *Wheelock v. Moulton*, 15 Vt. 519.

Double taxation does not mean a tax upon the same thing in different States. It only applies to two taxes upon the same thing by the same authority.

Dwight v. Boston, *supra*.

And taxation in another State, directly or indirectly, has not been held by this court to exempt from taxation here, unless the letter of the law clearly makes it exempt.

Bullock v. Guilford, 59 Vt. 516; *Catlin v. Hull*, 21 Vt. 152; *St. Albans v. National Car Co.* 57 Vt. 68.

So in New Jersey, in *State v. Newark*, 25 N. J. L. 315.

A surrender of the power to tax, when claimed, must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power.

Delaware Railroad Tax, 85 U. S. 207, 21 L. ed. 888; *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 206, 21 L. ed. 895; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 560; *West Wisconsin R. Co. v. Trempealeau County Suprs.* 98 U. S. 595, 23 L. ed. 814; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 805; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 882; *People v. Davenport*, 91 N. Y. 574-586; *Ind. v. Yeager*, 2 West. Rep. 240-242, 104 Ind. 195; *People v. Illinois Cent. R. Co.* (Ill.) 6 West. Rep. 725.

In the exemption, as found in Rev. Laws, 270, "shares of stock" first line, "stock" second line and "stock" last line, must be held to mean the share or interest owned by the individual, and not the capital owned and controlled by the corporation. If there could be any doubt when looking to this clause alone, there cannot be when it is compared with the Act of 1857 and the Act of 1858.

Pratt v. Boston Street Comrs. 139 Mass. 559-563.

Tyler, J., delivered the opinion of the court:

The most important question that arises in the case is whether or not the plaintiff's Eastern Townships Bank stock is taxable in this State. Rev. Laws, § 267, requires that all real and personal estate, except as otherwise provided, be set in the list at 1 per cent of its value in money on the first day of April of the year of its appraisal. Section 288 provides that shares of stock in bank shall be set in the list like other personal estate, to the owner thereof, in the town where he resides, if he resides in this State. Therefore this property should bear its proportion of the burden of taxation unless it falls within the exemption of the second division of § 270, Rev. Laws, which is as follows: "Shares of stock in a corporation situated in another State, when all the stock of such corporation is taxed in such State to the holders, whether residing within or without such State, or when the corporation is taxed in such State for all its stock." It appears by the agreed statement that the plaintiff's shares of stock were not taxed in Canada. The law of the Province of Quebec imposes a direct tax upon banks and certain other corporations, and takes no notice of the individual shareholders for the purpose of taxation. Act 45 Vict., chap. 22, is entitled "An Act to Impose Certain Direct Taxes on Certain Commercial Corporations." Section 1 enumerates the corporations which shall annually pay the several taxes specified in section 3, in order to provide for the exigencies of the public service, and includes banks in the enumeration. Section 3 reads: "The annual taxes imposed upon and payable by the commercial corporations mentioned and specified in section 1 of this Act shall be as follows: (1) Banks. (a) Five hundred dollars, when the paid-up capital of the bank is five hundred thousand dollars or less than that sum; one thousand dollars, when the paid-up capital is from five hundred thousand dollars to one million dollars; and an additional sum of two hundred dollars for each million or fraction of a million dollars of the paid-up capital from one million dollars to three million dollars; and a further additional sum of one hundred dollars for each million or fraction of a million dollars of the paid-up capital over three million dollars. (b) An additional tax of one hundred dollars for each office or place of business in the cities of Montreal and Quebec, and of twenty dollars for each office or place of business in every other place."

The above Act was passed by the Legislature of the Province of Quebec, May 27, 1882, and was operative upon the Eastern Townships Bank, which was located in Sherbrooke, in that Province, and doing business there with a capital of \$1,500,000. This bank has been taxed and has paid its taxes each year since the passage of the Act, in compliance with its requirements. No question can now be raised but that the Legislature had authority to pass the Act. It derived its power to legislate from the British North American Act of 1867, by which the Dominion of Canada was formed. That Act provides that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of 18 L. R. A.

subjects enumerated; that is to say, "direct taxation within the province, in order to the raising of a revenue for provincial purposes." This authority of the Legislature and the rights of the government to collect taxes under the Act, was contested by certain banks and other corporations in several suits, which finally passed by appeal to the privy council of England, where it was held, sustaining the decree of the Queen's Bench, that the tax imposed was not a tax upon any commodity which the banks dealt in and could sell at enhanced prices to their customers; that it was not a tax on their profits nor upon their several transactions; but that it was a tax of a direct lump sum, assessed by simple reference to their paid-up capital and their places of business. The plaintiff, in the year 1888, was a resident and taxpayer in the Town of Derby, in this State, and the owner of 100 shares of stock in this bank, which the listers of that town set to him, with his other personal estate, in the grand list, so that the same was assessed for taxes that year. The question is whether the payment of the annual tax by the bank to the Canadian government brings the case within the exemption provided by our Rev. Laws, § 270, above quoted. There are but three kinds of taxation to which corporations can be subjected, namely: upon their real and personal property, upon their franchises, and upon their capital stock. A reference to the Canadian Statute shows that this tax was imposed upon corporations, without any reference to the amount or value of their property, or its use, capacity, or productiveness. It is almost equally clear that it was not designed as a franchise tax,—a tax upon the privilege of carrying on business under corporate organizations within the province. Generally, when the latter tax is imposed, means are adopted to ascertain the value of the franchise, as indicated by the amount of business done by the corporation taxed. In this case the Provincial Legislature graduated its taxation of corporations, not according to the value of their corporate franchise, nor the amount of their business, but solely according to the amount of their paid-up capital. "Capital" and "capital stock" are in legal intentment synonymous, and are used in legislative Acts as equivalent terms, though strictly not of the same meaning. It is said in 1 *Desty, Taxation*, 358, that "capital" and "capital stock" are in legal intentment synonymous, and are used in legislative Acts as equivalent terms, though strictly not of the same meaning; that "capital stock" means, not shares of stock either separately or in the aggregate, but it is intended to designate the property of the corporation subject to taxation, not in separate parcels, but in a homogeneous unity. In *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, somewhat different language is used. *Chief Justice* Waite speaks of the money paid in by subscribers for the shares of the capital stock as constituting the capital of the corporation, although the stock created by such subscription and payment was the property of the several holders of the shares; also of the aggregate of the subscriptions making the aggregate of the stock, and each subscriber owning that part of the stock which his shares represent. He says that, as capital, it belongs to the cor-

poration, but as stock it belongs to the holders of the shares into which the capital is divided. In that case the capital stock of the railroad company was exempt by its charter from taxation, and it was held that the shares were for that reason also exempt.

Courts and law-writers doubtless mean the same thing. They only differ in forms of expression. Though the capital stock of a corporation is produced by the payment of subscriptions for shares, the aggregate of shares and capital stock are not identical. When the capital is divided into shares and sold, the corporation ceases to be the owner of them. They then become the private property of the individual holders, while the money paid for them becomes the property of the corporation,—its capital or capital stock, with which to transact the business for which it was organized. Shares and stock are thus closely related. The court said in *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701, that shares, in their aggregate totality, are sometimes called the "capital stock" of a bank, though a different thing from its moneyed capital. Cooley, Taxn. 169, says: "So a tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation, when no contract relations forbid." Upon this ground the Supreme Court of the United States, in the cases referred to by defendant's counsel, has held that shares of stock in a corporation may be taxed although a tax has been laid upon the entire capital.

Counsel for the plaintiff concede that "shares of stock" and "capital stock" are not one and the same thing, and that it is within the power of the Legislature to lay a tax upon both; but they contend that, as the value of the shares depends upon the amount and value of the capital, a tax upon the latter is in effect a tax upon the former; that the amount of the dividends is necessarily diminished by the amount

of the tax paid upon its capital stock. By the term "all its stock," which is employed in section 270 of our Statute, is not meant the aggregate of shares into which the capital stock of a corporation is divided, but the moneyed capital which was produced by the payment by the stockholders for their shares. "Taxes" are defined as being the enforced proportional contribution of persons and property levied by the authority of the State, for the support of government and for all public needs. By the laws of the Province of Quebec, the entire capital stock of the Eastern Townships Bank was made to contribute its proportion of the expense of supporting the government under which it existed and transacted business. The question before us is not what the Legislature of this State had the power to do in respect to the taxation of shares held by our citizens in a foreign corporation when the capital stock of the corporation has been taxed in the State in which it is located. We are to construe our Statute as it stands; and it seems to us that the only reasonable construction to be given it is that it was intended to provide for such a case as this; that, the capital stock of this corporation having borne its proportion of the public burden in one jurisdiction, its shares held here are exempt from taxation. We think the word "State" employed in the Statute should be construed to mean a foreign State as well as one of the United States. The Statute was enacted for the relief and benefit of stockholders; therefore, upon the reason of the law, shares of stock in a foreign corporation should be exempt as well as those in a corporation located in one of the States of this Union. The view that we have taken of the first question in the case renders it unnecessary to consider the other questions presented in the exceptions.

Judgment reversed, and judgment for the plaintiff to recover the value of the property, as appears in the agreed statement, with interest.

INDIANA SUPREME COURT.

John O. HENDERSON, State Auditor, *Appt.*,
v.

Board of COMMISSIONERS OF the State
SOLDIERS & SAILORS MONUMENT.

(....Ind....)

1. An appropriation of a certain sum for a state soldiers' and sailors' monu-

ment by an Act requiring bonds from commissioners that the cost shall not exceed that sum with donations and contributions can be used only for the structural work of the monument, and not to pay the compensation and expenses of commissioners, secretary, and architect, or expenses of advertising for, and procuring, the design, or for other incidental expenses authorized by the Act.

NOTE.—Appropriation of state revenues.

Whether an appropriation shall or shall not be made is a legislative question over which the judicial department has no supervision or control. *Smith v. Myers*, 7 West. Rep. 90, 109 Ind. 1; *State v. Haworth*, 7 L. R. A. 240, 122 Ind. 462; *Wilson v. Jenkins*, 72 N. C. 6; *Goddin v. Crump*, 8 Leigh, 154; *Burch v. Earhart*, 7 Or. 58; *Franklin v. State Board of Examiners*, 23 Cal. 173; *People v. Pacheco*, 27 Cal. 175.

Separate resolutions of each branch of the Assembly authorizing payments cannot amend or
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vary the provisions of a statute making appropriations. *Rice v. State*, 96 Ind. 47.

To an appropriation nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. *People v. Brooks*, 16 Cal. 49.

A direction in a statute to the proper officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation. *Ristine v. State*, 20 Ind. 323.

Setting apart so much of the county revenue as is necessary to pay the cost of repairs provided for

2. A sufficient appropriation is made by an Act expressly authorizing expenses to be incurred and directing that they shall be paid when it is taken in connection with the general statute authorizing the auditor of the State to "draw warrants on the treasurer for all moneys directed by law to be paid," etc.

(June 12, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of petitioners in a proceeding instituted to compel defendant to transfer certain expenses from the account to which he had charged them and charge them against the general fund in his hands for the payment of current expenses. *Affirmed.*

The facts are stated in the opinion.

Mr. A. G. Smith for appellant.

Messrs. W. E. Niblack and A. J. Beveridge for appellees.

McBride, J., delivered the opinion of the court:

This was an application by the appellees, the Board of Commissioners of the State Soldiers' and Sailors' Monument, for a writ of mandate against the appellant, as Auditor of State. The controversy can be best stated by quoting the complaint, which is brief, and, omitting prefatory matter, is as follows:

"Your petitioners, George J. Langsdale, Thomas W. Bennett, Mahlon D. Manson, Geo. W. Johnston and DeWitt C. McCollum, respectfully say that they constitute the Board of Commissioners of the State Soldiers' and Sailors' Monument, provided for by the Act known as 'An Act to Provide for the Creation of a State Soldiers' and Sailors' Monument

or Memorial Hall or Monument and Memorial Hall Combined, According to the Discretion of the Trustees in This Act Provided for, and Declaring an Emergency,' approved March 3, 1887; that said Board of Commissioners, soon after its organization, proceeded to erect a Soldiers' and Sailors' Monument, as provided in said Act, at an estimated cost not exceeding two hundred thousand (\$200,000) dollars, the amount appropriated by said Act; that the sum of ninety-nine thousand and four hundred and forty-one dollars and eleven cents (\$99,441.11) has been expended in structural expenses upon said monument; and that contracts are outstanding for additional work to be performed upon, and material to be used in the erection of, said monument, to meet and discharge which the further sum of ninety thousand nine hundred and eighty-two dollars and sixty cents (\$90,982.60) will be required; that other sums of money have been expended, as incidental expenses, by said Board of Commissioners in the discharge of their duties, which have devolved upon them, no part of which incidental expenses has been applied in payment of the structural expenses hereinabove referred to, and which your petitioners are advised and believe are not properly payable out of the amount appropriated by the Act for the erection of the monument in question, as follows:

For payment of architects, including plans and model,	\$10,348.85
For Commissioners' <i>per diem</i> , traveling and hotel expenses	\$8,879.82
For engineering	15.00
For experts	1,404.25
For attorneys' services	165.00
For office and miscellaneous expenses	1,892.23

by the statute is a sufficient appropriation made by law within § 10 of the Act of April 6, 1885, p. 129. *State v. Johnson*, 3 West. Rep. 692, 105 Ind. 468.

Where the State has made an appropriation to meet an obligation an officer whose duty it is to draw a warrant upon the fund set apart by statute may be coerced into a performance of that duty. *Gray v. State*, 72 Ind. 567.

But where there is no statute making the appropriation no action lies against officers of the State. *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; *Hans v. Louisiana*, 24 Fed. Rep. 55.

But the justice of a claim, though apparent and unquestioned, does not authorize a mandamus to issue to the state auditor to compel him to issue his warrant, nor the treasurer of state to pay the same where no money is set apart for such purpose by an appropriation made by law. *State v. Porter*, 89 Ind. 287; Ind. Const. art. 10, § 195.

An Act of the Legislature recognizing a claim against the State as valid, and providing for its payment, prevents the claim from becoming barred by the lapse of time. *Corkings v. State*, 1 Cent. Rep. 77, 99 N. Y. 491.

Enforcement of obligations incurred by State.

A State has no constitutional power to annul or impair a valid contract entered into by it. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43, 3 L. ed. 650; *Trustees of W. & E. Canal Co. v. Beers*, 67 U. S. 2 Black, 448, 17 L. ed. 327; *Davis v. Gray*, 88 U. S. 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 108 U. S. 5, 26 L. ed. 13 L. R. A.

302; *People v. Platt*, 17 Johns. 195; *Montgomery v. Kasson*, 16 Cal. 189; *State v. Barker*, 4 Kan. 379.

The government is as much bound by a contract duly made by its authorized officers in its behalf or by alternatives offered it under a contract, when once exercised, as is any private citizen. *Fowler v. United States*, 3 Ct. Cl. 43; *Allen v. United States*, Id. 91. See also *Cooke v. United States*, 12 Blatchf. 43; *United States v. Bostwick*, 94 U. S. 53, 66, 24 L. ed. 65, 66.

In entering into a contract a State lays aside its attributes of sovereignty and binds itself substantially as one of its citizens under his contract, and the law which measures individual rights and responsibilities measures with few exceptions those of the State. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Gray v. State*, 72 Ind. 567; *State v. Cardozo*, 8 S. C. 71; *People v. Canal Comrs.* 5 Denio, 401; *Penitentiary Co's Nos. 2 & 3 v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 534; *Grogan v. San Francisco*, 18 Cal. 590.

But a State may defeat the enforcement of its contract, for a State cannot be sued (*Hans v. Louisiana*, 24 Fed. Rep. 55); and it may fail to make the necessary appropriation to meet its obligation. *State v. Porter*, 89 Ind. 290; *May v. Rice*, 91 Ind. 546; *Rice v. State*, 95 Ind. 33.

If there is no appropriation the courts are powerless to assist a party to enforce his contract against the State. *Ristine v. State*, 20 Ind. 323; *State v. Ristine*, Id. 345; *Newell v. People*, 7 N. Y. 94; *Sunbury & U. R. Co. v. Cooper*, 38 Pa. 273.

For secretary's salary	1,817.25
For printing and stationary	1,401.77
For superintendence	2,265.50
For advertising	795.11
For removal of Gov. Morton's Monument out of the way	203.25
Making a total of	29,187.53

"Your petitioners say that said several sums of money are merely incidental expenses; that no part of them are structural expenses; but notwithstanding the fact that said sums are purely and solely incidental expenses, they have nevertheless been paid by the treasurer of state upon warrants issued by the Auditor of State, and against and in the face of the repeated request of said Board of Commissioners not to do so, and their repeated protest against so doing, have been by said Auditor of State charged to and against the fund of two hundred thousand (\$200,000) dollars created and set apart by the above-recited Act, for the erection of a soldiers' and sailors' monument, known as the 'Monumental Fund'; that they, said petitioners, have demanded of John O. Henderson, who is the present Auditor of State, that he shall transfer the several sums, all of which are purely incidental expenses, from said monument fund, and charge the same to and over against the general fund in the hands of the treasurer of state, for the payment of current expenses, and that the said John O. Henderson has failed and refused, and still fails and refuses, to comply with their said demand either in whole or in part or in any respect.

"Wherefore, your petitioners pray that an alternative writ of mandate shall be issued and directed to the said John O. Henderson, requiring him to so transfer said several sums of money so paid and classified, as merely incidental expenses, from said monument fund, and to charge the same to and over against what is known as the general fund in the state treasury, as above stated, or else to show cause why he shall not or ought not to do so, and will ever pray.

"William E. Niblack,

"Albert J. Beveridge,

"Attorneys for Petitioners.

"George J. Langsdale, one of the above-named petitioners, being duly sworn, says that he is the president of said Board of Commissioners of the State Soldiers' and Sailors' Monument, and that he is fully conversant with the facts and matters set out in the foregoing petition; and that the matters and things alleged in the foregoing petition are true, as he is informed and verily believes.

"George J. Langsdale, President.

"Subscribed and sworn to before me, a notary public in and for the County of Marion, State of Indiana, this 20th day of April, 1891.

"(Seal) Eva Edwards, Notary Public."

The appellee appeared, waived the issuance of an alternative writ of mandate and demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to an alternative or peremptory writ of mandate. The demurrer was overruled.

and the appellant, excepting to the ruling, declined to plead further. Judgment was rendered, awarding a peremptory writ of mandate, and from such judgment this appeal is prosecuted.

The questions presented call for a construction of the Act approved March 3, 1887, known as the State Soldiers' and Sailors' Monument Act. Acts of 1887, 30; Elliott's Supp. § 2048.

The appellee insists that the sum of \$200,000 appropriated by that Act was intended by the Legislature to be devoted solely to the structural expense of erecting the monument; that no part of it was to be used for the payment of incidental expenses, and that all incidental expenses are to be paid from the general fund in the state treasury. The appellant's contention is, that the sum appropriated was intended to cover the entire amount to be paid by the State toward the erection of the monument, and that there is no appropriation of any other sum for the payment of incidental expenses.

The provisions of the Act in question are substantially as follows:

"Section 1. The sum of two hundred thousand dollars . . . is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, for the purpose of erecting a State Soldiers' and Sailors' Monument, said appropriation to be used in connection with such other funds as have already been or may hereafter be donated and contributed for that purpose."

Section 2 provides for the appointment of five commissioners, prescribes their oath of office, requires them to each give bond in the sum of \$5,000 for the faithful performance of their duties; and further conditioned that the cost of the monument shall not exceed the appropriation, with donations and contributions, fixes their compensation at four dollars per day and traveling expenses and provides for the filling of vacancies.

Section 3 prescribes certain of their duties, locates the monument in Circle Park in the City of Indianapolis, and authorizes the making of certain contracts with the city.

Section 4 requires the Commissioners to prepare, select or adopt a design for the monument, to advertise for plans, designs and specifications; to offer a premium of \$1,000 for the best, and \$500 for the second best design, with authority to reject any and all designs offered and to advertise as often as may be necessary to procure suitable designs and plans, and authorizing them to employ experts to examine all plans and test all estimates submitted.

Section 5 authorizes the letting of contracts for the work and prescribes the manner of paying the contractors.

Section 6 prescribes the material to be used in the erection of the monument, and requires the architect to give bond, with sureties, in the penal sum of \$10,000, "conditioned that said plans shall be perfect and complete for the purpose designed and intended, and that the monument shall be fully completed and finished as a whole, and in every part, for and within the price and cost estimated and fixed by such architect; and which price or cost

shall be stated in his proposition or submission of plan and specification."

This section also forbids the making of any change in the plans or specifications which will increase the aggregate cost of the monument so as to exceed the cost prescribed in the Act.

Section 7 authorizes the appointment of a secretary, prescribes his duties, and fixes his compensation at \$75 per month.

Section 8 authorizes the commissioner to employ a superintendent, whose duties and compensation they are authorized to fix.

Section 9 forbids members and officers of the Board to have any interest in any contract connected with the erection of the monument, and prescribes penalties.

Section 10 makes the architect whose plans are accepted the supervising architect, requires of him a bond as such supervising architect, and provides for his compensation.

The case of *Campbell v. State S. & S. Mon. Comrs.*, 115 Ind. 591, involved the construction of this Act. It was there held that it was the intention of the Legislature that the entire sum of \$200,000 appropriated should be devoted, so far as used at all, to the structural work of the monument, and that all incidental expenses, such as are involved in this case, must be paid from the general fund in the state treasury, and that there was sufficient in the Act to operate as an appropriation, authorizing the Auditor of State to draw warrants on the treasurer of state to pay the same. That case is vigorously attacked by the appellant, and we are asked to overrule it. It is manifest that if *Campbell v. State S. & S. Mon. Comrs.* was correctly decided, it is decisive of the case now before us. After careful consideration of the question, we are of the opinion that the conclusion reached in *Campbell v. State S. & S. Mon. Comrs.* was correct.

Section one of the Act appropriated \$200,000 for the purpose of erecting a monument. Section 4 provides for advertising for plans and specifications for a monument to cost not exceeding that amount. The commissioners and architect each and all give bond that it shall not exceed in cost that amount. If the incidental expenses are all to be deducted from the \$200,000, how can the board of commissioners or the architect act safely and intelligently in the preparation and acceptance of plans and specifications? If they understand that a certain definite sum is available for structural work, they have a tangible basis upon which to calculate. The Act compels the incurring of certain incidental expenses, the amount of which is necessarily uncertain. No one can tell in advance what events may occur to delay or prolong the prosecution of the work, or how much time the Commissioners may have to give to it. It cannot be foretold how often they may have to advertise for plans and specifications before such plans will be submitted as will meet the requirements. Nor could they tell in advance how often they might be compelled to employ experts to assist in the selection of plans and test estimates. Already incidental expenses have been incurred and paid amounting to more

than \$20,000. It is not claimed that any of these were not necessary to the proper prosecution of the work. It is not possible to foretell how much time will still be required for the completion of the work; and, as a consequence, how much additional must be paid for salaries and other incidental expenses.

When the commissioners advertised, inviting plans and specifications, upon what basis were architects invited to make their estimates? Did the Legislature intend to say to them, "First guess on the probable amount of the \$200,000 which will be absorbed in incidental expenses, and bind yourself with sureties in the penal sum of \$10,000 that your guess is right?"

To give to the Act the construction contended for by the appellant would be to hold that the Legislature required at the hand of the commissioners and architects very unreasonable, if not impossible, things; but, if the intention of the Legislature was that the \$200,000 should be devoted alone to the structural work, the commissioners could easily select a design and let a contract for the erection of a monument within the limits named.

The case of *State House Comrs. v. Whittaker*, 81 Ind. 297, is in point. The Legislature appropriated \$2,000,000 for the building of a new state house, and limited the entire cost to \$2,000,000. The provisions of the two Acts are very much alike; indeed, the Act providing for the erection of the monument is in many of its provisions, and in some entire sections, literal copies of the Act providing for the erection of a new state house, which will be found in the Acts of the Special Session of 1877, page 68. Like the Act now in question, that Act not only in express terms limited the cost of the building to \$2,000,000, but also required the giving of bonds, both by the commissioners and by the architect. The bond required of the commissioners was conditioned that the cost of the building should not exceed \$2,000,000, and the bond required of the architect was conditioned that the building should be "fully completed and finished as a whole, and in every part, for and within the cost and price estimated and fixed by such architect." The court held that the sum of \$2,000,000 might be expended in the construction of the new state house; and that in addition thereto, all incidental expenses, such as salaries, traveling expenses of the board, compensation of architect, secretary and superintendent, rents, etc., might be paid out of the fund denominated the new "state house fund;" but that such expenses should not be deducted from the \$2,000,000 which might be expended in what might strictly be called the construction of the building.

So, in this case, we hold that the sum of \$200,000 appropriated for the erection of the monument can only be expended in the actual structural work, and that no part of it can properly be expended in the payment of merely incidental expenses.

Counsel for appellant insists that the case of *State House Comrs. v. Whittaker*, *supra*, is not authority because a special tax was levied for the collection of a special state

house fund, while there is no special monument fund. This cannot affect the question, as the application of the sum limited for the erection of either structure is not made to depend upon the amount of money belonging to any special fund. The board of state house commissioners were limited to the expenditure of \$2,000,000 in the erection of the state house, without regard to the amount realized from the special tax levied for that purpose.

The question remains, Is there an appropriation authorizing the Auditor of State to draw warrants on the treasurer of state for the payment of the incidental expenses?

In *Campbell v. State S. & S. Mon. Comrs.*, *supra*, the court said: "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly; and in general as well as in specific terms. . . . The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said, generally, that a direction to the proper officer or officers to pay money out of the treasury on a given claim, or class of claims, or for a given object, may by implication be held to be an appropriation of a sufficient amount of money to make the required payments,"—citing *Ristine v. State*, 20 Ind. 328.

It is possible, as claimed by the appellant, that the language above quoted was outside of the question before the court in that case. It however states the law correctly and we fully approve and adopt it.

The eighth subdivision of section 5611, Rev. Stat. 1881, authorizes the Auditor of State to "draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable." The Act providing for the erection of the monument expressly authorizes the incurring of each of said several items of incidental expenses, and directs that the same shall be paid. We think there is a sufficient appropriation to make it the duty of the appellant to draw warrants for the payment of the same. For a very full discussion of what constitutes an appropriation of money, see the case of *Carr v. State*, 127 Ind. 204, 11 L. R. A. 370.

The judgment of the Marion Circuit Court is affirmed, with costs.

SUMNER *et al.*, Appts.,

v.

William J. DARNELL.

(....Ind....)

1. A deed to certain persons "commissioners of W. County, and their successors

in office for the use of said county" accepted by an entry upon the county records as a deed "to and for the use of" said county, gives the legal title to the county and not to the commissioners, where there was no statute designating their corporate name and style.

2. Removal of a county seat, fifty-six years after its location on land conveyed for such use, does not make a total failure of the consideration which will cause a reversion to the grantor.

3. A conveyance "for the use of" a county "in consideration of the seat of justice having been permanently established" at a certain place, is not on a condition subsequent that the county seat remain there and no reversion is worked by removal of the county seat.

(April 3, 1891.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Wayne County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Julian & Julian for appellants.

Messrs. Fox & Robbins for appellee.

Miller, J., delivered the opinion of the court:

This was an action by the appellants against the appellee to recover certain real estate in Centerville, Wayne County. The complaint was in four paragraphs. A demurrer was sustained to the second paragraph, and cause put at issue by answer in denial. The errors assigned in this court relate only to the overruling of a motion made by the appellants for a new trial, and on exceptions to the conclusions of law upon the special findings of fact. The motion for a new trial was predicated upon the alleged insufficiency of the evidence to sustain the finding. We have read the evidence carefully, and find that it fully and without conflict sustains the finding of facts made by the court. The special finding, omitting description of real estate, is as follows, viz.: "Having been requested by the plaintiffs in said cause to make a special finding of facts herein, and conclusions of law thereon, now find: That William Sumner was a resident of Centerville, Wayne County, Ind., from the year 1818 to the year 1840, at which last-named date he removed to Hamilton County, Ind., where he died intestate in the year 1868; that he left surviving him as his sole heirs four children, the plaintiffs in this suit, and Thomas Sumner, who died in 1883, leaving surviving him, — Sumner, his wife; that between the years 1818 and 1820 the said William Sumner was the owner in fee simple of — acres of real estate in the Town of Centerville, and in the vicinity thereof, and was interested in the development of the town; that prior to the year 1816 the county-seat of said Wayne County was fixed at Salesbury, and subsequently, by an Act of the General Assembly of the State of Indiana approved December 21, 1816, it was

NOTE.—Conditions in deed for land must be express and certain.

Conditions in a deed of land are not to be raised 13 L. R. A.

by inference or argument. *Rawson v. Uxbridge School Dist.* No. 5, 7 Allen, 125.

To bind the heirs or assigns to the performance

enacted that, from and after the 1st day of August, 1817, the seat of justice in and for said county should be removed to and permanently fixed in the Town of Centerville, in said county, and on the 1st day of August, 1817, said seat of justice was, pursuant to said Act, removed to said Town of Centerville; that afterwards, to wit, on the 18th day of May, 1819, the said William Sumner being the owner of the following real estate, to wit, . . . did, in consideration of the seat of justice having been permanently established in the Town of Centerville, within and for said county, and for no other consideration, execute to Thomas J. Warman, Enos Grave, and Beah Butler, the commissioners of said county and their successors in office, for the use of said county forever, a warranty deed for the same; that said deed was duly recorded on the 18th day of May, 1819, in the recorder's office of said Wayne County, Ind., in Deed Record B, page 140; that on the — day of August, 1820, the new court-house at Centerville was completed and accepted by the said county commissioners of said county, and by them taken possession of, and on said date they consented to be entered their approval and acceptance of the deed of said William Sumner of May 18, 1819, in the record of their proceeding of said date, in the following words, to wit: 'William Sumner produced a deed for the public square in the Town of Centerville given by said Sumner and wife to and for the use of Wayne County, which deed was recorded in Book B, page 140, which deed was approved and accepted by the board.' That said real estate so conveyed by the said Sumner and wife to said county commissioners was thenceforward continuously used by said county for the purpose of a public square until the year 1873, at which date the county seat was removed from said Town of Centerville to the City of Richmond; that on the 7th day of March, 1874, the commissioners of said county, for a valuable consideration, sold and conveyed the west half of the

same to one Sabra Jones, which deed was recorded in the recorder's office of Wayne County, Ind., in Deed Record 59, page 480, and on the 15th day of June, 1874, for a valuable consideration, they sold and conveyed the east half of the real estate to the said Sabra Jones, which deed was recorded in the recorder's office of Wayne County, Ind., in Deed Record 59, page 478; that said Sabra Jones took possession of said real estate on said dates, respectively, and that, after various transfers by deeds duly executed and recorded, the following part of the real estate included in the land conveyed by said William Sumner to the said county commissioners by deed of May 18, 1819, was conveyed on the 4th day of March, 1884, to defendant William J. Darnell, who now holds possession of the same; that said deed was duly recorded in the recorder's office of said Wayne County, Ind., in Deed Record No. 80, at page 121; that prior to the commencement of this suit the plaintiffs demanded of the defendant the possession of the same." And, as a conclusion of law on the foregoing finding of facts, the court finds for the defendant. Proper exceptions were taken to the foregoing conclusions of law by the plaintiff, and this presents for our consideration the question discussed by counsel in their elaborate briefs.

The conclusions of law deduced by the court from the special findings are assailed upon several different grounds, one of which is the claim that, inasmuch as the deed was to "Thomas J. Worman, Enos Grave, and Beah Butler, commissioners of Wayne County, and their successors in office, for the use of said County of Wayne," it gave to the commissioners the legal title to hold as trustees, and limited the county to the mere use of the premises; and that by the removal of the county-seat the use was lost and forfeited, and the title vested *eo instante* in the grantor or his heirs. As we construe the grant, it was in legal effect and contemplation a conveyance to the county. Nothing in the lan-

of a condition subsequent, the condition must expressly mention them. Page v. Palmer, 48 N. H. 385.

Words used in a deed will not be construed as a condition subsequent when any other reasonable construction can be given them. Wier v. Simmons, 56 Wis. 687.

The words "provided always, and this deed is upon the express condition" (Hammond v. Port Royal & A. R. Co. 15 S. C. 10), or "shall indemnify and save harmless," are necessary to express a condition subsequent. Michigan State Bank v. Hastings, 1 Doug. 225.

A deed, to a town, of land "for a burying place forever" does not convey an estate upon a condition subsequent. Rawson v. Uxbridge School Dist. No. 5, *supra*.

A conditional estate must be clearly and unequivocally indicated by express terms in the grant. *Ibid*.

So on a condition that grantee shall forever maintain a line fence, a neglect to do so after death of the grantee will not forfeit the land. Emerson v. Simpson, 48 N. H. 475.

A deed conveying land upon condition that no building or erection shall ever be made on the land except dwelling-houses, and outhouses for the same, shows merely by description what rights
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passed to grantee and what were retained by grantor, and that subsequent purchasers could not erect the prohibited buildings. Fuller v. Arme, 45 Vt. 400.

Where no time is fixed within which the conditions were to be performed, the law will allow a reasonable time. Ellis v. Kyger, 7 West. Rep. 749, 90 Mo. 600.

A party insisting on a forfeiture of an estate for breach of condition must bring himself clearly within its terms. Voris v. Renshaw, 49 Ill. 425.

Establishment of county seat.

A statute providing that the county seat of a county should be permanently established at a certain place, upon the fulfillment of certain prescribed terms and conditions, is not a contract, but the public law relating to a public subject, with respect to which a prior Legislature has no power to bind a subsequent one. Newton v. Mahoning County Comrs. 100 U. S. 543, 25 L. ed. 710.

Where the county erects a court-house on land conveyed to it, the removal of the county seat does not divest the county of its title, nor evidence its intent to abandon the property or to use it for other purposes. Poitevent v. Hancock County Suprs. 58 Miss. 810.

guage used indicates a design on the part of the grantor to vest the legal title in the commissioners and their successors as individuals, to act as trustees, rather than as the agents of the county, or to impose upon them any duties or obligations other than those required of them as public officers. The statute in force at that time did not, as does the present one, designate the corporate name and style to be assumed by boards of commissioners (Act approved December 17, 1816), and the form used in this deed was at that time commonly used in conveying property to corporations and quasi corporations in this State. It is significant, also, that the entry made upon the county records by the board of commissioners in accepting the deed was for a deed "to and for the use of Wayne County." See also *Carder v. Fayette County Comrs.* 16 Ohio St. 353; *Hayward v. Davidson*, 41 Ind. 212.

Another position taken by the appellants is stated in their brief as follows: "But this is not all we rely upon. The total failure of the consideration of the Sumner deed itself worked a loss of the county's claim, and gave to the Sumner heirs the right to assert their title to the square, independent of the condition subsequent." No authority is cited in support of this position, and we know of none that will sustain it. The duration or stability of the title to land does not ordinarily depend upon the certainty or stability of the consideration paid for it. But, independently of the legal question involved, the finding informs us that the county-seat remained at Centerville from the 1st day of August, 1817, until the year 1873, long after the grantor had removed from the county. We may reasonably suppose that, if the location of the county-seat at Centerville was of advantage to the grantor, he must have received some of the benefits during the half century it remained there, and that consequently there was not an entire failure of consideration. *Hunt v. Beeson*, 18 Ind. 380; *Jeffersonville M. & I. R. Co. v. Barbour*, 89 Ind. 375.

The remaining and principal contention of the appellants is that the conveyance of the land to or for the use of the county was conditioned in the seat of justice of Wayne County remaining permanently at Centerville, and that its removal to Richmond caused the land to revert to the appellants as the heirs of the grantor. The rule of strict construction applicable to conditions subsequent, usually expressed in the words, "conditions subsequent are not favored in law, and are construed strictly," is elementary, and does not require the citation of authorities. A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it. The rule is stated in 2 Devlin on Deeds, as follows: "Sec. 976. Parol condition. Aside from the question of a reformation of a deed in cases where clauses have been omitted by mistake, it is certain that, in an action to recover property conveyed by deed on the ground that a condition on

which it was made has not been performed, the deed must speak for itself, and a condition cannot be ingrafted upon a deed absolute in form by parol evidence. The ingrafting of a contemporaneous condition in a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake." A condition may be created by any words which show clear, unmistakable intention on the part of a grantor to create an estate on condition, regard being had to the whole of the deed in which they occur. The word "condition" need not be used, but words importing a condition must be used or plainly inferred from the instrument and the existing facts. *Tiedeman, Real Prop.* § 272; *Labree v. Carleton*, 58 Me. 213; *Rawson v. Uzbridge School Dist. No. 5*, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Episcopal City Mission v. Appleton*, 117 Mass. 327; *Paschall v. Passmore*, 15 Pa. 307; *Wier v. Simmons*, 55 Wis. 642; *Raley v. County of Umatilla*, 15 Or. 172; 2 Washb. Real Prop. 5th ed. 2. It appears from the finding, *supra*, that in the year 1816 the General Assembly passed an Act fixing the seat of justice for Wayne County permanently at Centerville from and after the 1st day of August, 1817, and that pursuant to the Act, on that day, it was removed to Centerville; that afterwards, on the 18th day of May, 1819, the lands in controversy were conveyed by a general warranty deed to the commissioners "for and in consideration of the seat of justice having been permanently established in the Town of Centerville, within and for said county. . . . for the use of said County of Wayne." No other words from which any condition, limitation, or right of re-entry by the grantor or his heirs can be inferred are expressed in the conveyance, or in the subsequent entry made by the board of commissioners accepting the deed. The cases cited by appellants' attorneys, and principally relied upon to show that this deed was conditioned on the seat of justice remaining at Centerville, will be examined in their order. The first one is *Stanley v. Colt*, 72 U. S. 5 Wall. 119-163, 18 L. ed. 502, 508. This was an action to recover, for breach of condition, a tract of land devised by the plaintiff's ancestor to an ecclesiastical society in which the property was devised to the society, "to be and remain to the use and benefit of said Second or South Society, and their successors, forever." Then comes the condition or limitation upon the devise: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let," etc. The court held that there was not a condition subsequent, using these words: "Our conclusion is that the construction urged by the plaintiff of the will, importing a condition, a breach of which forfeits the devise, is not well founded." The next case cited is *Hunt v. Beeson*, 18 Ind. 380. In this case a lot was donated by the proprietor of a town for a "tan-yard;" and was used as such from 1834 to 1858. The court held that it was donated upon a condition subsequent, the condition evidently being the erection of a tan-yard on the lot, and not the perpetual maintenance of the same; for the court held that the con-

dition was fully performed, and that the property did not revert upon its subsequent sale and appropriation to other purposes. The case of *Indianapolis P. & C. R. Co. v. Hood*, 66 Ind. 580, was a conveyance of some lots to the company "for a site for the depot of said railroad at Peru, . . . to have and hold the premises . . . for the purposes aforesaid." The statement of the use and condition was much stronger than is contained in the deed under consideration, and it does not support the position of the appellants. We do not feel called upon to extend the rule in favor of conditions subsequent beyond that indicated in this case. The case of *Scott v. Stipe*, 12 Ind. 74, is not well reported, but as explained in *Scanlin v. Garvin*, 46 Ind. 275, does not sustain the appellants' contention; for it is said that the grant was upon condition that a church should be erected on the lot, and that it should "forever thereafter be used as a house of worship." Also see *Cook v. Leggett*, 88 Ind. 211. The case of *Warren v. Lyon City*, 22 Iowa, 351, was a suit by the grantor, who dedicated land for a "public square," to enjoin the city from leasing or selling the same. The case is not in point. In *Henderson v. Hunter*, 59 Pa. 335, the condition expressed in the grant to a church was, "so long as they use it for that purpose, and no longer, and then to return back to the original owner."

We are unable to find that any of the cases cited by appellants sustained their theory of this case. In *Heaton v. Randolph County Comrs.*, 20 Ind. 398, the conveyance was to "the board of trustees of the county seminary of Randolph County, and their successors in office, forever, to have and to hold the premises aforesaid, with all the appurtenances, to the only proper use, benefit, and behoof of said 'board of trustees, for the use of said seminary forever.'" It was claimed that this created a condition subsequent, and that, the premises having ceased to be used as a seminary, the grantor was to receive the land. The court held that the corporation received an unconditional title, which was not defeated by the alleged failure to use the premises for the purposes of a seminary, or by using them for other purposes, that there was nothing in the deed that imports a condition; and that if the grantor intended that the property conveyed should only be used for a seminary edifice, or, in case it should be used otherwise, that the estate should be forfeited and revert the condition should have been expressed or fairly implied. In *Seebold v. Shiller*, 84 Pa. 183, land upon which a court-house and jail had been erected was conveyed to the commissioners by name, and their successors in office, "in trust for the use of the said county, in fee simple." The county was subsequently divided, the seat of justice removed, and trustees appointed to sell the lots. Held, that there was no reverter. In *Adams v. County of Logan*, 11 Ill. 386, a landowner proposed that, if the county-seat should be located at Pottsville, he would give land for a court-house and other county purposes. The proposition was accepted, and the General Assembly passed 18 L. R. A.;

"An Act to Locate Permanently the Seat of Justice of Logan County," and it was located at Pottsville. Subsequently the county-seat was removed. It was held that the grantor was without remedy. The suit was to recover the money rather than land, but it was held that the deed was unconditional. In *Harris v. Shaw*, 13 Ill. 456, land was conveyed to commissioners, by name, and their successors in office, for the use of a county forever, in consideration of one dollar, and that the county-seat had been located on the premises. The county-seat was afterwards removed, and the grantor sued to recover the land. It was held that there was no condition, and that he could not recover. The citation of authorities to this effect might be greatly extended, but we will refer to the following: *Raley v. County of Umatilla*, 15 Or. 172; *Portland v. Terwilliger*, 16 Or. 465; *Coffin v. Portland*, 18 Or. 77; *Columbia First M. E. Church v. Old Columbia Pub. G. Co.* 103 Pa. 608; *Paschall v. Passmore*, 15 Pa. 307; *Raussen v. Uxbridge School Dist.* No. 5, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Crane v. Hyde Park*, 135 Mass. 147; *Sohier v. Trinity Church*, 109 Mass. 1; *Board of Suprs. v. Patterson*, 56 Ill. 111; *Lave v. Hyde*, 89 Wis. 347; *Wier v. Simmons*, 55 Wis. 637; *Brown v. Caldwell*, 23 W. Va. 187; *Southard v. Central R. Co.* 26 N. J. L. 14; *Barrie v. Smith*, 47 Mich. 181; *Gage v. School Dist.* No. 7, 64 N. H. 232, 4 New Eng. Rep. 284; *Page v. Palmer*, 48 N. H. 387; *Morrill v. Wabash, St. L. & P. R. Co.* 96 Mo. 174; *Thornton v. Trammell*, 89 Ga. 202.

It is questionable whether the appellants would be entitled to a recovery if the deed contained a condition subsequent. It appears from the finding that the county-seat remained at Centerville from 1817 to 1873, a period of fifty-six years, and that this suit was brought more than seventy years after the location of the seat of justice at Centerville. It may fairly be presumed that the grantor at the time he executed the deed to the commissioners owned other property, the value of which he expected would be enhanced by the location of the county-seat, or that he had other interests to be subserved thereby. If so, we may also infer that he received during his lifetime, and while a resident of Wayne County, the substantial benefit of his donation. In *Hunt v. Beeson*, 18 Ind. 880, it was held that the maintenance of a tan-yard for the period of twenty-four years was a substantial compliance with the condition contained in the conveyance. In *Mead v. Ballard*, 74 U. S. 7 Wall. 290, 19 L. ed. 190, a conveyance, upon condition that an institute "shall be permanently located upon said lands," was complied with by the location of the institution thereon August 9, 1848, and its remaining there until 1857. In *Jeffersonville M. & I. R. Co. v. Barbour*, 89 Ind. 875, the use for thirty-three years of lands granted "expressly for the use and purpose of depot grounds," and providing that if not used for that purpose it should revert to the grantors, was held to be a performance of the condition, so as to prevent a forfeiture. We find no error in the record.

Judgment affirmed.

STATE of Indiana, *ex rel.* John WORRELL,
Appl.,
v.

Bruce CARR, State Auditor.

(....Ind.....)

1. **Payment of salary** with full knowledge of the facts, to one who had previously been acting as a *de facto* officer, and who attempted to retain the office after the qualification of the officer *de jure*, is no defense to a claim for the salary by the officer *de jure*, at least where the latter has also been performing the duties of the office.
2. **A provision in an Appropriation Act** that the salary for a certain office shall be paid to a certain person named, and none other, and a statute providing a penalty for paying it to any other person than the one named, are absolutely void as attempts to exercise judicial powers by declaring who is the legal officer entitled to the salary.

(June 18, 1891.)

A PPEAL by relator from a judgment of the Circuit Court for Marion County in favor of defendant in a proceeding brought to compel defendant to draw a warrant on the state treasurer in favor of relator for the amount of the salary which relator alleged he had earned as chief of the bureau of statistics. *Reversed.*

The facts are stated in the opinion.

Olds, J., delivered the opinion of the court:

The relator filed his petition in this case, asking that a writ of mandate issue against the appellee, the Auditor of State, compelling him to draw his warrant on the treasurer of state in favor of the relator for the sum of \$2,500, the amount alleged to be due the relator as his salary as chief of the bureau of Indiana statistics. Issues were joined on the complaint and a trial had. There were demurrers filed to the paragraphs of answer

and overruled and exceptions reserved. Errors are assigned on these rulings. On proper request, there was a special finding of facts and conclusions of law stated by the court. The conclusions of law were excepted to by the appellant and a proper assignment of error.

The questions presented and discussed relate to the right of the relator to the salary alleged to be due him and his right to have a writ of mandate issue compelling the Auditor of State, the appellee, to draw his warrant on the treasurer of state in favor of the relator for the sum due him. No question is presented and discussed as to the regularity of the proceedings or as to the proper parties being before the court.

The facts found by the court show that, on the 31st day of May, 1889, the relator, John Worrell was appointed and commissioned chief of the Indiana bureau of statistics by Alvin P. Hovey, governor of the State of Indiana; that at the time of his appointment, he was a resident voter of the State, of legal age, and in every way eligible to hold the office, and on the day of his appointment he took the oath of office, which was indorsed on the back of his commission, and filed a copy thereof in the office of the secretary of state, and in every way qualified as such officer; and on the same day appellee was notified of the relator's appointment and qualification; that after the relator's appointment he applied for office room in the state capitol, to be occupied by him as the chief of the Indiana bureau of statistics, and was assigned a room for that purpose by the Auditor of State, which room was independent and removed from a room occupied by William A. Peelle, Jr., and said relator Worrell has been doing work and performing the duties as the chief of the bureau of statistics independent of work performed by said Peelle from May 31, 1889, to November 19, 1890.

Note.—Office and officer.

An office is a public employment conferred by the government. It embraces the ideas of tenure, duration, emolument, and duties. *Folts v. Kerlin*, 2 West. Rep. 671, 105 Ind. 221; *United States v. Hartwell*, 73 U. S. 6 Wall. 385, 18 L. ed. 880.

Everyone appointed to perform a public duty, and who receives compensation, is a public officer. *Folts v. Kerlin*, *supra*; *Henly v. Lyme*, 5 Bing. 91, citing *Case of Wood*, 2 Cow. 30, note; *People v. Brooklyn*, 77 N. Y. 508.

An office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. *Hamlin v. Kassafer*, 15 Or. 456.

A public officer is bound to perform the duties of his office for the compensation fixed by law. *Barth v. Cutler* (Utah) July 12, 1890, citing *Evans v. Trenton*, 24 N. J. L. 784; *Territory v. Carson*, 7 Mont. 417; *Jones v. Grant County* *Supra*, 14 Wis. 518; *Fawcett v. Woodbury Co.*, 55 Iowa, 154; 1 Dillon, Mun. Corp. 315.

An office is void as to the officer *de facto* himself, though valid as to strangers. *State v. Dierberger*, 7 West. Rep. 135, 90 Mo. 309.

Acts of a *de facto* officer are void as to himself, unless he is also officer *de jure*, but are good if for the benefit of strangers or the public. *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484; *Adam v.* 13 L. R. A.

Mengel (Pa.) 7 Cent. Rep. 185; *Green v. Burke*, 23 Wend. 430; *People v. Nostrand*, 46 N. Y. 375; *People v. Hopson*, 1 Denio, 574. See *Pooler v. Reed*, 73 Me. 129; *State v. Carroll*, 38 Conn. 449; *McVeany v. New York*, 80 N. Y. 192; *Dolan v. New York*, 68 N. Y. 274; *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 523; *McCue v. Wapello County*, 56 Iowa, 696; *People v. Potter*, 68 Cal. 127.

Officers de facto and de jure distinguished.

A person in possession of an office may be an officer *de facto*, while some other person may be the officer *de jure*, though there cannot be an officer *de jure* and an officer *de facto* both in possession at the same time. *Carli v. Rhener*, 27 Minn. 298; *Steinback v. State*, 38 Ind. 439; *Cronin v. Gundy*, 16 Hun. 524. See *Brown v. Lunt*, 37 Me. 423; *State v. Brown*, 12 Minn. 538; *Wilcox v. Smith*, 5 Wend. 281; *People v. Peabody*, 6 Abb. Pr. 223; *People v. Cook*, 8 N. Y. 67; *Plymouth v. Painter*, 17 Conn. 585; *Re Boyle*, 9 Wis. 264; *Morgan v. Quackenbush*, 22 Barb. 72.

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. *Rex v. Bedford Level*, 6 East, 355.

He is one who exercises the duties of an officer under color of an appointment or election to that office. *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

At the time relator Worrell was appointed, commissioned and qualified as chief of the Indiana bureau of statistics, said office was held and occupied, and the duties thereof were being performed, by one William A. Peelle, Jr., a person who was eligible to fill the office, who held said office under and by virtue of an election thereto by the fifty-third, fifty-fourth and fifty-sixth General Assembly of the State of Indiana, and was commissioned under said first two elections by Governors Porter and Gray, which commissions set out the elections and certified thereto; that Governor Hovey refused to issue to said Peelle a commission under the election of said Peelle to said office, by the fifty-sixth General Assembly; that Peelle claimed and had no other title to said office except as herein above found, said office being vacant except as so occupied and claimed by Peelle and Worrell.

The findings further show that Worrell demanded of Peelle possession of the office immediately after his appointment and qualification, and Peelle refused to surrender it, and that Worrell immediately commenced quo warranto proceedings against Peelle for the possession of the office, which were twice appealed to the supreme court and reversed, and were not disposed of until after the state election in 1890, at which election Peelle was duly elected to said office, and was commissioned by the governor and qualified as such officer; and on Peelle's motion, supported by proof of his election, the quo warranto proceedings were dismissed; that during all of the time Peelle continued to occupy the apartments as he had previous to Worrell's appointment, and retained the archives of the office, collected information and made records the same as he had done prior to Worrell's appointment; that the salary of the chief of the bureau of statistics is \$1,800 a year, and there is money in the treasury

of the State of Indiana subject to be paid out on warrants of the Auditor of State, for the payment of the salary of said chief; that relator has, prior to the commencement of this suit, demanded of the appellee that he draw a warrant in relator's favor for his salary, and since November 4, 1890, he has made demand upon the appellee that he draw such warrant for the sum of \$2,550, said sum to be paid to him as salary from May 31, 1889, to November 1, 1890, and presented itemized and qualified bills therefor as required by law, and appellee has refused to draw such warrant; that on October 31, 1889, appellee drew his warrant on the treasurer of state in favor of William A. Peelle, Jr., demand having been made by said Peelle for the sum of \$750 as salary, or by way of compensation as chief of the Indiana bureau of statistics from May 31, 1889, to November 1, 1889; otherwise said appellee has not drawn his warrant on the treasurer of state in favor of any person for the salary of said office.

There is a further finding in regard to the provisions of the laws appropriating the amount for the salary of such office, and a provision that it should be paid to Peelle as such chief. On the foregoing facts, the court stated as a conclusion of law that relator was not entitled to a writ of mandate as prayed in his petition.

The Act of the Legislature approved March 29, 1879, creating a state bureau of statistics, made it the duty of the bureau to collect, systematize, tabulate and present in biennial reports statistical information and details relating to agricultural, manufacturing, mining, commerce, education, labor, social and sanitary condition, vital statistics, marriages and deaths; and the permanent property of the productive industry of the people of the State. The first section of this Act provides that the department is established for the collection and dissemination

An officer *de facto* is not entitled to the salary attached to the office. *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

One claiming a salary must prove his legal title to the office; and an officer *de facto*, and not *de jure*, cannot maintain an action for salary. *Romero v. United States*, 5 L. R. A. 60, 24 Ct. Cl. 331.

Payment of salary to a *de facto* officer without authority is no defense against a claim, for payment by the officer *de jure*. *Williams v. Clayton* (Utah) March 8, 1889. See *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

If a *de facto* officer has abandoned the office, the rightful incumbent may sue for salary. *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 538.

The rule against collaterally impeaching the title of an officer *de facto* does not apply when the officer himself seeks to recover compensation. *Phelon v. Granville*, 1 New Eng. Rep. 678, 140 Mass. 386, citing *Fowler v. Bebee*, 9 Mass. 231; *Buckman v. Ruggles*, 15 Mass. 180. See notes to *State v. Peelle* (Ind.) 8 L. R. A. 228; *State v. Lewis* (N. C.) 11 L. R. A. 105.

Officer de jure entitled to the salary.

Where an officer is in possession of an office *de facto*, the officer *de jure* is the one who has the lawful right to the office; and who has either been ousted or has never taken possession. *Hamlin v. Kassafer*, 15 Or. 456.

The city cannot deduct money earned by a marshal L. R. A.

during the time he was prevented from performing his duties. *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

The city marshal *de jure* of Portland, Maine, being willing to perform his duties, but prevented by the city authorities, is entitled to the salary while the office is filled by an officer *de facto*. *Ibid*. See *Dolan v. New York*, 68 N. Y. 274; *McVeany v. New York*, 80 N. Y. 185; *Fitzsimmons v. Brooklyn*, 3 Cent. Rep. 660, 102 N. Y. 585.

A *de jure* officer can recover from an intruder damages, generally measured by the salary received by the intruder. *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 538; *People v. Nolan*, 2 Cent. Rep. 459, 101 N. Y. 539, citing *Dolan v. New York*, 68 N. Y. 274; *Lawlor v. Alton*, 8 Ir. C. L. Rep. 160; *Glascocock v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 483; *People v. Smyth*, 28 Cal. 21; *Sigur v. Crenshaw*, 10 La. Ann. 297; *United States v. Addison*, 78 U. S. 6 Wall. 291, 18 L. ed. 919.

When appropriation of state fund unnecessary.

If the salary of a public officer is fixed and the times of payment prescribed by law, no specific annual appropriation is necessary. *Reynolds v. Taylor*, 43 Ala. 420; *Nichols v. Comptroller*, 4 Stew. & P. 157; *Thomas v. Owens*, 4 Md. 189; *Green v. Purnell*, 12 Md. 383; *State v. Hickman* (Mont.) Feb. 15, 1890; *State v. Weston*, 4 Neb. 216.

of information hereafter provided, by biennial printed reports to the governor and Legislature of the State, and it provides for the appointment of the chief by the governor. Acts 1879, p. 198.

Some amendments have been made to this Act by an Act passed in 1888. Elliott's Supp. § 1852. An attempt was made to change the method of selecting the chief and provide for his election by the General Assembly; and by an Act in 1889 (Elliott's Supplement, §§ 1854 to 1862, inclusive), some additional duties were added, and it was made the duty of the chief to transmit one copy of the biennial report to each county and state officer. The duty of the bureau is to gather such information as is required by the law, systematize it and publish it in proper printed reports, and to disseminate such information by printed reports of all such information collected and distribute them to the Governor of the State, the General Assembly and to each state and county officer of the State. There is no law providing that any public records shall be kept of such information save the printed reports. The benefit to be derived on account of such a bureau is through the publication and distribution of the biennial reports. It is provided that head-quarters for the bureau shall be furnished by the State.

The findings of fact show that the relator Worrell had been assigned and provided office rooms by the Auditor of State in the state house. There was nothing to prevent him from discharging the duties of the office, collecting and systematizing the information contemplated by the law and publishing the same in printed reports, and distributing them with the same efficiency and to the same extent as if Peelle had surrendered the apartments occupied by him previous to that time, and the findings of fact show that Worrell did discharge the duties of the office in compliance with the law. It is true, there is a finding that Peelle was in possession of the archives and records of the office. What the archives and records were that he was in possession of the findings do not show. The law makes no provision whereby such officer is required to keep any public records or anything else to be kept in connection with, and belonging to the office, there to remain as the property of the State, which the outgoing officer would be required to turn over to his successor. The findings of fact show that Worrell was eligible to the office; that he was duly appointed, commissioned and qualified as such officer; that the appellee, the Auditor of the State, had notice at the time of his appointment and qualification; that he made application to the Auditor of State for apartments and the Auditor of State assigned him apartments for head-quarters of the bureau; and that he occupied them and discharged the duties of the office. It is further found that Peelle retained the apartments formerly occupied by him, and continued to act, or assumed to act, as chief, and collect information the same as he had done before; but the findings show that he had no title to such office except through a pretended election by 18 L. R. A.

the General Assembly. In the adjudication in the quo warranto proceedings, the main question in this case was settled by the decisions of this court on appeal. *State v. Peelle*, 121 Ind. 495, and *State v. Peelle*, 124 Ind. 515, 8 L. R. A. 228.

By these decisions between these same parties, the law was settled that the statute authorizing the election of a chief of the bureau of statistics by the General Assembly was unconstitutional and void, and that the election and commission of Peelle gave to him no title to the office, and that the governor was authorized to appoint to fill the vacancy until the office was filled by an election. Under these decisions, the facts found in this case show that Worrell was, during the time from his appointment and qualification up to the date of the election and qualification of Peelle as his successor, the *de jure* officer; not only the *de jure* officer, but in possession of and discharging the duties of the office. When he was appointed by the governor and qualified, he became the *de jure* officer; and when he was assigned quarters by the Auditor of State in the state capitol to occupy as head quarters for the bureau and discharge the duties of the office, he was equipped in full to discharge all the duties incident to the office, and he did discharge the duties from thenceforward until his successor was elected and qualified. Being a *de jure* officer and in possession of and discharging the duties of the office, under all authorities, he is entitled to the salary. Indeed, the later and better reasoned cases hold that the salary is an incident to the office, and belongs by law to the person holding the legal title to the office, and that he can sue and recover it regardless of the fact, whether he is occupying and discharging the duties of the office or not, if he is willing to do so; but is kept out by another, who is claiming to act as an officer *de facto*. This would seem to be the true theory; though it is not necessary to go to that extent in this case, as, under the facts found, Worrell was not only the *de jure* officer, but was in fact in possession and discharging the duties of the office during the time for which he claims salary. It is true, the State and the public are interested in having a public office filled; and when one holds an office though without title, and acts as an officer *de facto*, and keeps out the *de jure* officer, and while so in possession discharges the duties of the office, the public good demands that the acts of such *de facto* officer, in so far as they affect third parties or the public, be declared valid; but there is no valid reason for declaring that, as between the *de jure* and *de facto* officer, the *de facto* officer is entitled to the salary; or that he, by excluding the *de jure* officer, can prevent him from recovering the salary; or for holding that when one charged with the duty of paying the salary when, with knowledge of all the facts, he pays to the *de facto* officer, he shall be released from paying to the *de jure* officer, the disbursing officer cannot be sued or compelled to pay a *de facto* officer. When the *de facto* officer sues for his salary he brings in question the title to the office,

and he cannot recover without establishing his legal right and title to the office. To hold that a payment by a distributing officer to a *de facto* officer exonerates him from liability to the *de jure* officer for the salary, but stimulates irresponsible persons to cling to an office without even a shadow of title, and exclude the lawful occupant with a view of recovering the salary of the lawful occupant to the office; but under the facts in this case, we are not required to go to the extent of holding that the *de jure* officer out of possession can recover his salary notwithstanding another is occupying and discharging the duties of the office as an officer *de facto*; for in this case the facts found show Worrell to have been an officer *de jure* in possession of the apartments assigned to him by the proper officer, the Auditor of State, and discharging the duties of the office so that the headquarters of the bureau of statistics of the State of Indiana were, both in law and in fact, in the apartment in the capitol building set apart for occupancy by Worrell, the legally appointed, commissioned and qualified chief of the bureau of statistics; and, as it seems to us, it would be a travesty on justice to hold that Worrell, under such a state of facts, could be deprived from recovering his salary, or that the Auditor of State could refuse to draw a warrant, or the treasurer of state refuse to pay a warrant for his salary; notwithstanding Worrell is the lawful officer in possession, but on account of Peelle continuing to occupy rooms theretofore occupied by him, and to gather statistics; after it was held by the Supreme Court of Indiana that the law under which Peelle claims to have been elected is unconstitutional and void, and the commissions issued in pursuance of such elections gave him no title to the office. Indeed, the facts found show that Peelle terminated the quo warranto proceedings by abandoning any claim to the office by virtue of his pretended election by the General Assembly, and set up his title to the office by virtue of his election by the people and his commission and qualification thereunder; dismissing the case upon the grounds that, after his election and qualification he was the legal chief of statistics, and no judgment of ouster could be rendered against him.

The appellee had full knowledge of Worrell's appointment and qualification; he assigned him apartments to occupy as such officer; he knew that he was in possession of the office, as he had assigned him the apartments in the state capitol which he occupied.

Worrell is entitled to recover the full amount of his salary, and to have a warrant drawn on the treasury by the Auditor of State for the amount, unless the provision of the law naming Peelle as the chief to whom the salary is to be paid prohibits the payment to the legal officer; and this we will now consider.

As we have seen, Peelle was not the legal officer, and Worrell was the legal officer in possession of the office, discharging the duties of the office. The proposition contended for is that, notwithstanding Worrell was the legally appointed and qualified officer discharging the duties of the office, for which

a salary is fixed, and to which the legally qualified officer is entitled as an incident to the office, that the Legislature can make an appropriation to pay the salary which Worrell has earned, and to which he is entitled, and without any legal authority to do so, name Peelle as such officer, chief of the bureau of statistics, and appropriate an amount to pay the salary of the chief and provide it should be paid to Peelle and none other; and such a clause in a law would be valid, providing for the payment to Peelle the salary earned by and due to Worrell. The statement of the proposition carries with it the fallacy of it. That such a provision is invalid seems too clear to admit of discussion. It is directly appropriating a salary due to one and which is the property of one for the benefit of another.

By an Act of the General Assembly approved March 11, 1889, there is appropriated "for all of the expenses of the bureau of statistics authorized by law, including the salary of the chief of said bureau, of all assistants, all traveling and office expenses, including all blanks, stationery and postage to be paid out on the itemized and qualified bills of the chief of the bureau of statistics \$11,000; for the year ending October 31, 1889, the sum of \$4,000." Stopping with this provision of the law, no complications could arise. It expressly provides that the several sums shall be paid out "on the itemized and qualified bills of the chief;" but there follows, in a separate clause of the Act, a provision in the law providing that "the several sums so appropriated by this Act for said bureau of statistics shall be paid to William A. Peelle, Jr., chief of said bureau, elected by this General Assembly, or to his successor in office appointed pursuant to an Act of the General Assembly in case of the death, removal from the State or resignation of said William A. Peelle, Jr., and to no other person or persons."

It is evident that this provision was inserted in the law, not with a view of paying the salary to Peelle regardless of the fact as to whether he was the legal chief of the bureau or not, for the appropriation is made with a provision that it shall be paid out on the itemized account of the chief. The clause relating to Peelle evidently was inserted upon the theory that he was the legal officer. Certainly, no legislative body would so far forget their duties and obligations to the State as to endeavor to elect an officer without authority of law, and endeavor to forestall any effort on behalf of the legally elected officer to recover the office or discharge its duties by placing the appropriation in such condition as that the salary belonging to the legal officer, and incidental expenses of the office could not be recovered by the legally elected or appointed and qualified officer. To hold that the General Assembly intended to provide that the person chosen by the General Assembly shall have the office, right or wrong, and shall receive the salary, or, at least, that no other person, though legally entitled thereto, shall receive the salary or draw the sum so appropriated for running such office and department of

the government would be attributing improper motives to its members. Courts should not impugn the motives of legislators, and it would be impugning their motives to hold that they intended by the provisions of this law to declare the person the General Assembly elected to this office should have the salary and draw the amount appropriated, though the election is illegal and he may have no right to the salary or the money, notwithstanding another has been lawfully elected or appointed and qualified and become the lawful chief of said bureau. Certainly such was not the intention of the Legislature, and the act would be absolutely void if it was. The legislative department has the right, and it is its duty, to make appropriations for the payment of salaries and the expense of running the various departments of the state government. Whether salaries might not in some instances be recovered without an appropriation it is not necessary to decide; but it is certain that there is no authority to go through the formality of electing an officer to an office then in existence, though the election be void, and appropriating funds to pay the salary of the legal officer, and providing that such sum shall be paid to the officer having no title to the office. To enunciate such a doctrine would be to hold that the Legislature might convene and choose persons to fill all of the state offices, and appropriate money to pay the salary of the legal officer, and then declare that in such instance it shall be paid to the person so chosen by the Legislature to fill such office, and to none other.

The Constitution provides that no person charged with official duties under one department of State shall exercise any of the functions of another. Art. 3, § 1.

The part of the law making an appropriation to pay the salary of the chief and to pay the expenses of the bureau is the exercise of a legislative function; but that portion which declares that the said sum shall be paid to Peelle is an attempt to exercise judicial powers by declaring who is the legal chief of the bureau of statistics and entitled to the salary, and such provision is absolutely void. There is a like provision in the law relating to other officers in charge of state institutions. Sec. 4 of the Act—Elliott's Supp. § 2239—provides that "if the Auditor of State shall draw his warrant for any of the sums herein named when the person to whom the same are payable are designated or named herein; or if the treasurer of state shall pay any of said sums, or any part thereof except to such persons herein named, he shall be guilty of a felony," etc.

What we have said in regard to the provision of the law relating to the naming of Peelle as the person to whom the amount shall be paid is equally applicable to this. It is, in effect, in the first instance, an attempted adjudication as to who the legal officers are, and then an effort to enforce the judgment by providing a penalty for disobeying it. The legal officers are entitled to their salaries and money appropriated for conducting a department of state or a public institution should be drawn by the officer

legally entitled to receive it; and not by any certain person regardless of whether he has been legally elected or is in possession of the office or not; and it is not within the province of the Legislature to declare in an appropriation bill who are or who are not the legally elected officers of any department. They probably may provide against the paying out of the money to any person other than the legally qualified and acting officer or officers, and subject the officer to a penalty for paying the same to any other than such officer or officers; but it cannot adjudicate as to who are the legal officers, and provide that payment shall be made to them and none other.

The conclusion we have reached is well supported by the most recent and well-reasoned cases; although there is still some irreconcilable conflict in the authorities, particularly in the earlier cases.

In *Andrus v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, it was held that a *de jure* officer might recover his full salary from the city notwithstanding another had been in possession of the office and kept the *de jure* officer out, and the salary had been paid to the person acting as an officer *de facto*; the city having notice that the officer *de jure* claimed he was illegally deprived of the office, that the city was not entitled to credit for what the *de facto* officer earned by his personal services. In that case the court says: "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performed under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office and he cannot recover by showing merely that he was an officer *de facto*." In *Nichols v. MacLean*, 101 N. Y. 526, 2 Cent. Rep. 500, 54 Am. Rep. 730, the court says: "It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*." In *Harris v. Jays*, Cro. Eliz. 699, the doctrine is tersely stated as follows: "The act of an officer *de facto* when it is for his own benefit is void, because he shall not take advantage of his own want of title which he must be cognizant of; but when it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good."

In a note by the Hon. A. C. Freeman to this case, in the American State Reports, in speaking of the cases holding that the payment to the *de facto* officer is a good defense to an action by the *de jure* officer, he says: "These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that this right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession; nor to question the title in any other way than by a proceeding in quo

warranto. It is believed that none of these grounds are well taken; and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that although he may faithfully discharge its duties, he cannot maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*.

In the next place, if he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure* in any appropriate form of action.

If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county notwithstanding such payment.

If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof." Mr. Freeman concludes by saying: "Hence the principal case and cases in California and Tennessee maintain the doctrine against the weight of authority, but in harmony, we think, with judicial principle, that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county or other public body charged with the duty of making its payment."

Numerous authorities are cited in support of the doctrine as stated by Mr. Freeman, and we think it lays down the proper rule. See also *People v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193; *People v. Oulton*, 28 Cal. 44; *Memphis v. Woodward*, 12 Heisk. 499; *Matthews v. Copiah County* *Supra*. 58 Miss. 715; *McCue v. Wapello County*, 56 Iowa, 698; *Glascok v. Lyons*, 20 Ind. 1; *Douglass v. State*, 81 Ind. 429.

Judge Cooley, in a very able dissenting opinion in the case of *Auditors of Wayne County v. Benoit*, 20 Mich. 176, holds that the payment of salary to a *de facto* officer is not a defense to an action by the *de jure* officer, and this is in harmony with all general principles of the law. The *de jure* officer is entitled to the possession and emoluments of the office, and he is unlawfully kept out of it by an intruder. It is inconsistent with all principles of justice and equity that such intruder and unlawful occupant shall have the emoluments for the length of time he can continue in possession, or that the person from whom the salary is due, when he has knowledge of the facts, can set up as a defense the fact that a *de facto* officer is in possession of the office and depriving the *de jure* officer of the possession of the office; though, as we have heretofore stated, it is unnecessary to go to this extent in this case; as Worrell, in addition to being a *de jure* officer, was occupying apartments set apart to him by the State, and was dis-

charging the duties of the office as well and as fully as he could in any other place, so that he was both a *de jure* and *de facto* officer. As regards this case, there was an appropriation made to pay the salary of the chief of the bureau of statistics; that money is in the treasury. The only method by which Worrell, who is such *de jure* officer, can recover his salary is by a proceeding in mandate compelling the Auditor of State to draw a warrant on the treasurer for the amount. The Auditor refused to draw his warrant and Worrell instituted this suit. The facts found show the money in the treasury; that Worrell is the *de jure* officer; that immediately upon his qualification he was assigned quarters by the Auditor of State; that he has discharged the duties of the office. The only possible or pretended defense urged is that Peelle, who had been acting as a *de facto* chief prior to Worrell's appointment, continued to occupy the apartments which he had theretofore occupied, and to gather statistics and do as he had before done, not having any title to the office, and that the appellee had, with full knowledge of all the facts, paid to Peelle \$750 of salary. These facts constitute no defense to Worrell's action for mandamus to compel the payment of his salary. Worrell was entitled to his mandate, and the circuit court erred in its conclusions of law.

Judgment reversed, with instructions to the court below to restate its conclusions of law stating that Worrell is entitled to a mandate as prayed for for the full amount of salary due him, \$2,550; and to render judgment accordingly.

Elliott, J.:

I concur in the conclusion reached in the opinion of the court solely upon the ground that the controversy as to the particular office in dispute is settled by the prevailing opinion delivered in the cases between the claimants to the office on former appeals. Accepting those decisions as the law of the particular controversy, as the court is bound to do, it must follow that Worrell is the rightful officer; and that, as the rightful officer, he is entitled to the compensation attached to the office. The case, in the form it has assumed, is unique; and cannot, as I suppose, be deemed a precedent justifying the inference that a state disbursing or distributing officer must, at his peril, decide a controversy between rival claimants to a public office. This I say because the doctrine of the prevailing opinions on former appeals is that Peelle did not have and could not have, any title to the office; and upon these decisions the Auditor of State could have acted without incurring any risk; inasmuch as the entire controversy as to the right to the office concerned matters of law, and not of fact. In saying this I do not mean to be understood as receding from the opinions heretofore expressed upon the principal question; for I here simply yield to the doctrine declared by the court in its former decisions.

TENNESSEE SUPREME COURT.

Julius COOK. *Plff. in Err.*,v.
STATE of Tennessee.

(....Tenn.....)

1. An Act requiring a voter to place a mark opposite the name of each candidate voted for by him does not conflict with Tenn. Const., art. 4, § 1, as imposing the requirement of education on the part of the voter in addition to the constitutional requirements.
2. Act March 11, 1890, to provide for purity of elections, is not in conflict with Tenn. Const., art. 11, § 8, as class legislation, because it applies only to counties of 70,000 and cities of 9,000 population.
3. An Act to provide for the purity of elections, which does not prevent an elector from casting his vote fairly, does not interfere with the privileges and immunities of the citizens so as to conflict with U. S. Const., Amend. 14.
4. The commissioners and registrars of election which Tenn. Act March 11, 1890, provides shall be appointed by the governor and the commissioners respectively, are not county officers within Tenn. Const., art. 11, § 17, providing that no county office shall be filled otherwise than by the people or the county court.

(June 6, 1891.)

ERROR to the Criminal Court for Shelby County to review a judgment convicting defendant of violating the provisions of a statute designed to secure the purity of elections. *Affirmed.*

The Act in question passed March 11, 1890, chap. 24, provided a system of election whereby the names of all candidates should be printed on one ticket and the voter should make a cross-mark opposite the name of the candidate voted for, while in a compartment closed from the view of other voters. In providing for the registration of voters the Statute provides that three commissioners of registration shall be appointed by the governor for each county, and that registrars of election shall be appointed by such commissioners.

Further facts appear in the opinion.

Messrs. L. B. Eaton and Charles Eaton for plaintiff in error.

Mr. George W. Pickle, Atty-Gen., for the State.

Turney, Ch. J., delivered the opinion of the court:

Plaintiff in error was indicted for removing ballots, aiding electors in making their ballots, instructing them how to vote, etc., was convicted, and has appealed. His defense is the unconstitutionality of the Act of the Legislature passed March 11, 1890, chap. 24, entitled "An Act to Provide more Stringent Regulations for Securing the Purity of Elections in this State, and Applicable to Counties Having a Population of over Seventy Thousand," and cities of over nine thousand, inhabitants, computed by the census of 1880, or which may hereafter have such numbers by any subsequent federal census, 18 L. R. A.

etc. The attack is mainly on the grounds that the Act violates art. 4, § 1, and art. 11, § 17, of the Constitution: it being argued that under the first ordinance there can be no restriction or qualification of the right to vote, except the condition of the payment of a poll-tax, and that the law in question requires an educational qualification, in that it imposes upon the elector the duty of being able to select for himself the name or names of the candidates for whom he desires to vote. If these requirements violate the letter or spirit of art. 4, § 1, the law is a nullity. To determine this the section must be construed as a whole. The provisions that every male citizen of the age of twenty-one, etc., shall be entitled to vote; that there shall be no qualification attached to the right of suffrage, except that each voter shall have paid his poll-tax; that the General Assembly may enact laws to secure the freedom of elections and the purity of the ballot-box,—must consist together.

The proposition that the Statute before us adds to these qualifications that of education is comprehensive, and involves more or less refinement of the term "educational." "Education" is a broad term, and includes all knowledge, if we take it in its full, and not in its legal or popular, sense. Whatever we learn by observation, by conversation, or by other means, away from what has been implanted by nature, is education. In fact, everything not known intuitively and instinctively is education, but not in the sense we must understand the objection to this Act. The convention of 1870, in a spirit of conservatism appropriate to the times, prepared and presented the Constitution, which was adopted by the people. That Constitution gives, as we have seen, the elective franchise, with the qualifications named. It is certain that, at that time, there was much misgiving and apprehension as to the future of the State, and all felt the necessity of such constitutional provisions as would, if rightly construed, preserve in its integrity a republican form of government for the State. It is evident the framers of the Constitution did not intend, by its conference of the right to vote, to ignore an educational qualification in all respects. It fixes the age at twenty-one, with a citizenship of the United States, and twelve months' residence in the State, and six months' in the county. The age was fixed as one of maturity, at which period the law presumed the proposed voter to have sufficiently ripened in mental power to determine for himself the soundness or unsoundness of the measure upon which he is called to vote. Citizenship of the United States is a prerequisite, as fixing such interest in the welfare of the federal government as supposes a study of and acquaintance with its governmental policy, and so is a residence in the State and county, as well as to become acquainted with the character and capacity of the men who might ask office. These restrictions are terms of educational probation. A foreigner, if in the United

States, and in any State and county, for any number of years, however long, before becoming naturalized, must still reside in the county six months after naturalization before he is entitled to vote. *State v. Clokey*, 5 Sneed, 486. A native citizen or resident of any county cannot remove to another, however short the distance of removal, and be entitled to vote in the latter, until he shall have been a resident citizen thereof for the period of six months. All this is to acquaint and identify him with the wants and interests of the people with whom he proposes to live.

It is, from these clearly-defined constitutional requirements, manifest that the framers of the Constitution did not contemplate an indiscriminate and ignorant exercise of the elective franchise, but guarded against it as far as they could then see it. Having done this, they naturally concluded the future might develop mischiefs that would not fall within the defined guards, and, to make sure of protection in such emergencies, they granted to the General Assembly the power to enact laws to secure the freedom of elections and the purity of the ballot box. The purpose of the law before us is to require the voter to cast his own ballot; to do away, as far as possible, with the illegal practice of voting oftener than once, existing in some quarters of the State; and to defeat bribery, duress and corruption at the polls. The law is plain and simple in its provisions. Every voter, however illiterate, can always find a friend to himself, or some one candidate, who will read and explain the law and the manner of its observance. Ballots and cards of instruction are always at hand. The names of the candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and with easy readiness place his cross (X) opposite that name, and fold his ticket as required. The argument of inconvenience is as nothing compared to the rights intended to be protected by that inconvenience, and the pulling, pushing, and bribery of ignorant men before and at elections. The inconvenience to a part of the community must yield to the good of the whole. The law presumes the voter expresses the choice of his judgment by his ballot. No man, learned or unlearned, can have a choice without being first informed. If, then, information is required as to any part of the right and duty of voting, why not as to all? The Constitution surrounded the right of suffrage with some inconveniences, and authorized the Legislature to attach more. In the exercise of its power, the Legislature must be reasonable and just, not imposing impossible or oppressive conditions, else its legislation will be void.

That the law applies only to counties of 70,000 and cities of 9,000 inhabitants does not impeach its validity.* All counties and

cities that have or may hereafter have the designated population are embraced. It applies to all parts of the State, and each county and city may come within its provision. This principle has often been applied by this court, holding that similar legislation was not class. The Statute in nowise infracts the 14th Amendment to the Constitution of the United States. Article 4, § 4, of the instrument, guarantees to every State in the Union a republican form of government. No government can be republican that fails to secure the purity of elections. By these terms of the United States Constitution the Legislature of each State has the organic authority for the passage of such laws as will secure that purity, and it cannot be urged that such laws abridge the privileges or immunities of the citizens. In the matter of voting, the only privilege one has is to cast his vote fairly, and not interfere with others by fraud, force, or duress. His privileges are personal. Whatever may be necessary to carry out the sections of the two Constitutions cited is within the power of the Legislature for adoption. It may employ every legislative means, however vigorous, to accomplish the ends contemplated by the framers of the constitutions. The Legislatures are, as a rule, the judges of the measures to be adopted, and their necessity. The power to regulate and reform is theirs. They are presumed to know the condition and wants of the State.

The commissioners and registrars named in the Act are not county officers, in contemplation of art. 11, § 17, of the Constitution, which ordains: "No county office created by the Legislature shall be filled otherwise than by the people or the county court." They merely constitute the machinery by which the law is operated. They are more in the nature of judges or inspectors of elections. In speaking of the statutes requiring the county court to make appointments of judges of elections, *Judge Milligan* said: "This provision of the Statute, we apprehend, is merely directory, and whether the appointment is made by the county court, by the sheriff, or coroner, as the case may be, by and with the advice of three justices, or an equal or less number of justices or respectable freeholders, the result is the same. The object of the Statute is to secure just and competent inspectors, and when that end is attained, without prejudice to the contestant, it constitutes no ground for declaring the election void. Were the law held otherwise, and a strict conformity in all respects to its letter exacted of every officer holding popular elections, it would result in interminable contests about unsubstantial formalities, and end in the practical denial of the right of the people to choose their own officers." *McCraw v. Harralson*, 4 Coldw. 42. The officers recognized by this Act being so nearly akin to and closely associated with those of judges and inspectors of elections, the holding of *Judge Milligan* applies with full force. Such officers had three sources of appointment, and none of election, and therefore were not county officers, in the sense of the provision

*Const., art. 11, § 8, provides that the Legislature shall not pass any law granting to any individuals "rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

of the Constitution. We so hold as to the officers mentioned by this Act.

The judgment of the Criminal Court, holding the Act to be constitutional, is affirmed.

William KATZENBERGER, *Plff in Err.*,

v.

Leopold LAWO.

(.....Tenn.....)

1. A train propelled by a small engine called a "dummy," although exclusively engaged in carrying passengers, whether run within or without the limits of a municipality, is a "railroad" train within the meaning of a statute prescribing regulations to be observed by railroads for the avoidance of accidents.

2. An ordinance prohibiting railroad steam whistles to be blown in a city is a nullity so far as it conflicts with the general law of the State requiring whistles to be blown as signals to persons on the track.

(May 7, 1891.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's failure to comply with the statutory requirements as to precautions for the avoidance of accidents. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gantt & Patterson for plaintiff in error.

Messrs. R. G. Brown and Bolton Smith, for defendant in error:

The presumption is not lightly to be indulged that the Legislature has by implication repealed, as respects a particular municipality, or as respects all municipalities, laws of a general nature elsewhere in force throughout the State.

Dillon, *Mun. Corp.* § 88. See also *Seibold v. People*, 86 Ill. 38.

A municipal corporation can pass no ordi-

nance which conflicts with any general statute in force.

Dillon, *Mun. Corp.* § 329.

The grant of power to the taxing district of Shelby County to "permit and regulate the passage of cars" is in reality nothing more than authority to further regulate such matters by imposing such additional restrictions upon railroads as the greater danger of passage through a thickly populated district calls for.

Rogers v. Jones, 1 Wend. 287; *State v. Welch*, 36 Conn. 215.

It is utterly impossible to operate a dummy line without greatly obstructing and rendering more dangerous other business and travel usually seen and always allowable on a public highway.

Street R. Co. v. Doyle, 88 Tenn. 750.

Where a road is operated by steam and by the general public also, the two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.

Springfield v. Connecticut River R. Co. 4 Cush. 65.

Following out the reasoning in the *Doyle Case*, the statutory precautions required of the commercial railways for the protection of the life and property of the citizen are equally demanded of a dummy line.

Lurton, J., delivered the opinion of the court:

By a collision on one of the streets of Memphis, between a wagon driven by Lawo and a dummy train of street-cars, he sustained such bodily injuries as have resulted in judgment for \$3,000 against plaintiff in error, who, as receiver, was operating the railway at the time. The circuit judge charged the jury that the statutory precautions required to be observed by railroads, and contained in subsection 4, § 1298, Tenn. Code (Mill. & V.), applied to the movement of all railway trains upon the streets of Memphis, and that a dummy line was a "railroad" within the meaning of this provis-

NOTE.—*Statutory provisions to prevent accidents on railroads.*

In proportion to the danger must be the degree of diligence to which railroad companies are held in the protection and preservation of human life in operating their roads. *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20.

The statute makes no exception and tolerates no excuses; its language is "every railroad company." *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 266; *Columbia v. East Tennessee & V. R. Co.* 9 Heisk. 343.

It should be rigidly short of requiring absolute impossibilities. *East Tennessee, V. & G. R. Co. v. Scales*, 2 Lea, 693.

For if any obstruction appears on the road so suddenly that it is impossible to comply with all the statutory requirements after it could and ought to have been seen by the lookout, the company will not be liable. *East Tennessee, V. & G. R. Co. v. Swaney*, 5 Lea, 119, 128; *East Tennessee, V. & G. R. Co. v. Scales*, 2 Lea, 688; *Louisville & N. R. Co. v. Stone*, 7 Heisk. 471.

But if there was sufficient time after it ought to have been seen by the lookout, the company will be liable. *East Tennessee, V. & G. R. Co. v. White*, 13 L. R. A.

5 Lea, 540; *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 266; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20; *Hill v. Louisville & N. R. Co.* Id. 327.

An engineer has no right to presume that a man upon the track will step off on the approach of a train, but he should give the alarm the instant he sees him on the track. *Hill v. Louisville & N. R. Co.* 9 Heisk. 323.

Ordinance cannot conflict with state law.

A municipal ordinance which conflicts with a state law on the same subject is void. Rule applied as to various subjects. See *New York v. Nichols*, 4 Hill, 206; *Thompson v. Mt. Vernon*, 11 Ohio St. 688; *Adams v. Albany*, 29 Ga. 56; *Sill v. Corning*, 15 N. Y. 297; *Cincinnati v. Gwynne*, 10 Ohio, 190; *Wood v. Brooklyn*, 14 Barb. 425; *Markle v. Akron*, 14 Ohio, 586; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453.

Yet a corporation may, in some cases, consistently with general law, further regulate by ordinance subjects already regulated by statute. 1 Dillon, *Mun. Corp.* 376, citing *Huddleson v. Ruffin*, 6 Ohio St. 604; *Rogers v. Jones*, 1 Wend. 237; *State v. Welch*, 36 Conn. 215.

ion. Each of these propositions has been assigned as error. Counsel have urged very forcibly that when, by legislative and municipal consent, a railroad has been laid longitudinally upon the streets of a city, it is not practicable to observe the requirements of the statute in reference to stopping the train whenever any person, animal, or other obstruction appears on the road; that, under such circumstances, a railway is lawfully upon the street; and that to construe the statute as applicable when thus upon the streets, will prevent any movement of trains, inasmuch as at all times persons, animals or other obstructions will be upon the road, and within observation of the lookout upon the locomotive. The statute was enacted for the purpose of preventing accidents. It prescribes precautions which, so far as they relate to the duty of watching the track, and the duty of avoiding collision with persons or animals on the track, are identical with the common-law duty of diligence. *Tipton v. Railroad Co.* 90 Tenn. —; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 18.

If these precautions are observed the Statute relieves the company of responsibility. If it fails to observe them, the statute imposes liability. All other questions out of the way, the rule would be the same, regardless of the Statute. With respect to the burden of proof, and the effect of contributory negligence, the Statute changes the rule of common law. If there be any strength in this argument, it would practically repeal the Statute, for the same difficulty in literally observing it will be found to exist between country stations, the track in the daytime being very generally used as a walkway. Practically, it is unnecessary to stop the train when an object appears on the track, save in a very few instances. The Statute only requires it when necessary, and experience demonstrates that this necessity seldom arises. The track is generally cleared by signals, and no liability arises from failure to stop, unless such failure has resulted in an accident. What the common law would impose as ordinary care, when necessary to avoid injury to the property of another, or an accident to a person upon the track, is not so difficult of accomplishment, when embodied in legislation, as to authorize a construction suspending it when the necessity for its observance is most necessary.

When a railroad is longitudinally upon the street of a city, the danger of accidents is obviously increased. Under such circumstances, there should be a corresponding increase of diligence. The railway is upon the street of its own volition. The economical acquisition of the right of way has been regarded as of greater benefit than the dangers incident to a road so placed. But the use of the street by the railway is not exclusive. The public have equal rights. To say that, under such circumstances, the Statute should be held inoperative, would be to say that the Legislature intended that it should not apply just where the probability of accidents is greatest. It will doubtless be found necessary, where a road is upon the street of a city, to so regulate the speed that the train

can be stopped within a short distance, in case of necessity. A train pulled by a small engine called a "dummy," although exclusively engaged in carrying passengers, is a "railroad," within the meaning of the Statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railway as to the ordinary railroad of commerce.

In the case of *Street R. Co. v. Doyle*, 88 Tenn. 747, we had occasion to consider the resemblance and difference between the dummy line and the commercial railway. For the reason then stated, we think the statutory precautions against railroad accidents apply to dummy lines, whether run within or without the limits of a municipality.

The third assignment of error is for the refusal of the court to charge the jury that, under the ordinances of the City of Memphis, the blowing of a whistle by a railway engine was a misdemeanor, and that, therefore, the statutory precaution of blowing the whistle when a person or animal appeared on the road, need not be observed within the city limits. There was no error in this. By the Act creating the present government, in force in the City of Memphis, power was given the municipality "to permit and regulate the laying of railroad tracks of iron, and the passage of railroad cars through the taxing district, and to remove such railroad track if it obstructs travel, or does not conform to the laws of the taxing district; and to make all suitable and proper regulations in regard to the use of the streets for street-cars, and to regulate the running of the same, so as to prevent injury or inconvenience to the public." Acts 1879, chap. 84, p. 100. Under this authority the municipality has enacted an ordinance regulating the running of trains through the city. It seems wise and salutary in the main. Among other things prohibited is the blowing of the steam-whistle. In place of this, the bell is required to be rung, and watchmen are required to be stationed at street crossings. The ordinances of this municipality are of no authority where they conflict with the general law of the State. So far as this ordinance conflicts with Code (Mill. & V.), § 1298, prescribing precautions against accidents, this ordinance is a nullity. The authority given in the Act creating the taxing district, and which we have quoted, gives no authority to suspend, alter or change the general statutes of the State regulating the running of railroad trains. To support the contention of counsel as to this last request, we have been referred to Patterson on Railway Accident Law. This author does say, concerning statutory signals, that, "of course, the railway may excuse its non-performance of the statutory duty by showing that the duty was, on this particular occasion, omitted within the bounds of a municipality whose ordinances, lawfully enacted, forbade the giving of signals within its limits." § 163. The author cites the case of *Pennsylvania Co. v. Hensil*, 70 Ind. 569. This case seems to support the text. But, on looking to the Code of Indiana regulating the giving of signals at road crossings, it is found that the Act

provides "that nothing therein contained shall be so construed as to interfere with any ordinance or by-law that has been or may be passed by any city or town, regulating the management or running of engines or trains within such city or town." Ind.

Code 1881, § 2178. We have no such exception made in our Statute. The other request refused had been substantially given, and the fifth assignment is overruled.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

J. M. GESSNER, *Resp't.*,
v.
Aaron PALMATER, *Appt.*

(....Cal....)

1. **A vendor who, in accordance with the contract of sale, retains title to the property until the purchase-money notes are paid, has a lien on the property for a security of the debt, within the meaning of a statute forbidding an attachment where the debt is secured by mortgage or lien.**

2. **The assignee of a note given on the purchase of land by contract which leaves the title in the vendor until the note is paid is entitled to the benefit of the vendor's lien and cannot attach the land as a creditor without security.**

(*McFarland, J., dissents.*)

(May 16, 1891*)

*A decision was reached in this case and an opinion handed down on July 28, 1890, affirming the order of the superior court. A rehearing was subsequently granted and the court afterwards reached the conclusion stated in the opinion given herewith. [Rep.]

NOTE.—Vendor's Lien.

The grantor's lien exists in several of the States: *Champion v. Brown*, 6 Johns. Ch. 398, 402, 2 L. ed. 163, 164; *White v. Williams*, 1 Paige, 502, 2 L. ed. 731; *Fish v. Howland*, 1 Paige, 20, 2 L. ed. 545; *Warner v. Van Alstyne*, 3 Paige, 513, 3 L. ed. 253; *Shirley v. Congress Sugar Ref. Co.* 2 Edw. Ch. 505, 6 L. ed. 438; 3 Pom. Eq. 253.

Alabama: *Foster v. Trustees of the Athenæum*, 3 Ala. 302.

It may be enforced although the debt is barred by the Statute of Limitations. See *Finn v. Barber*, 61 Ala. 590; *Bizzell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 433; *Shorter v. Frazer*, 64 Ala. 74. But see *Linthicum v. Tapscott*, 28 Ark. 237.

California: Where in a deed conveying land there was a reservation in express terms to grantor of a lien to secure the payment of a note given for part of the purchase price, such lien is more than a vendor's lien; it is an equitable mortgage which passes with the assignment of the promissory note. *Dingley v. Bank of Ventura*, 57 Cal. 467.

Georgia: *Marine & F. Ins. Bank v. Early*, R. M. Charl. 279.

Kentucky: *Greenup v. Strong*, 1 Bibb, 590; *Voorhes v. Instone*, 3 Bibb, 353; *Outton v. Mitchell*, 4 Bibb, 236; *Bubank v. Poston*, 5 T. B. Mon. 237.

Maryland: *Ridgely v. Carey*, 4 Harr. & McH. 167; *White v. Casanave*, 1 Harr. & J. 108; *Ghiselin v. Ferguson*, 4 Harr. & J. 522.

New York: 3 Pom. Eq. 253; *Champion v. Brown*, *supra*; *Garson v. Green*, 1 Johns. Ch. 308, 1 L. ed. 151; *Fish v. Howland*, *Warner v. Van Alstyne*, and *Shirley v. Congress & S. Sugar Ref. Co.* *supra*.

It will be enforced where a note had been given for the unpaid purchase money on which a judgment at law had been first obtained by the vendor 13 L. R. A.

A PPEAL by defendant from an order of the Superior Court for Los Angeles County refusing to dissolve an attachment which was alleged to be illegal because the debt sought to be collected was secured by lien. *Reversed.*

Section 537, Code Civ. Proc., provides that in an action on a contract for the payment of money, plaintiff may have the property of defendant attached, unless the debt is secured by mortgage or lien.

The facts are stated in the opinion.

Mr. Winslow P. Hyatt for appellant.

Messrs. Del Valle & Munday for respondent.

Paterson, J., delivered the opinion of the court:

This is an appeal from an order denying a motion to dissolve an attachment. The motion was made on the ground that the note upon which the action was brought was given to Webster, plaintiff's assignor, in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff

before filing his bill. *Ford v. Smith*, 1 McArth. 596; *Ten Eick v. Stimpson*, 1 Sandf. Ch. 247, 7 L. ed. 316. Ohio: *Williams v. Roberts*, 5 Ohio, 85; *Mayham v. Coombs*, 14 Ohio, 428; *Follett v. Reese*, 20 Ohio, 546. Virginia: *Graves v. McCall*, 1 Call, 414; *Hundley v. Lyons*, 5 Muntf. 342.

North Carolina: *Henderson v. Stewart*, 4 Hawkes, 256; *Howlett v. Thompson*, 1 Ired. Eq. 399.

Effect of taking note.

Taking vendee's note does not discharge the lien. *Fish v. Howland*, 1 Paige, 30, 2 L. ed. 549.

It is not waived or destroyed by giving a receipt in full for the purchase price, or by a recital to that effect in the deed, nor by the grantee giving his own personal security—bond, note, or bill—for the price. *White v. Williams*, 1 Paige, 502, 2 L. ed. 721.

The lien is not absolutely extinguished by the assignment of the note, where the liability of the vendor continued upon the note, by reason of the indorsement, but was in a sort of abeyance, and might be revived by the vendor, after he should have paid the note on his liability as indorser. *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 240; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 154. See *Briggs v. Hill*, 6 How. (Miss.) 362; *Brush v. Kinsley*, 14 Ohio, 20; *Wellborn v. Williams*, 9 Ga. 89; *Smith v. Smith*, 9 Abb. Pr. 420.

If the vendor indorses the note and is afterwards obliged to take it up at maturity, upon failure of the vendee to pay, the lien revives and takes effect as if no assignment had been made. *Kelly v. Payne*, 18 Ala. 371; *Turner v. Horner*, 29 Ark. 440; *White v. Williams*, 1 Paige, 502, 2 L. ed. 721; *Lindsey v. Bates*, 42 Miss. 357; *Cotton v. McGehee*, 54 Miss. 510; *Rogers v. James*, 33 Ark. 77; *Scott v. Mann*, 36 Tex. 167.

by the assignment of the note, and, being thus secured, an attachment was improper. The affidavit filed in support of the motion states that the defendant purchased certain land from Webster under a contract which provided for payment of the purchase price by installments, and that at the time and place of making said contract for the sale and purchase of said lot of land, and as part of the said contract, the defendant executed and delivered to Webster the promissory note sued on, and that Webster still holds, against the defendant, the contract giving him the right to purchase. There is, perhaps, no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendors' lien, against whom and in whose favor it avails, and how it may be discharged or waived. *Hammond v. Peyton*, 34 Minn. 531. The various definitions given and principles applied to it by the courts, are hopelessly irreconcilable; and, if we take the expressions found in decisions and text-books without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a "vendors' lien." It is the creature of courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties

intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a bona fide purchaser for value. *Sparks v. Hess*, 15 Cal. 186; *Baum v. Grigsby*, 21 Cal. 172; *Lehndorf v. Cope*, 122 Ill. 333, 11 West. Rep. 618. The latter is improperly designated as a vendors' lien. Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. *Stevens v. Chadwick*, 10 Kan. 413. It has been called an "imperfect" or "equitable" mortgage, which is more appropriate term than "vendors' lien." *Moore v. Lackey*, 53 Miss. 85. In many of the best-considered cases, including *Sparks v. Hess*, *supra*, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the

When an assignment is made for the benefit of a third person there is no particular equity in his favor; but when for the security or payment of his own debt the equity continues, the assignee in such case holds the lien as well for the benefit of the assignor as for himself; he is subrogated to all his equities. *Jones, Mort.* § 216; *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Plowman v. Riddle*, 14 Ala. 169.

Vendors' lien cannot be assigned.

In the following States it can be transferred by neither assignment nor subrogation:

Arkansas: *Shall v. Biscoe*, 18 Ark. 142, 162; *Williams v. Christian*, 23 Ark. 255; *Hutton v. Moore*, 26 Ark. 382, 390; *Jones v. Doss*, 27 Ark. 518; *Carlton v. Buckner*, 28 Ark. 66; but an assignment as collateral security is permitted. *Blevins v. Rogers*, 32 Ark. 258; *Crawley v. Riggs*, 24 Ark. 563; *Carlton v. Buckner*, 28 Ark. 66.

California: *Baum v. Grigsby*, 21 Cal. 172; *Williams v. Young*, 21 Cal. 227; *Ross v. Heintzen*, 36 Cal. 313; *Lewis v. Covilland*, 21 Cal. 173.

Georgia: *Wellborn v. Williams*, 9 Ga. 86; *Webb v. Robinson*, 14 Ga. 216.

Illinois: *Small v. Stagg*, 35 Ill. 39; *Wing v. Goodman*, 75 Ill. 159; *Moshier v. Meek*, 80 Ill. 79; *Carpenter v. Mitchell*, 54 Ill. 123.

Maryland: *Dixon v. Dixon*, 1 Md. Ch. 220; *Iglehart v. Armiger*, 1 Bland, Ch. 519; *Schnebley v. Ragan*, 7 Gill & J. 120; *Wellborn v. Williams*, 9 Ga. 84.

Mississippi: *Rutland v. Brister*, 53 Miss. 683; *Pitts v. Parker*, 44 Miss. 247; *Lindsey v. Bates*, 42 Miss. 397; but if grantor is compelled to take up the note as—
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signed, the lien revives in his favor. *Stratton v. Gold*, 40 Miss. 773. See *Perkins v. Gibson*, 51 Miss. 699.

Missouri: *Pearl v. Hervey*, 70 Mo. 160; *Adams v. Cowherd*, 30 Mo. 458.

New York: *White v. Williams*, 1 Paige, 502, 2 L. ed. 721.

Ohio: *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, 14 Ohio, 437; *Jackman v. Hallock*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ohio, 383.

Contrary view.

In the following States the lien may be assigned with the debt:

Alabama: A transfer of the debt carries the lien (*Simpson v. McAllister*, 56 Ala. 223; *Wells v. Morrow*, 38 Ala. 126; *White v. Stover*, 10 Ala. 441); but if the grantor assigns the notes for the debt "without recourse," or in any other manner which cuts off all his own liability thereon, the lien is held not to pass. *Bankhead v. Owen*, 60 Ala. 457; *Barnett v. Riser*, 63 Ala. 347; *Walker v. Carroll*, 65 Ala. 61.

Indiana: *Nichols v. Glover*, 41 Ind. 24; *Johns v. Sewell*, 33 Ind. 1; *Wiseman v. Hutchinson*, 20 Ind. 40; *Kern v. Haslerigg*, 11 Ind. 443.

Kentucky: *Broadwell v. King*, 8 B. Mon. 449; *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 B. Mon. 465; *Kenny v. Collins*, 4 Litt. 289; *Eubank v. Poston*, 5 T. B. Mon. 237; *Edwards v. Bohannon*, 2 Dana, 99; *Johnston v. Gwathmey*, 4 Litt. 317.

Tennessee: *Eskridge v. McClure*, 2 Yerg. 84. See *Durant v. Davis*, 10 Heisk. 522; *Thorpe v. Dunlap*, 4 Heisk. 674.

Texas: *De Bruhl v. Maas*, 54 Tex. 464; *White v. Downs*, 40 Tex. 225; *Watt v. White*, 33 Tex. 421.

purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. *Avery v. Clark*, 87 Cal. 619 (filed February 6, 1891); *Wright v. Troutman*, 81 Ill. 374; *Adams v. Conherd*, 30 Mo. 460; *Lovely v. Peterson*, 75 Ala. 109; *Bradley v. Curtis*, 79 Ky. 327; *McClintic v. Wise*, 25 Gratt. 448; *Lagoo v. Badollet*, 1 Blackf. 419; *Dingley v. Bank of Ventura*, 57 Cal. 471. There are a few decisions to the contrary, some of which inveigh against the rule, and, emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed. 2 Jones, Liens, § 1119, note.

The provisions of our Civil Code, §§ 3046, 3047, apply to the vendor's lien proper, and not to the security held by a vendor under an unexecuted contract for the sale of land. There has been, and still exists, a great conflict of decision among the American courts, not only as to the nature of the security of the implied lien, but as to whether it could be assigned, and what act of the vendor would amount to a waiver of the lien. Perry, Tr. 4th ed. § 328, note 4. The notes of the code commissioners, and cases cited by them under the sections above referred to, show that it was intended to settle this conflict by express enactment. Ann. Civil Code, §§ 3045, 3046, notes; *Avery v. Clark*, *supra*.

We are not called upon in this case to say whether the purchaser of a negotiable note for value, without notice of the security held by a vendor of real estate under an unexecuted contract, would have the right to a writ of attachment. The affidavit, on motion to discharge the writ herein, stated that plaintiff "purchased the note sued upon in this action with full knowledge that the same was given as collateral to and identical with the debt secured by said contract and the lien on said real estate." The note having been secured originally by the vendor's lien, and plaintiff having taken it with notice of that fact, it was his duty to state in his affidavit for the writ "that such security has without any act of the plaintiff, or the person to whom the security was given, become valueless." Such is the requirement of the Statute. Section 538, Code Civil Proc. The affidavit upon which the attachment was issued states that the payment of the sum claimed "has not been secured by any mortgage or lien upon real or personal property." The affidavit filed by defendant in support of his motion to discharge the writ states facts showing that the note was originally secured. No counter-affidavit was filed by plaintiff. The attachment was improperly issued, and therefore the motion should have been granted.

The order is reversed, with directions to discharge the attachment.

We concur: **Beatty, Ch. J.; De Haven, J.; Garoutte, J.; Harrison, J.**

McFarland, J.:

I dissent, and adhere to the views expressed in the former opinion. 24 Pac. Rep. 608. I cannot subscribe to the doctrine that the owner in fee of land, who simply agrees to convey it upon the payment to him of certain money evidenced by a promissory note, is in the same position as one who conveys the land and takes back a mortgage; or that if, in the former case, he merely assigns the promissory note, the assignee of the note has a lien on the land. If the latter can enforce such a lien, he must be able to release it. But how could he release it? It could be released only by conveying the land to the vendee, but how could he convey that which he hath not? If, after the assignment of the note, the vendor should convey the land to the vendee, what then would be the condition of the supposed lien of the assignee of the note? The whole doctrine must rest on the untenable proposition that the assignment of a negotiable promissory note is a conveyance in fee of land.

I know that some of the recent text-writers speak of such a case as bearing "a strong similitude to that of mortgagee and mortgagor," and say that, although it "is often spoken of in the cases as a vendors' lien," yet, in their opinion, such language is "a misuse of terms;" and that, although "it has been said, in English and American decisions, that the vendors' lien may arise before conveyance as well as after," yet that this saying "confounds legal notions which are essentially different." But, in my opinion, those "English and American decisions" correctly state the law, and tend to prevent confusion. In this *State Sparks v. Hess*, 15 Cal. 194, is the leading case on the subject. In that case the court says: "This is not a suit to enforce a vendors' lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted;" and that, while the position of the vendor is "in some respects" like that of a mortgagee, it is in other respects different. "The vendor is at liberty to ask either a decree directing performance, and in case of refusal a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract." Throughout the whole case the right of the plaintiff is treated as and called a "vendors' lien;" and there is no doctrine better established than that a vendors' lien is not assignable. In the case at bar there was no conveyance of the legal title from the owner of the land (Webster) to the assignee of the note; and, in my opinion, the mere assignment of the note carried no title to the land, and no vendors' lien, nor any lien at all. But, in my opinion, a vendor's right is too shadowy to be a lien, within the meaning of the Attachment Law.

OHIO SUPREME COURT.

PENNSYLVANIA CO., *Pf. in Err.*,
v.

Jacob LANGENDORF.

(48 Ohio St.)

- *1. It is not negligence per se for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court.
2. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment.
3. In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance.

(May 5, 1891.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Statement by **Bradbury, J.:**

The defendant in error recovered a judgment against the plaintiff in error in the Court of Common Pleas of Lucas County for damages resulting from an injury received by him while rescuing a child of tender years, who had fallen in front of an advancing freight train of the plaintiff in error. This judgment was affirmed by the circuit court, and thereupon these proceedings were brought to obtain a reversal of the judgments of both courts.

*Head notes by the COURT.

NOTE.—*Negligence; assuming risk, to save human life; not contributory negligence.*

A person who steps upon a railroad track in a humane effort to save others from danger from an approaching train cannot be held a trespasser. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22.

Where there is a sudden emergency, allowing but little time for deliberation, and the life of a fellow creature is in danger, it does not follow, as a matter of law, that in encountering danger to rescue life a person is necessarily guilty of want of reasonable care. *Buel v. New York Cent. R. Co.* 31 N. Y. 314, 13 L. R. A.

Any further statement of facts necessary to understand the questions decided will be found in the opinion.

Mr. E. W. Tolerton, for plaintiff in error: No one can recover for an injury or loss which he himself has contributed to occasion.

Hott v. Wilkes, 3 Barn. & Ald. 811; *Corwin v. New York & E. R. Co.* 18 N. Y. 42; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

It was the duty of the court to say to the jury that, as a matter of law, it was a rash act for the plaintiff to throw himself upon the track, knowing that a train was coming, with his back towards the train, and without any attempt to look or observe it. The law will impute negligence to the act "if made under such circumstances as to constitute rashness in the judgment of prudent persons."

Eckert v. Long Island R. Co. 43 N. Y. 502.

If plaintiff could have, by the use of ordinary care, prevented the child from going upon the track in the first place, or might have, by the use of ordinary care, followed the child across the track, and prevented it from returning to a place of danger, then it was his duty to do so, and his neglect to do so, and his omission to act until the child was in extreme peril, was an act of negligence which bars his right to recover.

Evansville & C. R. Co. v. Hiatt, *supra*.

Messrs. Bissell & Gorrill for defendant in error.

Bradbury, J., delivered the opinion of the court:

The defendant in error, in June, 1886, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and

A person with a view to his own self-preservation may take a risk upon himself, short of mere rashness and recklessness, even if it was not the wisest and most prudent course under the circumstances. *Mayo v. Boston & M. R. Co.* 104 Mass. 187.

What is ordinary or reasonable care is usually to be determined by the judgment and experience of the jury, and not of the judge. *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208. See *Lane v. Atlantic Works*, 107 Mass. 104; *Rexter v. Starin*, 73 N. Y. 601.

Mere error of judgment in case of danger is not contributory negligence. See *note to Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 196.

approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised, and the watchman absent, was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the Railroad Company was established. It is contended, however, that the negligence of the Railroad Company should have related to the party injured, and that the jury, in passing upon the case of the defendant in error, should not have taken into consideration the rights of the rescued child, but should have confined itself to considering the relations existing between him and the Railroad Company; and in this connection the plaintiff in error requested the court of common pleas to charge the jury as follows: "The plaintiff's right to recover depends entirely upon the fact that the defendant was guilty of negligence in its relations to this plaintiff. The jury, in deliberating upon your verdict, must not consider the rights of the child. This action has nothing to do with her rights. The sole questions here are, Was the defendant guilty of negligence which caused the plaintiff's injuries? and Was the plaintiff himself guilty of contributory negligence?" This request was properly refused. Negligence does not usually relate to anyone in particular, and does not in any case so relate unless there is some special duty owing to the individual affected by the negligent act or omission. In the case under review the Railroad Company owed no special duty to either the rescuer or the rescued that it would not have owed to any individuals similarly situated. The obligation was to the public generally; and any person who, without fault on his part, received an injury in consequence of its failure to discharge this obligation, may recover from it compensation therefor. No other relation is necessary, where the obligation is to the public, than that the one by its negligence has caused injury to the other without the latter's fault. It is also objectionable in

another particular,—that of requiring the jury to ignore the rights of the child. It is true that the child in its relations to the Railroad Company might have a right of action for injuries received by it, and yet no right accrue to the defendant in error for those received by him in the same accident. The circumstance that the child had a right of action could not be conclusive that the defendant in error had one also, though the same blow of the locomotive injured both, for the negligence of the latter might contribute to the result in a manner to defeat his recovery, while no negligence could be imputed to the child. If it was the object of this request to impress upon the minds of the jury the proposition above stated, that the rights of action of the child and its rescuer against the Railroad Company were distinct, the language selected was not well chosen. The phrase: "The jury, in deliberating on your verdict, must not consider the rights of the child. This action has nothing to do with her rights"—was well adapted to mislead the jury into the belief that the imminent danger of the child, and its right to be rescued therefrom, were to be excluded from their consideration. This view would have defeated the recovery, for the very ground upon which the defendant in error founded his claim was that the imminent peril of the child warranted the risk he assumed in undertaking its rescue.

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the Railroad Company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the Railroad Company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. . . . If you find that the peril to which the child was exposed was caused by such negligence of the Company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to

constitute rashness in the judgment of prudent persons. . . . If he believed, and had good reason to believe, that he could save the life of the child, without serious injury to himself, the law will not impute to him blame for making the effort." Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the stand-point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some States, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the Railroad Company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be

done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority.

In *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In *Eckert v. Long Island R. Co.*, 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. *Linnehan v. Sampson*, 126 Mass. 506; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560; *Beach, Contrib. Neg.* p. 45, § 15; *Wharton, Neg.* § 814; *Pierce, Railroads*, 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. *Carroll v. Minnesota Valley R. Co.* 14 Minn. 57; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634. We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William H. HILL
v.
C. F. JEWETT PUBLISHING CO.

Llewellyn POWERS
v.

SAME.

(....Mass....)

1. **The forgery of the necessary signature of the treasurer to certificates of stock** by the president of a corporation whose only authority as to the issue of certificates is to sign them does not make the corporation liable therefor to holders who took them in private and personal transactions with the president.
2. **A corporation is not negligent in permitting its president to continue in office** and have access to its certificate book and seal so as to make it liable for his act in issuing forged certificates of stock by reason of his former misconduct in pledging his own shares to another person in violation of an agreement to pledge them to his associates in the corporation.

(June 26, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County (Morton, J.) for the opinion of the full court of two actions brought to establish the alleged rights of plaintiffs as stockholders in defendant corporation, in which verdicts had been directed in favor of defendant. *Judgment on the verdicts.*

NOTE.—*Corporation not liable for misfeasance of its officers.*

A stockholder in a bank cannot maintain an action against the directors for their misfeasance in delegating the whole control of its affairs to the president and cashier, who waste and lose the capital, the injury being to the corporation direct and only remotely to the stockholders. *Smith v. Hurd*, 12 Met. 371.

Where a person had notice that the surrender and transfer of certificates of stock were prerequisites to the lawful issue of new stock, and accepted the new certificate without assuring herself that such prerequisites had been complied with, she is not an innocent holder of the stock. *Moore v. Citizens Nat. Bank of Piqua*, 111 U. S. 156, 28 L. ed. 385. See *Allen v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

Where one buys a certificate of corporate stock not under seal of the corporation and not signed by the person whom he knows is its president, he cannot be said to be an innocent purchaser. *Byers v. Rollins*, 13 Colo. 22.

In such case if the party fails to investigate the title to the stock, he is affected with notice of whatever he might have discovered upon making proper inquiry. *Farrington v. South Boston R. Co.* 5 L. R. A. 849, 150 Mass. 406.

A pledge to a bona fide pledgee of fraudulently issued certificates of corporate stock is not a pledge of shares of stock, but simply of a right to receive indemnity for the fraudulent acts of the officers in issuing the spurious shares. *Kisterbock's App.* 127 Pa. 601.

Damages to a holder of shares of stock fraudulently issued by corporate officers should be measured by the market value of valid stock at the time 13 L. R. A.

The case sufficiently appears in the opinion. *Messrs. Robert M. Morse, Jr., and Charles E. Hellier*, for plaintiffs:

These cases must be governed by *Allen v. South Boston R. Co.* and *Craft v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

It was held, in both cases, that the plaintiffs could recover.

See also *Titus v. Great Western Turnp. R.* 61 N. Y. 237; *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 80; *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 231; *Willis v. Philadelphia & D. R. Co.* 6 W. N. C. 461; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. (Pa.) 180.

The only cases where the corporation has been held not liable to holders for value of certificates fraudulently issued by an officer of the corporation are—

Farrington v. South Boston R. Co. 5 L. R. A. 849, 150 Mass. 406; *Moore v. Citizens Nat. Bank of Piqua*, 111 U. S. 156, 28 L. ed. 385.

The ground of the decisions in these cases was the same, namely, that the fact that the certificates were newly issued in the name of the party who took them as collateral security for a private loan to the officer who issued them put the person so taking them upon inquiry as to whether a former certificate had been surrendered, in accordance with the provision on the face of the certificate received.

The gist of the plaintiffs' cases lies in the negligence of the defendant corporation, which has permitted a fraud to be perpetrated to the

when the corporation refused to recognize the corporate shares as valid. *Allen v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

Negligence; responsibility for proximate or direct consequences:

A defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct. *Bennett v. Lookwood*, 20 Wend. 223; *Crain v. Petrie*, 6 Hill, 523; *Vedder v. Hildreth*, 2 Wis. 427.

Where the wrongful act of one person merely affords an opportunity or occasion for the illegal acts of another, the injury in such cases is too remote. *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 30; *Scholes v. North London R. Co.* 21 L. T. N. S. 835.

An original, wrongful or negligent act will not be regarded as the proximate cause where some new agency, not within the reasonable contemplation of the negligent actor, has intervened to bring about the injury. *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274; *Gilliland v. Chicago & A. R. Co.* 2 West. Rep. 139, 19 Mo. App. 411.

If one's fault happens to concur with something extraordinary and not likely to have been foreseen he will not be answerable for the unexpected result. *Fairbanks v. Kerr*, 70 Pa. 86; *People v. Albany*, 5 Lans. 524; *McGrew v. Stone*, 53 Pa. 436. See *notes to Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 194; *Read v. Nichols* (N. Y.) 7 L. R. A. 130; *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 82.

The damage for which recovery may be had must always be the natural and proximate consequence of the act complained of. *Vedder v. Hildreth*, 2 Wis. 427; *Walker v. Ellis*, 1 Sneed, 515; *Ehrgott v. New York*, 96 N. Y. 264; *Wiley v. West Jersey R. Co.* 44 N. J. L. 247.

detriment of the plaintiffs; and the mode in which the fraud has been accomplished is immaterial, except so far as it may bear on the notice to the plaintiffs or their reasonable care.

Shaw v. Port Philip & C. Gold Min. Co. L. R. 13 Q. B. Div. 108; Machinists Nat. Bank v. Field, 126 Mass. 345; Re Balia & S. F. R. Co. L. R. 8 Q. B. 584.

A corporation is estopped to deny the validity of certificates issued in proper form under the seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value, without knowledge or notice that they had been fraudulently issued.

Allen v. South Boston R. Co. supra; Boston & A. R. v. Richardson, 185 Mass. 473; Machinists Nat. Bank v. Field, supra; Pratt v. Taunton Copper Co. 123 Mass. 110; Moores v. Citizens Nat. Bank of Piqua, 111 U. S. 156, 28 L. ed. 385; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Shaw v. Port Philip & C. Gold Min. Co. supra. See also Holden v. Metropolitan Nat. Bank, 138 Mass. 48.

The plaintiffs were under no legal obligation or duty to investigate the validity of the certificates received by them, or to question Jewett's title to the same.

Salisbury Mills v. Townsend, 109 Mass. 115.

It is not necessary to the conveyance of the legal title to a certificate of stock to record the transfer of the shares in the books of the corporation; the delivery of the certificate with an assignment thereof is sufficient.

Loring v. Salisbury Mills, 125 Mass. 150;

Stone v. Hackett, 12 Gray, 231; Eames v. Wheeler, 19 Pick. 444.

Messrs. Samuel J. Elder and William Cushing Wait, for defendant:

Plaintiff's certificates being forgeries are not the contracts of the Company; and no implied contract can be raised to issue new ones in their places. To have complied with plaintiffs' demands would have been to over-issue the stock of the corporation, which it could not be compelled to do.

Allen v. South Boston R. Co. 5 L. R. A. 716, 150 Mass. 200, 207; Bishop v. Balkis Consolidated Co. L. R. 25 Q. B. Div. 77; British Mut. Bkg. Co. v. Charnwood Forest R. Co. L. R. 18 Q. B. Div. 714.

A corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued.

Allen v. South Boston R. Co. supra.

In these cases the certificates were not "duly signed by the officers authorized to issue certificates," and they were taken under circumstances which put the taker upon inquiry and which affect him with notice of all that he could have learned by inquiry.

Farrington v. South Boston R. Co. 5 L. R. A. 849, 150 Mass. 406.

Shaw v. Port Philip & C. Gold Min. Co. L. R. 13 Q. B. Div. 108, the only case in which a corporation has been held liable for a fraudulent issue of stock where the certificates have not been signed by the proper officers, is readily 18 L. R. A.

distinguished from the present. A declaration to create an estoppel must be made "by a party whose duty it was to know and state the truth and be relied upon by one who had no other means of information or was justified in relying upon such declarations.

Hambleton v. Central Ohio R. Co. 44 Md. 551.

C. Allen, J., delivered the opinion of the court:

The by-laws of the defendant corporation provide that "each stockholder shall be entitled to a certificate of stock under the seal of the corporation, and signed by its president and treasurer." The certificates taken by the respective plaintiffs each called for these two signatures and purported to bear them. The plaintiffs were therefore apprised of the necessity for two signatures. In point of fact, however, the certificates did not bear the signature of the treasurer, his name having been forged by the president. There was no special provision in the by-laws, giving the president anything to do in respect to the issuing of certificates of shares, except a requirement that he should sign all such certificates. Transfers were to be recorded by the clerk. The purchaser named in a transfer so recorded was entitled to a new certificate upon producing the transfer to the treasurer, and delivering to him the former certificates. There was no actual or ostensible authority in the president to issue certificates. He was only to sign them. The certificates taken by the plaintiffs were invalid for want of the two signatures required by the by-laws.

But the plaintiffs contend that the defendant is nevertheless bound to make the certificates good, or responsible for their being bad, on the ground that it was negligent in permitting Jewett to remain president of the corporation, in view of his previous known misconduct, and to have control of its certificate book and seal, and that the cases fall within the principle that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

In order to reach this conclusion, it must be made to appear that the frauds and forgeries of Jewett were such natural and probable results of his continuance in the office of president of the corporation that the defendant ought to have anticipated and guarded against them, and also that the plaintiffs on their part exercised due diligence and precaution in accepting the certificates from him.

In the absence of any previous misconduct on Jewett's part, it could hardly be maintained that there was any negligence on the part of the corporation in keeping its seal and book of certificates of shares where the president could have access to them, so as to be able to remove blank certificates from the end of the book and impress the corporate seal upon them. We are not aware that it is customary for corporations in this country to keep their seals or books of certificates in such a way that access to them can only be had when two or more officers are present.

The chief safeguard in respect to the certificates is the necessity of two signatures. And accordingly when one who has had confidence reposed in him has availed himself of his opportunity to commit a fraud upon others by means of forgery, it has usually been held in England that the loss was not a natural or probable result of the confidence thus reposed, even though it showed carelessness, and that it was too remote to be properly chargeable upon those who were thus careless in reposing the confidence. *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389; *Staple of England v. Bank of England*, L. R. 21 Q. B. Div. 160, 176; *Swan v. North British Australasian Co.* 2 Hurlst. & C. 175, 189. See also *Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 103, 117, on appeal, L. R. 23 Q. B. Div. 243, 255, 263.

The plaintiffs rely much on *Shaw v. Port Philip & C. Gold Min. Co.*, L. R. 13 Q. B. Div. 103, which in many of its general features much resembles the present case, but with certain differences. In that case the secretary of the defendant Company issued a certificate of shares, with the name of a director forged by himself. The person to whom it was issued bought shares on the market, through a broker, who received a transfer signed by the secretary, accompanied by what purported and in all respects appeared to be a regularly issued certificate of those shares. These were deposited at the company's office, with the request for the issue of a new certificate, in the usual way. The new certificate was issued, in the usual form by the secretary, but the signature of a director, which was required, was forged. It was a part of the regular and authorized duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution and signature of certificates, with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. Moreover, the Company, after the issue of the certificate, paid a dividend thereon, by check signed by the secretary and two directors. The decision of the case, which was not heard before the court of appeal, was placed on the ground that the Company had made it the duty of the secretary to procure the preparation, execution and signature of certificates with the prescribed formalities, and thereupon to issue them to the person entitled to receive them. The principal fact upon which the decision turned is wanting in the case before us. The president of the defendant corporation was not the proper officer to issue certificates, and the certificates which the plaintiffs received did not come from the office of the defendant in regular course of business, but they were received by the plaintiffs under private and personal transactions between themselves and Jewett, the president.

The plaintiffs, however, contend that the previous and known misconduct of Jewett had been such that it distinguishes the present case from others, and that by reason thereof the defendant should be held responsible for his acts. This misconduct consisted 13 L. R. A.

in pledging his shares to Evans & Co. when he had agreed to pledge them to his associates in the corporation. According to the original understanding when the corporation was formed, Estes & Lauriat subscribed and paid for the whole of the stock, but there was an agreement under which Jewett was to have the option of buying one half of the stock at a certain price at any time within one year. Jewett was president of the company, and Jackson, one of the firm of Estes & Lauriat, was treasurer. In the absence of the two senior members of the firm, Jewett elected to take his half of the stock, but stated that he could not very easily pay for it then, and Jackson consented to issue the certificates to him with the understanding that he was to give his notes for them, and that the firm would hold the stock as collateral. The stock was accordingly issued to Jewett, who took it, and did not pledge it to the firm, but afterwards pledged it to Evans & Co. There is no distinct statement how it happened that Jewett was allowed to take away the certificates, instead of pledging them on the spot to the firm; nor how soon afterwards he pledged them to Evans. Apparently confidence was reposed in him, and at any rate there is nothing to show that any steps were taken to compel him to pledge the shares to the firm according to his promise. What Jackson did in consenting to the issue of the stock to Jewett without retaining them in pledge was within his power as a member of the firm.

On the whole, we find nothing to show that the corporation or its other members had reason to suppose from what Jewett had done that he would be likely to issue forged certificates of shares, if allowed access to the certificate book and seal of the corporation; and accordingly it is not to be held responsible for his criminal fraud, as for an act made possible by its negligence.

In the cases heretofore determined by this court, where a corporation was held responsible for the fraudulent issue of shares, the certificates were in fact signed by the proper officers whose signatures were required, and there was carelessness on the part of the president in leaving certificates signed in blank by himself with the treasurer, and also carelessness on the part of other officers of the Company. *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716.

In each case the entry must be—
Judgment on the verdict.

COMMONWEALTH OF MASSACHUSETTS

v.

Henry S. BROWN.

(... Mass.)

The agent of a common carrier is chargeable with aiding and abetting in

NOTE.—Aiders and abettors of crime are all principals.

Anyone who counsels, aids or abets in the commission of any offense may be charged, tried and

bringing intoxicating liquors into a city to be sold illegally, where, knowing or having reasonable cause to believe, that the purchaser intends to sell them illegally, he habitually delivers them to him either personally or by his subordinates, although he does not know that the liquors were ordered until they came, and neither has nor could have anything to do with the transportation until they are brought to the city.

(May 22, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of an indictment charging defendant with bringing into Lowell certain intoxicating liquors having reasonable cause to believe that they were intended to be

sold in violation of law, which resulted in defendant's conviction. *Overruled.*

The facts sufficiently appear in the opinion.

Mr. Walter I. Badger for defendant.

Mr. A. E. Pillsbury, Atty-Gen., for the Commonwealth.

Morton, J., delivered the opinion of the court:

The defendant in this case was charged with bringing into the City of Lowell certain intoxicating liquors, having reasonable cause to believe that the same were intended to be sold in said city in violation of law. It was agreed at the trial that the City of Lowell granted no licenses at the time named in the complaint. It is well settled that one

convicted in the same manner as if he were the principal. *State v. Shenkle*, 38 Kan. 48. See also *State v. Cassidy*, 12 Kan. 580; *State v. Brown*, 21 Kan. 50; *State v. Mosley*, 31 Kan. 355.

Everyone present, actually or constructively, when a crime is being committed, who advises, aids or abets its commission, is a principal. *United States v. Gooding*, 25 U. S. 12; *Wheat*, 400, 6 L. ed. 603; *United States v. Wilson*, 1 Bald. 104; *United States v. Kelly*, 2 Sprague, 83; *Com. v. Campbell*, 7 Allen, 541; *People v. Woodward*, 45 Cal. 238; *Ward v. Com.*, 14 Bush, 238; *Kessler v. Com.*, 12 Bush, 18; *King v. State*, 21 Ga. 221; *Hawkins v. State*, 13 Ga. 322; *Boyd v. State*, 17 Ga. 194; *Smith v. People*, 74 Ill. 144; *Williams v. State*, 47 Ind. 568; *Goff v. Prime*, 26 Ind. 198; *State v. Shelledy*, 8 Iowa, 477; *Shannon v. People*, 5 Mich. 71; *Strang v. People*, 24 Mich. 1; *State v. Ricker*, 29 Me. 84; *State v. Davis*, 23 Me. 408; *State v. Phillips*, 24 Mo. 475; *Reg. v. Lynch*, 26 U. C. Q. B. 208; *Reg. v. McMahon*, Id. 195; *Simpson v. State*, 5 Yerg. 366; *Reg. v. Wallis*, 1 Salk. 335; 2 Archb. Crim. Proc. 945; *Hately v. State*, 15 Ga. 848; *Dean v. State*, 26 Ind. 495; *Com. v. Knapp*, 9 Pick. 496; *State v. Cheek*, 18 Ired. L. 114; *State v. Lymburn*, 1 Brev. 397; *Baker v. State*, 12 Ohio St. 214; *Welch v. State*, 3 Tex. App. 418; *Wells v. State*, 4 Tex. App. 26; *Floyd v. State*, 12 Ark. 48; *Reg. v. Howell*, 9 Car. & P. 437; *Reg. v. Tracy*, 6 Mod. 178; 4 Bl. Com. 34; 1 Hale, P. C. 233; 1 Russell Crimes, 9th ed. 49; 1 Wharton, Crim. Law, 8th ed. 208.

A person present and encouraging, consenting, aiding, or advising another person to place an obstruction on a railroad track, is as guilty as the latter. *State v. Douglass*, 44 Kan. 618.

This case was, however, reversed on rehearing. See *State v. Douglass*, *supra*, where it was held that mentally consenting to the commission of a crime, where no expressed consent either by word or act is given, does not make the person consenting guilty of any offense, following *Clem v. State*, 38 Ind. 418; *State v. Cox*, 65 Mo. 29; *White v. People*, 81 Ill. 833; *State v. Hildreth*, 9 Ired. L. 440, 51 Am. Dec. 389; 1 Wharton, Crim. Law, § 211, a, d.

Persons who are incapable personally of committing a certain crime may be punished as principals if they take part as aiders and abettors, although there is no reference to them in the statute describing the offense. *United States v. Stevens*, 44 Fed. Rep. 132; *United States v. Bayer*, 18 Nat. Bankr. Reg. 408; *Boggus v. State*, 34 Ga. 275; *State v. Sprague*, 4 R. I. 257; *Rex v. Potts, Russ. & R.* 353; *Audley's Case*, 8 How St. Tr. 401; *Rex v. Gray*, 7 Car. & P. 164; *Reg. v. Crisham*, Car. & M. 187.

Parties co-operating are all principals.

Where two persons are jointly indicted, one for the murderous act, and the other for aiding, abetting, assisting, etc., both are principals. *State v. Anderson*, 5 West. Rep. 420, 39 Mo. 312.

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It is immaterial which of two parties co-operating in the commission of the offense inflicts the wound, as the law imputes the injury done by one as the act of the other. *State v. Payton*, 7 West. Rep. 131, 30 Mo. 220. See *State v. Blan*, 60 Mo. 318; *State v. Anderson*, 5 West. Rep. 420, 39 Mo. 312; 2 Wharton, Homicide, § 338; *State v. Dalton*, 27 Mo. 14.

So a blow inflicted by one is a blow by all participants; each is deemed agent of all, and his acts are the acts of all. *McGinnis v. State*, 31 Ga. 235; *Patton v. State*, 6 Ohio St. 407; *Fonts v. State*, 7 Ohio St. 471; *Clawson v. State*, 14 Ohio St. 234; *Hutting v. State*, 17 Ohio St. 583; *King v. State*, 21 Ga. 221; *Lewis v. State*, 38 Ga. 131; *People v. Woody*, 45 Cal. 289; *Brister v. State*, 26 Ala. 107; *State v. Anthony*, 1 McCord, L. 285.

Procuring commission of crime.

One who acts through another, even if that other be himself incompetent to commit the offense as from insanity or infancy, is a principal. *Berry v. State*, 10 Ga. 511; *Blackburn v. State*, 23 Ohio St. 148; *State v. Larnard*, 41 Vt. 585; *Rex v. Giles*, 1 Moody, C. C. 166; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Manley*, 1 Cox, C. C. 104; *Reg. v. Palmer*, 1 Leach, C. C. 102; *Russell, Crimes*, 53; 4 Bl. Com. 23; 1 Hale, P. C. 19; 1 Wharton, Crim. Law, 8th ed. § 212; *Fost. 340*; 1 East, P. C. 118; 1 Hawk. P. C. chap. 31, § 7.

So one who acts through the medium of an innocent agent is principal in the crime. *Com. v. Hill*, 11 Mass. 136; *Adams v. People*, 1 N. Y. 173; *State v. Fulkerson*, Phill. L. 233; *People v. Peabody*, 25 Wend. 472; *Collins v. State*, 8 Heisk. 14; *Reg. v. Michael*, 9 Car. & P. 356; *Reg. v. Mazeau*, Id. 676; *Reg. v. Clifford*, 2 Car. & K. 201. See 1 Wharton, Crim. Law, 8th ed. 161.

One employing an agent to assist in the execution of a criminal act is equally guilty. *McKee v. State*, 9 West. Rep. 839, 111 Ind. 378; 1 Wharton, Crim. Law, 247.

All are principals in misdemeanors.

At common law all are principals in misdemeanors (*Green v. State*, 13 Mo. 332; *Stipp v. State*, 11 Ind. 62; 1 Wharton, Crim. Law, 8th ed. § 223), as in the illegal sale of liquors. *Com. v. McDonald*, 151 Mass. 527; *Com. v. Major*, 6 Dana, 283.

Inciting, encouraging, and aiding another to commit a misdemeanor is itself a misdemeanor. *Jones v. Surprise*, 4 New Eng. Rep. 294, 64 N. H. 243.

Upon the trial of a complaint charging the keeping intoxicating liquors for illegal sale, where there is evidence that defendant and another purchased liquor, placed it in bottles and took it to the fair grounds, where it was drunk by various persons who paid money for the same, the case was properly submitted to the jury. *Com. v. Murphy*, 147 Mass. 525. See note to *Butler v. People* (Ill.) 1 L. R. A. 211.

who aids another in committing a misdemeanor is equally guilty with one who actually commits it (*Com. v. Ray*, 3 Gray, 441; *Com. v. Drew*, 3 Cush. 279; *People v. Erwin*, 4 Denio, 129; *United States v. Gooding*, 25 U. S. 12 Wheat. 475, 6 L. ed. 698; *Com. v. Gannett*, 1 Allen, 7; *Reg. v. Greenwood*, 16 Jur. 390), and this rule has been applied in this State to statutory offenses arising under the Liquor Law, so called. *Com. v. Galligan*, 144 Mass. 173, 3 New Eng. Rep. 801; *Com. v. Murphy*, 145 Mass. 250.

In the present case there was no testimony directly connecting the defendant with the transportation of the liquors which he was charged with bringing into the City of Lowell. The next question is whether there was any evidence tending to show that he aided or abetted in any way in bringing them into that city. And we think there was such evidence.

The defendant was the agent in Lowell of the New England Despatch Company, which was a common carrier between Boston and Lowell and other places. He drove one of the wagons in Lowell and hired and had charge of the other drivers there. In the ordinary course of the business of the company some of the goods carried by it to Lowell were received and transported in the following way: Customers in Lowell wrote their orders which were enclosed in sealed envelopes directed to certain parties in Boston, and sent or brought them to the company's office in Lowell. Sometimes the defendant took them and sometimes others in the office, but generally the cashier. These orders were put into a messenger's box in the office and were taken by the messenger to Boston and there delivered to the various parties to whom they were directed. Another person, a driver, in the company's employ at Boston, called at the various places for the goods thus ordered and collected and delivered them to the baggage master of the Boston & Maine Railroad, who placed them in the baggage car under the charge of one of the company's Lowell messengers and on the way to Lowell they were checked off by the messenger on the way bills accompanying the goods. Neither the defendant nor any of the employees knew the contents of the orders and the way bills did not describe the contents of the packages. When the goods arrived at Lowell they were delivered to the employees of the company, of whom the defendant was one, and they delivered them to the parties ordering them.

The liquors in question were brought into Lowell by the company in the ordinary course of business as thus described, but the defendant had no personal knowledge that they had been ordered or were to be received at Lowell till they were in the company's office at Lowell and none of the other employees at the Lowell office knew of it till the messenger checked off the packages containing them after the train had left Boston. There was evidence tending to show that a part of the liquors described in the complaint were marked "B Club" and that the defendant told one of the government witnesses that liquors marked "B Club" were to be delivered to

such persons in Lowell as should be designated by a man named Bartlett in Lowell; and a short time prior to the 8th of September, 1890, the day named in the complaint, liquors marked "B Club" on the boxes of which were the company's tags had been found in places in Lowell where liquors were illegally sold. There was also evidence that the defendant knew or had reasonable cause to believe that a portion of the liquors in question were intended to be sold in Lowell in violation of law and that the express company had previously brought intoxicating liquors into Lowell with such knowledge or with reasonable cause to believe that it was to be sold. It also appeared that the defendant had been before cautioned by police officers at Lowell not to deliver liquor to illegal dealers therein and had replied that he was not doing different from other express companies and was not doing as much as some of the others. It further appeared that teams under defendant's direction had been delivering liquors constantly since the first of May and he stated in the course of his testimony that he had to see that things went on right, that he had charge of the teams and drove some himself; that he first took charge after the goods reached Lowell and that he meant he wasn't bringing so much beer as the rest of the companies.

Upon this evidence it was clearly competent for the jury to find, as they must have found under the instructions of the court, that the despatch company undertook the business of transporting intoxicating liquors to Lowell indiscriminately as a general and habitual practice where it knew or had reasonable cause to believe that the same were intended to be used in violation of law. And the jury must have further found, as they were also justified in doing under the instructions of the court, that the defendant knew that such was its course of business and knowingly assisted and aided in the same by his own acts and that the liquors in question or a part of them were brought into Lowell in pursuance of such general course of business in which the defendant so participated and were in fact illegally transported, and that defendant performed a necessary part of the machinery in carrying on this illegal business.

The defendant cannot excuse himself on the ground that he did not know that the order was sent from Lowell for the liquors in question or that he did not know they were coming from Boston until they were received at the company's office in Lowell or that he did not himself bring them or manually aid in bringing them from Boston to Lowell, and could not have forbidden or controlled their transportation from Boston to Lowell. When the liquors arrived at Lowell he knew or had reasonable cause to believe that they were intended for sale in Lowell in violation of law. He had reason to know from the course of the business that they had been brought to Lowell from Boston pursuant to an order from a dealer in Lowell to a dealer in Boston. And he knew that when they arrived at Lowell both the shipper in Boston and the orderer in Lowell expected that he would aid in for-

warding them to their destination in Lowell. He himself expected to do this and to do it as one step in the transportation from the vendor in Boston to the purchaser and illegal seller in Lowell. In the strict sense of the words, therefore, he was aiding in bringing into Lowell intoxicating liquors with reasonable cause to believe that they were to be there sold in violation of law. He was one link in the chain of transportation from the shipper in Boston to the illegal seller in Lowell and he knowingly and voluntarily occupied that position. It was not necessary that he should know at every moment and

every step what everyone else did who was engaged in aiding or abetting or committing the misdemeanor. So far as he was concerned all that was necessary was that it should appear that he knowingly aided in the commission of the misdemeanor charged. If he did he was liable. *Reg. v. Swindall*, 2 Car. & K. 230.

For these reasons a majority of the court think that there was no error in the instructions and that the defendant's requests were rightly refused.

Exceptions overruled.

IOWA SUPREME COURT.

MT. ZION BAPTIST CHURCH *et al.*,

Appls.,

v.

H. A. WHITMORE *et al.*

(....Iowa....)

1. The majority of the members of a Baptist Church, although it is independent

in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants; and on attempting to do so they may be enjoined from interfering with the proper use and control of the property by the minority.

2. The decision of a Baptist council on the joint call of both factions of a Baptist Church, which agree to accept it as final,

NOTE.—Ecclesiastical law; church doctrines, by what law governed.

The doctrine of a religious congregation, adherence to which is a condition of membership, must be determined by its rules, constitution, or by laws. *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 503.

The church, or spiritual body, as to its doctrine, government and worship, is to be governed and regulated by its own peculiar rules. *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 153; *Chase v. Cheney*, 58 Ill. 583, 11 Am. Rep. 104. See *Gibson v. Armstrong*, 7 B. Mon. 481; *Bouldin v. Alexander*, 82 U. S. 15 Wall. 131, 21 L. ed. 66; *Watson v. Garvin*, 54 Mo. 363; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Connitt v. Reformed Prot. Dutch Church of New Prospect*, 54 N. Y. 551; *Reformed Prot. Dutch Church v. Bradford*, 8 Cow. 457; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *Ferraria v. Vasconcelles*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Happy v. Morton*, 33 Ill. 308; *Field v. Field*, 9 Wend. 304; *Gaff, v. Greer*, 88 Ind. 122.

In the case of *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118, the learned chancellor doubted the soundness of his former decisions, but his decree was reversed by the highest court in this State, by a vote of fourteen to three. *Chase v. Cheney*, *supra*; *Miller v. Gable*, 2 Denio, 492.

The decision of a religious judicatory as to what is consistent with a particular doctrine is conclusive on civil courts. *East Norway Lake N. E. L. Church v. Halvorson*, *supra*.

Whether any civil tribunal in the State could interfere to prevent the majority of the corporators in a religious society from introducing changes in the doctrines or modes of worship in their churches as they might deem expedient; where all religions are not only tolerated, but are entitled to equal protection by the principles of the Constitution,—*quære*. *Miller v. Gable*, 2 Denio, 523.

Religious doctrines will be examined by civil courts, when rights of property depend on adherence to them, only so far as to determine the fact of adhering to or teaching them; but no attempt will be made to determine their abstract truth or 13 L. R. A.

falsehood. *East Norway Lake N. E. L. Church v. Halvorson*, *supra*.

If a majority adhere to the organization and doctrines, they represent the church. *Bouldin v. Alexander*, *supra*.

Those who remain faithful to their allegiance to the church and its doctrines are its "rightful members." See note to *Finley v. Brent* (Va.) 11 L. R. A. 214.

An expulsion of the majority by the minority is a void act. *Bouldin v. Alexander*, *supra*.

Church property; title, in whom vests.

The title to church property of a divided congregation is in the faction in harmony with its own law and ecclesiastical laws, usages, customs, and principles. *McRoberts v. Moudy*, 1 West. Rep. 323, 19 Mo. App. 26; *Roshi's App.* 69 Pa. 462.

An organized church cannot be divested of its property, even by a majority of its members, until disbanded or disrupted according to custom. *McRoberts v. Moudy*, *supra*; *Venable v. Coffman*, 2 W. Va. 320.

Money raised for a specific purpose by a congregation does not vest absolutely in either bishop or priest, but belongs to the congregation; and trustees appointed by the congregation to receive it. *Amish v. Gelhaus*, 71 Iowa, 170.

A conveyance to trustees for the use of a religious society executes a legal estate in the congregation itself. *Fernsler v. Selbert* (Pa.) 5 Cent. Rep. 711; *Brendle v. German Ref. Cong. of Jackson Twp.* 33 Pa. 415; *Griffitts v. Cope*, 17 Pa. 93.

A conveyance to trustees of a religious society, without naming them, or any of them, vests the title in the corporation named in the deed, and not in any individuals. *Keith & P. Coal Co. v. Bingham*, 97 Mo. 196.

A majority of seceders cannot carry the church property into a separate connection. See *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118; *Den v. Bolton*, 12 N. J. L. 236.

An Act providing for the contingency of a division of a religious society, the majority to decide to which branch the congregation shall thereafter belong, is void so far as it diverts the trust property from the intended uses. See note to *Finley v. Brent* (Va.) 11 L. R. A. 214.

that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive and may be adopted by a court as the basis of its action in giving the control of the church property to the other faction.

(June 1, 1891.)

APPEAL by complainants from a decree of the District Court for Van Buren County in favor of defendants in a suit brought to enjoin defendants from unlawfully using certain church buildings and records and from interfering with complainants' use of the same. *Reversed.*

The facts are stated in the opinion.

Messrs. Craig, McCrary & Craig and Sloan, Work & Brown, for appellants:

The Mt. Zion Baptist Church was incorpo-

rated December 18, 1851, and at the time of its organization adopting the articles of faith and covenant published in the minutes of the Des Moines Baptist Association in the year 1848. The Church thus organized cannot be converted into a different church, even though the Church to which it is changed had subsequently the same faith.

First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 568.

That cannot be done inside of the Church by a majority which they could not do, by trying to transfer the church property to a different denomination.

2 Wait, Act. & Def. 262; *Hale v. Everett*, 58 N. H. 9, 16 Am. Rep. 82; *Kinhead v. McKee*, 9 Bush, 585; *Schnorr's App.* 67 Pa. 188, 5 Am. Rep. 415.

Where a schism has occurred in a church organization each party may alternate in the weekly use of the church. *Bowden v. McLeod*, 1 Edw. Ch. 588, 6 L. ed. 267.

Distinction between church and corporation.

There is a distinction between the church and the corporation. A church is an integral part of the corporation, or rather it is the corporation in its spiritual capacity. *Hardin v. Second Bapt. Church*, 51 Mich. 130. See *Lawyer v. Clipperly*, 7 Paige, 281, 4 L. ed. 156; *Robertson v. Bullions*, 11 N. Y. 243; *Bellport v. Tooker*, 20 Barb. 256; *Burrell v. Associate Ref. Church*, 44 Barb. 282; *Miller v. Gable*, 2 Denio, 402; *Ferraria v. Vasconcelles*, 51 Ill. 25; *Calkins v. Cheney*, 92 Ill. 468; *Keyser v. Stansifer*, 6 Ohio, 368; *Shannon v. Frost*, 3 B. Mon. 258; *German Evangelical Cong. v. Presler*, 17 La. Ann. 127; *O'Hara v. Stack*, 90 Pa. 477; *Sohier v. Trinity Church*, 109 Mass. 1; *Walrath v. Campbell*, 28 Mich. 111; *Hale v. Everett*, 58 N. H. 71.

Over the church as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others, and preserve the public peace. *Chase v. Cheney*, 56 Ill. 509, 11 Am. Rep. 104.

When it appears to have been the intention of the founder of a trust for religious worship, that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. *St. Mary's Church Case*, 7 Serg. & R. 539; *Den v. Bolton*, 12 N. J. L. 236.

Trustees cannot fasten on the institution the promulgation of doctrines contrary to those which were intended by the founder of the society. Nor can all the other members of the congregation call upon a single remaining trustee to effectuate such change. *Craigdallie v. Alkman*, 1 Dow, P. C. 1; *Foley v. Wontner*, 2 Jac. & W. 245; *Leslie v. Birnie*, 2 Russ. 114; *Davis v. Jenkins*, 3 Ves. & B. 156; *Milligan v. Mitchell*, 3 Myl. & C. 72, 1 Myl. & C. 440.

If the minority of a church congregation, not acting within the regular organization, get together and assume to elect trustees, there is not the color of an election which will make them *de facto* officers. *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 508.

Jurisdiction of civil courts over religious associations.

Rights of property or of contract, of religious organizations, are under the protection of the law, and the actions of their members subject to its restraints. *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 606.

Courts having no ecclesiastical jurisdiction cannot revise or question ordinary acts of church discipline. 13 L. R. A.

Their only jurisdictional power arises from the conflicting claims of the parties to the church property and the use of it. *Ibid.*; *Christ Church v. Phillips*, 5 Del. Ch. 429.

Civil courts will interfere with churches or religious associations only when rights of property and civil rights are involved. *Grimes v. Harmon*, 85 Ind. 218; *Ferraria v. Vasconcelles*, 51 Ill. 46; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *German Ref. Church v. Seibert*, 3 Pa. 291; *Shannon v. Frost*, 3 B. Mon. 258; *Gartin v. Penick*, 5 Bush, 110, 9 Am. L. Rep. N. S. 210; *Forbes v. Eden*, L. R. 1 H. L. Sc. App. 568.

Where there is a schism in a religious society, though the existence of the peculiar faith or doctrines of either branch may be incidentally involved in an inquiry relative to the rights of property, all that the court can do is to enforce the observance and execution of an ascertained trust. *Hale v. Everett*, 58 N. H. 71; *People v. Steele*, 2 Barb. 367.

Where property is conveyed to a religious society to promote the teachings of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, chancery under its general jurisdiction over trust will interfere for the purpose of carrying out the intention of the donors. *Robertson v. Bullions*, 9 Barb. 128.

From the early days of Christianity Unitarian and Trinitarian have always been deemed antagonistic systems, and the courts have decided that funds given to support the teaching of the one of them are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment. *Atty-Gen. v. Pearson*, 3 Meriv. 853, 7 Sim. 290; *Shore v. Atty-Gen.* 9 Clark & F. 365; *Atty-Gen. v. Shore*, 11 Sim. 592; *Atty-Gen. v. Wilson*, 16 Sim. 210; *Atty-Gen. v. Drummond*, 1 Connor & L. 210, 1 Dru. & W. 368; *Atty-Gen. v. Hutton*, 7 Ir. Eq. 612, 614; *Miller v. Gable*, 2 Denio, 492, 548; 2 Story, Eq. §1191, a.

Courts will examine into proceedings of religious bodies with indulgence, and will suppose their proceedings done in conformity with existing rights, rather than in gross usurpation of authority. *Mason v. Muncester*, 22 U. S. 9 Wheat. 445, 6 L. ed. 131.

In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society and enforce its polity in the spirit and to the effect for which it was designed. *Rottmann v. Bartling*, 22 Neb. 375.

Where the Constitution is silent as to the interpretation of certain books adopted by it, in respect to which honest differences of opinion arise, civil courts will not hold that adherence to either interpretation *ipso facto* dissolves membership. *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 508.

In case of the division of a religious corporation, the title to the church property will remain with those who retain their connection with, and conform to the usages and discipline of the organization with which they have been connected, although they may constitute only a minority.

2 Wait, Act. & Def. 268, citing *Winebrenner v. Colder*, 43 Pa. 244; *Schnorr's App. supra*; *Newburgh Assoc. Ref. Church v. Theological Sem. Trustees*, 4 N. J. Eq. 77; *Cincinnati M. E. Church v. Wood*, 5 Ohio, 288; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Lewis v. Watson*, 4 Bush, 228; *Bouldin v. Alexander*, 82 U. S. 15 Wall. 181, 21 L. ed. 69.

When property is conveyed to a religious corporation to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to different doctrines, it is the duty of chancery to interfere.

Miller v. Gable, 2 Denio, 492; *Roshi's App.* 69 Pa. 462, 8 Am. Rep. 275; *Rottmann v. Bartling*, 22 Neb. 375.

Equity will award the possession of the property to those who are the true adherents to the doctrines, teachings and faith of the church, and enjoin the seceders from the true faith of the church from in any manner interfering with them therein.

Schnorr's App., *Roshi's App.* and *Rottmann v. Bartling*, *supra*; *Kniakern v. Lutheran Churches of St. John and St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 888; *Grimes v. Harmon*, 35 Ind. 198; *State v. Farris*, 45 Mo. 183; *Kisor's App.* 62 Pa. 428; *Henderson v. Hunter*, 59 Pa. 335; *Feisel v. First German Soc. of M. E. Church*, 9 Kan. 592; *McKinney v. Griggs*, 5 Bush, 401.

If the trust was created for the benefit of those adhering to a particular denomination, courts of law will accept and follow the determination of the proper ecclesiastical tribunals as to who are adhering and in subordination to that denomination.

First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 567; 2 Wait, Act. & Def. p. 256; *Harmon v. Dreher*, 1 Speers, Eq. 87; *Chase v. Cheney*, 58 Ill. 509, 10 Am. L. Reg. N. S. 295; *German Reformed Church v. Seibert*, 3 Pa. 291; *McGinnis v. Watson*, 41 Pa. 9; *Connitt v. Reformed Prot. Dutch Church*, 4 Lans. 339, affirmed 54 N. Y. 551; *Lucas v. Case*, 9 Bush, 297.

The holders of the legal title to church property are regarded in a court of equity as holding it in trust for the maintenance of the faith and worship of the organization, and any diversion of it to another use is so far a breach of trust as to demand the interposition of the court.

Harmon v. Dreher and *Kniakern v. Lutheran Churches of St. John & St. Peter*, *supra*; *Atty-Gen. v. Pearson*, 3 Meriv. 358; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 127; *Watson v. Jones*, 80 U. S. 13 Wall. 680, 20 L. ed. 666.

Messrs. Wherry & Walker, for appellees:

If there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist

practice and usage there is but one remedy, namely: "They may retire and find a home in some other church; or they may organize themselves into a new one."

Hiscox, Baptist Church Directory, p. 58, note 6; *First Constitutional Presby. Church v. Congregational Soc.* 23 Iowa, 568.

The council had no power to render any judgment of any kind. If it is claimed to be anything more than merely advisory, then it is not such a tribunal as the practice of the Baptist Church authorizes.

Hiscox, Baptist Church Directory, pp. 129-131, notes 1, 10; "The Baptist Church Manual" by Dr. J. M. Pendleton.

The investigation of a dispute between members of a church, by a committee, according to church regulations, though applied for by both parties and attended by both, can have no effect upon their legal rights and the award of the committee is not evidence in a court of law.

2 Wait, Act. & Def. p. 266.

The legal tribunals of the State have no jurisdiction over the church or its members. It is not the province of courts of justice to decide or to inquire what system of religious faith is most consistent, or what religious doctrines are true or what are false in any case.

2 Wait, Act. & Def. p. 256; *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 102; *Hartford First Bapt. Church v. Witherell*, 8 Paige, 296, 3 L. ed. 159; *Lavoye v. Cipperly*, 7 Paige, 281, 4 L. ed. 156; *Robertson v. Bullions*, 9 Barb. 64; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *German Ref. Church v. Seibert*, 3 Pa. 291; *Shannon v. Frost*, 3 B. Mon. 258; *Gartin v. Penick*, 5 Bush, 110; *State v. Hebrew Congregation "Dispersed of Judah"*, 30 La. Ann. 205, 38 Am. Rep. 218; *State v. Farris*, 45 Mo. 183; *Lucas v. Case*, 9 Bush, 297.

The civil courts will not revise the acts or decisions of churches or religious societies upon ecclesiastical matters, but will interfere only when civil or property rights are involved.

Sale v. First Reg. Bapt. Church, 62 Iowa, 26; *Bird v. St. Mark's Church*, Id. 568; *Fadness v. Braunborg*, 73 Wis. 257.

Granger, J., delivered the opinion of the court:

The Mt. Zion Baptist Church was organized in October, 1842, and incorporated in December, 1851, and is located at Bonaparte, in Van Buren County. In 1852 it became the owner of lots 10 and 11, in block 12, in Bonaparte, and has erected buildings thereon for the use of the society, including a church and parsonage. The articles of association provide that "the articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848 shall be the articles of association adopted by this church, together with such rules of order as we may, from time to time, adopt, and the same is hereby adopted." In 1885, because of the teachings of one Aura Smith and his brother, of an experience or condition of "sanctification by a second experience," or "sinless perfection," there were differences of opinion and trouble among the members of the Church. The pastor of the Church, Rev. C. L. Custar, one H. A.

Whitmore and others, were regarded as adherents of the doctrine thus taught, and placed under charges of heterodoxy, with a request that a council of ministers and deacons be convened to hear and adjust the complaints. The persons thus charged were, at a regular meeting of the church, without trial or investigation, exonerated from the charge by a motion for that purpose. This action was had on the 7th of January, 1888. On the 4th of February thereafter charges were preferred against J. D. Israel, L. H. Mills, J. H. Murphy, Mrs. Troutman, and Mrs. Cox, who were of those opposing the alleged new doctrines. The charges were: "(1) for disregard of authority; refusing to submit to the requirements of the Church; setting aside the authority and majority of the Church in its actions and rulings; (2) for contention and strife; causing division; being leaders of evil; destroying the peace of the Church; attempting to divide the Church; (3) for false witness, testifying to things known to the Church to be entirely false, against Bro. C. L. Custar and other members of the Church in good standing." There was no trial upon the charges, but the Church proceedings show as follows: "The charges are of such a nature as to require immediate action, and motion to exclude the parties named from the fellowship of the Church carried." The record from this forward recognizes two "factions" in the Church, one designated as the "Whitmore faction," and the other as the "Israel faction;" and they are so generally spoken of in the record and arguments, the Whitmore faction being largely in the majority. On the 6th of June, 1888, the Israel faction about fifteen in number, assembled at the house of Mr. Israel, and, because of the difficulties existing in the Church, caused by the false doctrines being taught in the Church by the "former pastor, Rev. Custar, and other members of the Church, . . . namely, sanctification, a second blessing, especially to be sought for, and sinless perfection, and by using unscriptural discipline," decided that they constituted "the true and original Baptist Church of Bonaparte;" and it is this organization, with certain of its members, that are parties plaintiff for and on behalf of those having a common interest; the defendants being H. A. Whitmore and others, for and on behalf of those "associating and acting with them." The Israel faction, after deciding that it was the Church, called to its service as pastor Rev. J. L. Cole, and sought the possession and use of the church building and property then in the possession of the Whitmore faction, which was refused. On the 1st of August, 1888, a council of seven Baptist ministers assembled at Bonaparte, at the joint call of the two factions, and the following is the record of the matters to be submitted to it:

"The statement of reasons for calling the council was read by the minority, of which the following is a synopsis: '(1) That two brothers, William and Aura Smith, being professedly ministers of the gospel, came into our midst early in 1885, preaching the doctrine of entire sanctification and sinless per-

fection, inviting all professing Christians to seek this experience, and ridiculing Christians who failed to accept this invitation, and finally urging those who did accept this invitation to attend holiness prayer meetings. That Brother C. L. Custar, a former pastor of this Church, and several members of this Church followed after these Smith brothers, and accepted the aforesaid doctrine. (2) That Brother Custar taught this doctrine from the pulpit of this Church. That a holiness prayer meeting was organized in the spring of 1885, and carried on till May, 1888. That members of this Church professed entire sanctification, neglecting the regular meetings of this Church for holiness meetings. That this doctrine became a means of disturbance and alienation of feeling among the members. (3) That the teaching and acceptance of this false doctrine has been a cause of the difference of opinion and of the action of a minority in organizing the new body and claiming to be the real Bonaparte Baptist Church. [Signed] J. D. Israel and others.

"Reasons for calling a council were read on behalf of the majority party, of which the following is a copy: 'The Bonaparte Baptist Church organized the council to examine its faith and practice; its faith with reference to the doctrine of sanctification; its practice or discipline with regard to the exclusion of certain members of the church, who have since formed another organization, and claim to be the original and true Bonaparte Baptist Church. We want to know if we have so far departed from the faith once delivered to the saints that we can no longer be recognized as a regular missionary Baptist Church. We desire to know wherein we have wronged those whom we have excluded, that we may confess the same, and do all in our power to repair the broken walls of our beloved Zion. [Signed] H. A. Whitmore, C. L. Custar, Com.'

J. D. Israel and H. A. Whitmore as "leaders," and on behalf of their respective factions, signed the following: "For the sake of peace and harmony, and for the glory of our common Lord, it is hereby agreed that the findings and recommendations of this council shall be accepted as final, and in the fear of and by the help of God, we will carry them out in spirit as well as in letter. [Signed] J. D. Israel, H. A. Whitmore."

Each party selected a person to conduct the examinations in its behalf, and the record states that the examination was "thorough, satisfactory, and conducted in good spirit." Revs. Cole and Custar were appointed to receive the decision of the council "on behalf of their parties, respectively," and afterwards the council unanimously returned the following findings: "(1) We find that the doctrine of entire sanctification, taught by the Smith brothers, Miss Romack, and confessedly also by Bro. C. L. Custar, in the Church is not in harmony with the teachings of the Baptist denomination which deny instantaneous sanctification, the so-called second blessing, and sinless perfection. We hold to a true spirituality in our churches; to a high standard of Christian living; to progressive attainment.

and growth in grace. On the other hand, we hold that the doctrine of entire sanctification is subversive of the very end sought; destructive of the peace of our churches, in some instances destroying the churches themselves; and should be avoided as a deadly error. We are rejoiced at the noble stand taken by Bro. C. L. Custar in confessing his error in respect to this doctrine, and we trust that juster views of scripture teaching on this point may prevail in this Church and community. (2) The council recommend that the teaching of the above erroneous doctrine of second experience or entire sanctification be taught in this Church no more, forever; and that the teaching of it in this Church or permitting it to be taught in the Church is a just cause for church discipline. (3) We find that the exclusion of the three members of the choir was justifiable and regular, and we recommend to the young ladies that they make suitable acknowledgment to the Church. (4) We find that the exclusion of J. D. Israel, L. H. Mills, Jas. Murphy, Mrs. C. O. Troutman, and Mrs. J. W. Cox was hasty and unjustifiable. We recommend that the action of the Church in excluding them be at once rescinded."

At a regular meeting of the Church August 19, 1888 (both factions, as we understand), the decision of the council was on motion accepted, and the action of the Church in expelling J. D. Israel and others on the 4th of February was rescinded. At a meeting of the Church on the 10th of September, 1888, the Church annulled its action of August 19, and again, on the 3d of November, it took action on the findings of the council separately, and rejected numbers 1 and 2, being those with reference to the doctrine of sanctification. The petition recites the substance of the foregoing, and contains averments that the defendants and those associated with them have departed from the faith and practice of the Baptist Church, and are using the church building and records for the benefit and promotion of doctrines and a faith contrary to and in violation of the faith, covenants, and practice of the Baptist denominations, to maintain which the said Church was organized and the buildings erected. The relief sought is that the defendants be restrained from interfering with the plaintiff in the free use of the church buildings and property for their legitimate use as a place of worship and teaching the doctrines of the denomination.

The answer puts in issue the allegations of the petition that the defendants have departed from the faith and practice of the Baptist Church, and are using the church property or records for a purpose in violation of the teachings and doctrines of the denomination, and deny that the plaintiffs are denied the free use thereof for any legitimate purpose. The council found the doctrine of "entire sanctification," as taught by Smith brothers, was "not in harmony with the teachings of the Baptist denomination," but "subversive to the very end sought," and "destructive of the peace" of the churches. The correctness of this doctrine as a rule of faith and observance in the Baptist

Church was in dispute between the factions. It was not, as indicated by appellees' argument, a question of the truth or falsity of the doctrine on scriptural authority, but was it in accord with, or subversive of, the covenants and practice of the Baptist Church, with the limitations imposed by its articles of association? This was a purely theological question, and a council of theologians from that church was a proper tribunal to determine such a question, and was so recognized and agreed upon by the parties. It is, however, contended by appellees that they are not bound by this finding of the council, and we notice their reasons, or at least some of them. Much stress is laid upon the fact that each Baptist society is an independent body, with no higher ecclesiastical authority for its control; that its form of government is congregational where a majority govern; and that it is within itself "a little republic." It should be in mind that it is the distinctive character of the Baptist Church government that is relied upon to make it an exception, and free it from the generally expressed rule of law, by which a minority of an association may claim its property against a majority seeking to divert it from its legitimate use. A quotation from appellees' argument will indicate clearly the objection to be met. It is said: "Yes, we repeat again if this Church or any other Baptist church desires to change its 'articles of faith' or belief, it may do so, if a majority of its members concur therein. If it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere. It owes no allegiance to any man or body of men, except a majority of its own members. It has no creed except the Bible, and the right of its own members to interpret that according to the dictates of their own consciences. If a majority of the members of that Church believe the Bible to teach a certain doctrine, then that is 'Baptist doctrine,' because that Church has the right and the power to determine for itself what the Bible teaches, and no other church or churches has any right to interfere therein. The Baptists, as a denomination, have no creed. There is no such thing as a one Baptist church with one Baptist creed or belief. All there is of 'Baptist creed' consists in the right of each separate church to interpret the Scriptures for itself, and to say for itself what it believes the Scriptures to teach. There are as many 'Baptist churches' as there are several societies or congregations. There are as many 'Baptist denominations or creeds' as there are several societies or congregations which have given expression to their belief of what the Scriptures teach." Afterwards follows the conclusion: "We conclude, then, if there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist practice and usage there is but one remedy, namely, 'they may retire, and find a home in some other church; or they may organize

themselves into a new one." This exclusiveness of government within the strict lines of ecclesiastical authority may be conceded; but we are constrained to doubt that any writer, either upon ecclesiastical or civil law, where a controversy involved the right of a minority of an association to have its property devoted to the purpose for which it was given or granted, has laid down a rule so broad. As we think these statements and the conclusion lay at the foundation of other errors into which appellees have fallen, a brief consideration of them, and some rules of law, will render a consideration of many questions unnecessary.

Let it be understood at the outset that we are not adjudicating the right of any person to a religious belief or practice, nor are we to determine the truth or falsity of the doctrine of "sanctification," or "sinless perfection." Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association, less than the whole, may not divest it therefrom. The following cases more or less directly sustain the rule, and are but a few of the many bearing on the question: *Kniskern v. Lutheran Churches of St. John & St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 388; *Atty-Gen. v. Pearson*, 3 Meriv. 353; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172; *Hale v. Everett*, 58 N. H. 9; *Lawyer v. Cipperly*, 7 Paige, 281, 4 L. ed. 156; *Hartford First Bapt. Church v. Witherell*, 8 Paige, 296, 3 L. ed. 159; *Harrison v. Hoyle*, 24 Ohio St. 254; *Field v. Field*, 9 Wend. 401; *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118, 2 Denio, 492; *Cincinnati M. E. Church v. Wood*, 5 Ohio, 284; *Happy v. Morton*, 33 Ill. 398; *Lawson v. Kolbenson*, 61 Ill. 407; *Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Fidness v. Braunborg*, 73 Wis. 257; *First Constitutional Presby. Church v. Congregational Soc.* 28 Iowa, 567.

The Mt. Zion Baptist Church came into possession and ownership of the property it now holds under a profession of faith and practice limited by the "articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848," which we understand to accord with the teachings of the Baptist denomination. These articles of faith and church covenants, and the teachings with which they accord, are a limitation on the trust or use to which the property may be applied. Nice distinctions or shades of opinion on doctrinal points or practice do not merit the interference of a court of equity, and it is only when the departure from the faith is so substantial as to amount to a diversion of the property from the trust purpose that courts will interfere. The council selected by the parties declared, in effect, the doctrines taught by Smith brothers to be a deadly error, and destructive of the peace of the Church. Treating this finding for the present as legitimate and true for the purposes

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of the case, and the situation is that property given and devoted to the promotion of the Baptist Church is being used for its destruction. Appellees' contention because of their claims for the distinctive or independent character of the Baptist Church by which a majority may, without limitation, govern, would permit this result. They take the Scriptures as the only limitation upon or authority over the power of the church, both as to spiritual and material affairs, within the church; and wherein the members may differ the majority control, without reference to the original purposes of their association. The error of appellees in their claim for the "independency" of the majority in a Baptist church lies in a mistaken conception of what should be understood by "government." The power of the majority to govern is derivative, and the source of derivation limits the power. The organization gave birth to the Church, and a power to govern the Church. The Church is Baptist because of the faith and covenants that make it so. It is not the faith and covenants that need or are to be governed, but the members in the enjoyment and fulfillment of the same. The power to govern the Church gives no power to change the Church or the faith and covenants that fix its character. The property of this Church is the common property of all its members, and each has such an interest therein that he may insist that it shall be devoted to the religious faith for which it was given. The manner of the application is delegated to the judgment of a majority of the members of the Church, but there is no delegation of authority to the majority to apply it to the advancement of a church of another faith by a direct transfer, or by changing the faith of a majority of the members of the Church. It is when such an attempt is made that a court of equity will interfere to protect the rights of a minority in having the trust property applied in accord with the original intent. In *Schnorr's Appeal*, 67 Pa. 188, it is said: "When the founders or donors have clearly expressed their intention that a particular set of doctrines shall be taught, or a particular form of worship and government maintained, it is not in the power of individuals having the management of the institution at any time to alter the purpose for which it was founded." In the same case it is further said: "In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." *Rosh's App.* 69 Pa. 462; *Rottmann v. Bartling*, 22 Neb. 375.

If perchance a bare majority of some Baptist church should determine, on scriptural authority, their right to a plurality of wives, and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim of appellees that the church "owes no allegiance to any man or body of men," civil or ecclesiastical, except a majority of its members, the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on any principle of natural

justice, and we believe without the sanction of any judicial tribunal. We, of course, treat and understand the arguments and claims of parties as to the law to be applicable to the property interest of a church, for it is the only question involved in this suit.

It is said in *Schnorr's Appeal*, in a very similar connection, that "the guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches." The thought, with no intent or reason to impute a criminal or dishonest purpose in this case, is not without application to the marvelous freedom from interference claimed for a majority in a Baptist church, because of a congregational or independent form of government. It is further said in the same connection that such freedom "secures to individuals the right of withdrawing, forming a new society with such creed and government as they please, raising from their own means another fund, and building another house of worship; but it does not confer on them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves."

Mt. Zion Baptist Church was organized in 1842, and prospered, without dissension, till 1885, when this new doctrine, which had not before been taught or recognized in the Church, was introduced. With its introduction began trouble, resulting in a division of the Church upon religious faith as justified by the Bible. Not alone the finding of the council, but the record on other grounds, leads to the conclusion that at the organization of the Church and long after it was not thought of as a doctrine of faith or belief in the Church. The newness and singularity of the doctrine in that Church and community seemed to render it one for especial teaching and information, leading to the holding of "holiness meetings," and the truth of such religious experience was in dispute among professing Christians, and especially in the Baptist Church. Copious citations from the Scriptures and from religious treatises are made in support of a doctrine of sanctification which it is neither our province to deny nor affirm. It is likely true that one purpose of these citations is to show that the sanctification, the teaching of which the council found to be a deadly error, was not that taught by defendants, but that it was a doctrine of sanctification in accord with the teaching of the Baptist Church, which fact will be hereafter noticed.

It is urged that the findings of the council are without force, and not binding upon the defendants or on this court, because the church knows no tribunal except the church itself, and hence the action of the council is void. But has not this independent body a right to act for itself,—to agree upon a lawful method of adjusting any differences it may have? Where is the power to gainsay its right to do so? We do not hold, for it is not our province, that for the purpose of church observance the findings of the council are obligatory. Such is purely a matter of ecclesiastical direction and authority; but

the ecclesiastical question there determined, as to the fact of the doctrine taught by Smith brothers being error against the faith of the Church, we think is conclusively settled, and that it may be shown in the civil courts, in matters of which they take jurisdiction, when material to the question at issue. A reference to the reasons for calling the council shows this doctrinal question to have been in dispute, and the majority recognized itself as a party to a controversy on a doctrinal question, the settlement of which was for the "sake of peace and harmony, and for the glory of our common Lord." It was by common consent a method of settling the creed of the Church, and their acts in this respect, being of all the members, are as available in the civil courts to protect property rights as are their acts at the organization of the Church in fixing its creed and character. It will be observed that we are not holding that the recommendations of the council are of like effect, nor are we attaching legal signification to them. They do not go to the conditions that fix property rights with which we deal. After the majority has recognized itself a party to a controversy that should be settled in the interest of peace and harmony, the claim that it should itself sit in judgment to determine the controversy is somewhat novel. The minority lay at the door of the majority the charge of heresy. The majority say: "We constitute the Church. All power is vested in the Church, and hence in us. We determine that the charge is false." This is the precise claim made by appellees as to the power of a majority, and it is the precise action taken by appellees as a majority in Mt. Zion Baptist Church, after which the council was called, the action of which it would now repudiate. In view of this, the claim of the majority that "if it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere," is not strange. The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of and the widest departure from the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert trust property from its proper channel.

But it is said the council did not find that defendants believed or taught the doctrine of sanctification as taught by Smith brothers, and it is true that it is not in terms so found, although the inference is quite conclusive. If it was so found, the same reasons would not exist for our treating it as conclusive as in case of the doctrinal point before discussed. The inquiry as to the conduct of the defendants involves that before and after the proceedings of the council, and becomes a fact for us to find from the evidence. The

evidence, independent of the finding of the council as to the extent the doctrine was believed and taught except as to a few, including the pastor, who at or before the sitting of the council confessed his error, would leave us in serious doubt on this question but for what transpired after the sitting. On the 19th of August the Church (including the defendants) accepted the action of the council in pursuance of their agreement, and to this and the subsequent action of the Church we attach much importance in determining the fact. The council had only found that the particular doctrine of sanctification taught by Smith brothers was error, and the acceptance of the finding reached to no other doctrine. The recommendation that it be taught no more in the Church was only the "above erroneous doctrine." On the 10th of September the Church by action annulled its action of August 19, and again November 8, by further action, it rejected the action of the council as to said finding and recommendations, and accepted it in other respects. Thus it is seen that the majority organized as a church has in effect declared its adherence to the erroneous doctrine, and refused to abide by the recommendation that it should not be further taught in the Church. If the doctrine taught by Smith brothers was not that entertained by defendants, why reject the finding that it was error?" If it was not the intention to teach it in the Church, why reject the recommendation that it should not be further taught? This conduct of the majority, in the light of other facts, is quite conclusive, to our minds, of both its belief in the doctrine and its purpose to teach it in the Church. But as a reason for the action of the Church in repudiating the findings it is said: "The church had no right to sign the agreement, because it cannot delegate its authority, and the signing of the agreement was disloyalty to Christ, and a surrender of the cardinal principle of Baptist practice, namely, church independence." There is a seeming inconsistency between the language and conduct of the majority in this respect. The disloyalty to Christ appears to have been in making the agreement to abide by the action of the council, because of a surrender of principle. But the majority rejects part of the findings of the council and accepts other parts, one of which was favorable to it. We do not see how to sustain appellees' claim, except upon the theory that the disloyalty in making the agreement depended on the character of the findings under it, which we do not think would be claimed. It is again said: "For the defendants to have accepted these findings would have been for them to admit, not that they were teaching or intending to teach any such doctrine, but that C. L. Custar, their former pastor, to whom they had given a letter of recommendation to a sister church, had been teaching the doctrine of sinless perfection." But Rev. Custar was present at the meeting of August 19, when the church accepted the action of the council, and took his letter of dismission at that time, and took part in the proceeding, favoring the acceptance; and 18 L. R. A.

the findings, which he was a committee of the majority to receive, show that he had been confessedly a teacher of the same doctrines as Smith brothers, and confessed his error. How can we, in the light of such a record, accept the claim of the majority that in rejecting the finding and recommendation they were acting in the interest of the pastor? Other claims are made, as that the parties were by the council required to sign the agreement which was wrong, but nothing in the record shows but that it was not entirely voluntary as to all parties. It is further said that the action of a council is only advisory, and that it is never binding. The rule, as claimed, has the support of ecclesiastical authorities, but the agreement in this case made it more as to its effect on the property interests of the Church. It is a question entirely different from that pertaining to conscience, or the general rules for church government, as to which the authorities cited have especial reference. It should be kept in mind, to avoid misapprehension, that we have only treated the findings of the council as conclusive in so far as, by an agreement of the entire body of the Church, it determined a dispute as to its former faith or creed. We reach the conclusion upon the facts in the case that the majority have made a substantial departure from the original faith and covenants of the Church, and have diverted the property from the purpose for which it was given or granted.

In *App. v. Lutheran Congregation*, 6 Pa. 201, it is said: "It is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." See also *McGinnis v. Watson*, 41 Pa. 9; *Suttler v. First Reformed Dutch Church*, 42 Pa. 508.

In deciding who is entitled to control the Church property where there is such a division, we must look to the situation when the dispute began. In *Roehi's Appeal*, citing the above authorities, it is said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, and principles which were accepted among them before the dispute began are the standard for determining which party is right."

Thus aided by authority upon the facts as we find them, we are not in doubt as to our duty. The minority, when pressed from the Church by the departure of the majority, having the church organization, were justified in taking measures by organization to preserve the identity of the Church and its property interests, and under the law were entitled to its use and control. It is only by placing it there that the trust will be observed, and the cause is remanded to the district court for a decree to that effect.

Reversed.

NEW YORK COURT OF APPEALS (2d Div.).

Phœbe A. GREENE, *Resp't.*,

v.

Peter COUSE, *Appt.*

(.....N. Y.....)

A defendant in ejectment is not estopped to set up adverse possession by the fact that his grantor after setting up the same defense in a prior action had settled it by buying the plaintiff's title and giving his notes for the purchase price, and that the same plaintiff has brought a second action after a default in payment of the notes.

(Haight and Parker, JJ., dissent.)

(June 25, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Circuit Court for Delaware County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. James R. Baumes, for appellant:

Alex. Couse having acquired the title in fee by adverse possession to the lot in question, could not impair or lose it by the contract relied on by plaintiff under the "Statute of Fraudulent Conveyances and Contracts Relating to Lands."

4 Rev. Stat. 8th ed. 2589, § 6; *Wiseman v. Luckeinger*, 84 N. Y. 37, 38; *DeLancey v. Ganong*, 9 N. Y. 27.

When a party shows he has a legal title to

land, it cannot be taken from him by evidence that he has said he had no title to it.

Stuyvesant v. Tompkins, 9 Johns. 62, 63, affirmed in court of errors, 11 Johns. 569-572; *Keator v. Dimmick*, 46 Barb. 160, 161; *Jackson v. Cary*, 16 Johns. 305, 306; *Jackson v. McVey*, 15 Johns. 237; *Jackson v. Shearman*, 6 Johns. 19-21; *Baldwin v. Brown*, 16 N. Y. 363; *Jackson v. Long*, 7 Wend. 170-172.

A party in possession of lands may be permitted to protect himself against litigation by buying in claims made by others, without invalidating his legal rights or subjecting himself to any allegiance to others. By acknowledging the title of another he is not estopped from subsequently disclaiming holding under such title if the original entry was not under the person in whom the title is acknowledged; nor is any other person deriving the possession from such tenant estopped by such acknowledgment.

Herman, Estoppel, 2d ed. 1295, § 1159; *Jackson v. Leek*, 12 Wend. 105; *Jackson v. Spear*, 7 Wend. 403; *Jackson v. Given*, 8 Johns. 137-139; *Sparrow v. Kingman*, 1 N. Y. 242, 252-254; *Bigelow v. Finch*, 11 Barb. 498, 500; *Jackson v. Smith*, 13 Johns. 406, 413; *Jackson v. Parker*, 9 Cow. 86; *Glen v. Gibson*, 9 Barb. 634, 640; *Bain v. Mattoon*, 54 N. Y. 663-666.

One holding adversely, or otherwise, may purchase an outstanding title to support his own, whether he doubts the validity of his previous title or not, and such purchase or purchases will not affect the right or title under which such purchaser previously claimed to hold.

NOTE.—*Defenses in actions of ejectment.*

Whatever shows that the plaintiff is not entitled to the immediate possession of the premises claimed constitutes a good and valid defense in an action to recover the possession. *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.

Adverse possession must be pleaded. It cannot be shown under the general issue. *Hanse v. Mead*, 27 Hun, 162.

Defendant may interpose any equitable defense, such as an estoppel. See *Miller v. Platt*, 5 Duer, 272; *Crary v. Goodman*, 12 N. Y. 266; *Chase v. Peck*, 21 N. Y. 581.

But to avail himself of such defense, it must be pleaded. *Raynor v. Timerson*, 46 Barb. 518; *Blair v. Claxton*, 18 N. Y. 529.

The common-law rule excludes all defenses in ejectment, except those that are legal; and this rule is recognized in the federal courts. *Singleton v. Touchard*, 66 U. S. 1 Black, 342, 17 L. ed. 50; *Robinson v. Campbell*, 16 U. S. 3 Wheat. 212, 4 L. ed. 372.

But in various States equitable defenses may, under statutes, be made to the action; and not only may an equitable defense be set up, but equitable relief demanded on the part of the defendant, against the plaintiff. See *Wait, Act. & Def.* § 74, 88; *Requa v. Holmes*, 26 N. Y. 338; *Smith v. Tome*, 68 Pa. 158; *Fisher v. Moolick*, 13 Wis. 321; *Hayden v. Stewart*, 27 Mo. 286; *Newsome v. Williams*, 27 Ark. 632; *Meador v. Parsons*, 19 Cal. 294; *Willis v. Wozencraft*, 22 Cal. 607.

In several States, by virtue of the statute, every defense, legal or equitable, may be proved under the general denial. *Vanduyne v. Hepner*, 45 Ind. 451, 589; *Franklin v. Kelley*, 2 Neb. 79, 113, 115, 13 L. R. A.

In some States the defense of the Statute of Limitations may even be relied upon in this action under a general denial. *Nelson v. Brodback*, 44 Mo. 596; *Bledsoe v. Simms*, 53 Mo. 305, 307.

But it cannot be in other States, whose Codes expressly require the Statute to be pleaded. *Orton v. Noonan*, 25 Wis. 672.

An equitable defense to the action, must however, as it seems, be specially pleaded. *Stewart v. Hoag*, 12 Ohio St. 623; *Lombard v. Cowham*, 34 Wis. 486, 491.

Defendant in ejectment may successfully plead title acquired by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, or those claiming under him, whether a patent has been subsequently granted or not. *Patten v. Scott*, 10 Cent. Rep. 727, 118 Pa. 115.

It is not indispensable that the plaintiff in an action of ejectment should show a perfect indefeasible estate in fee simple, to authorize a recovery against one who can establish no legal right either of property or possession. *Lewis v. Goguette*, 3 Stew. & P. 184.

But possession should not be ousted without a clear title in the other party, especially when it has been upheld by the state tribunals. *Preston v. Bowmar*, 19 U. S. 6 Wheat. 580, 5 L. ed. 336.

And a plaintiff in ejectment who has no title whatever cannot recover, though he sue for the use and benefit of another who has the title. *Brooking v. Dearmond*, 27 Ga. 58.

But a defendant in ejectment who shows no title to the lands in dispute cannot take advantage of technical imperfections in the plaintiff's title (*McAllister v. Williams*, 1 Overt. (Tenn.) 107; *Zeringue*

Northrop v. Wright, 7 Hill, 477, 489, 495; *Burhans v. Van Vandt*, 7 Barb. 92, 102; *Jackson v. Newton*, 18 Johns. 355; *Marble v. McMin*, 57 Barb. 615; *Parker v. Merrimack River L. & C. Props.* 3 Met. 91; *Owens v. Myers*, 20 Pa. 134; *Bannon v. Brandon*, 34 Pa. 263; *Brandon v. Bannon*, 38 Pa. 63; *Lodge v. Patterson*, 8 Watts, 74; *Caperton v. Gregory*, 11 Gratt. 505; *Ridgeway v. Holliday*, 59 Mo. 444; *Cannon v. Stockmon*, 36 Cal. 585; *Hayes v. Martin*, 45 Cal. 559; *Blight v. Rochester*, 20 U. S. 7 Wheat. 535, 543, 5 L. ed. 516-519; *Chapin v. Hunt*, 40 Mich. 595; *Tobey v. Secor*, 60 Wis. 810, 812, 313; *Singer Mfg. Co. v. Tillman* (Ariz.) June 10, 1889; *Griffith v. Smith* (Neb.) June 13, 1889; *Giles v. Pratt*, 2 Hill, L. 439.

An offer to buy out a hostile claim will not estop the party making such offer from asserting title by adverse possession previously acquired.

Furlong v. Cooney, 72 Cal. 322; *Frick v. Simon*, 75 Cal. 387; *Pacific Mut. L. Ins. Co. v. Stroup*, 68 Cal. 150; *Riggs v. Riley*, 12 West. Rep. 744, 113 Ind. 208.

The agreement of March 5 was rescinded long before the commencement of the action.

The Bradstreets refused to convey according to its terms, and such refusal gave Couse the right to assent to the rescission and to treat the agreement as abandoned.

Hubbell v. Pacific Mut. L. Ins. Co. 1 Cent. Rep. 78, 100 N. Y. 47; *Lawrence v. Taylor*, 5 Hill, 107, 114, 115; *Morange v. Morris*, 3 Keyes, 48; *Graves v. White*, 87 N. Y. 463, 466; *Gerard, Real Estate*, 3d ed. 492, and cases cited; *Cross v. Beard*, 26 N. Y. 88; *Starbird v. Barrons*, 33 N. Y. 237.

The rule in such event would be to restore the respective parties to their rights as they existed prior to the making of the contract.

v. Williams, 15 La. Ann. 76; and when the plaintiff in ejectment shows a connection between his title and the title of the person in whose name he sues, it will be considered that he is authorized to use the name of the latter in the action. *Adams v. McDonald*, 29 Ga. 571.

Of course, it cannot avail the plaintiff anything to show that some third person has a better right to the premises in dispute than the defendant, unless he can connect himself in some way with the title of such third person; and the same rule will apply to the defendant in an action of ejectment. See *Bailey v. March*, 3 N. H. 274; *Enfield Props. v. Permit*, 3 N. H. 512; *Tyler, Ejectment and Adverse Possession*, chap. 4, p. 74.

As the law now stands any equitable defense may be interposed in a proceeding at law to recover the possession of real estate. Not only so, but in actions strictly legal, the defendant may have positive or affirmative relief for matter purely equitable, in a case properly stated, by way of a counter-claim or cross-demand. *Rozier v. Van Dam*, 16 Iowa, 175, 178.

The general doctrine in actions of ejectment is that the plaintiff must recover upon the strength of his own title and cannot rely upon the weakness of the defendant's claim. And if the case depends upon the legal title, the defendant may show an outstanding title in some third party, and need not show that he holds it himself or that his possession relates to it; but it must usually appear in such a case that this outstanding title existed at the time of the commencement of the suit, and was one on which the holder could recover, if he assert his right under it. *Love v. Simms*, 22 U. S. 9 Wheat. 18 L. R. A.

Battle v. Rochester City Bank, 3 N. Y. 88, 91; *Harris v. Hiscock*, 91 N. Y. 845.

Messrs. W. & G. W. Youmans, for respondent:

One who has recognized the title of plaintiff, by offering to purchase of him, cannot set up adverse possession.

Jackson v. Britton, 4 Wend. 507.

An offer to purchase lands by a party having the title does not impair or affect his right. Such offer, however, by a party bars the defense of adverse possession.

Ibid. See *Jackson v. Croy*, 12 Johns. 427; *Jackson v. Cuerden*, 2 Johns. Cas. 353.

As the plaintiff in ejectment must recover on the strength of his own title, it logically follows that the defendant may resist his suit by any title, either held by himself or outstanding, which will show that the plaintiff lacks an element which is essential to his right to recover.

Green v. Scarlett, 3 Grant, Cas. 238; 3 Wait, Act. & Def. p. 109, and cases there cited.

Potter, J., delivered the opinion of the court:

The action is ejectment, and was brought to recover possession of an undivided one-twelfth part of the premises described in the complaint. The answer was a denial of the complaint; also title in the defendant; also title in the defendant arising from adverse possession of the premises for more than twenty years and a counter-claim. The premises as claimed in the complaint consist of 100 acres in the N. W. corner of the E. $\frac{1}{4}$ of Great lot No. 24, Evans' Patent, in Delaware County. It was stipulated by the defendant, for the purposes of this appeal, that the plaintiff showed title in herself as one of the heirs-at-law of Martha Bradstreet, de-

515, 6 L. ed. 149; *Henderson v. Tennessee*, 51 U. S. 10 How. 311, 13 L. ed. 434; *Raynor v. Timerson*, 46 Barb. 518; *Green v. Scarlett*, 3 Grant, Cas. 238; *Townsend v. Downer*, 32 Vt. 183; *Atkins v. Lewis*, 14 Gratt. 30; *Dickinson v. Collins*, 1 Swan, 516; *Sharp v. Johnson*, 22 Ark. 79; *Roe v. Baxter*, 33 Ga. 81; *Connelly v. Doe*, 8 Blackf. 320; *Stuart v. Dutton*, 39 Ill. 91; *Nixon v. Porter*, 38 Miss. 401; *McDonald v. Schneider*, 27 Mo. 405; *Masterson v. Cheek*, 23 Ill. 72; *Sutton v. McLeod*, 29 Ga. 589. But see *Perkins v. Blood*, 36 Vt. 273; *Field, Lawyer's Briefs*, § 44.

Adverse possession is made out by the co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner; and whether these two essentials exist is, in all cases, a question of law, to be determined by the court, though the facts upon which they are founded are for the finding of the jury. *Baker v. Swan*, 32 Md. 355; *Dixon v. Cook*, 47 Miss. 220. See *Washburn v. Cutter*, 17 Minn. 361.

To determine what acts are sufficient to constitute an adverse possession, attention should be given to the character of the property, to discover the object of owning it, and the uses to which it would ordinarily be applied, that the mind with which it was possessed, as well as the mind with which such possession was acquiesced in, may be the better understood. *Corning v. Troy I. & N. Factory*, 44 N. Y. 577; 6 Wait, Act. & Def. 437. See notes to *Illinois Cent. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213; *Gage v. Hampton* (Ill.) 2 L. R. A. 512; *Erck v. Church* (Tenn.) 4 L. R. A. 641; *Cramer v. Clow* (Iowa) 9 L. R. A. 772; *Baker v. Oakwood* (N. Y.) 10 L. R. A. 887.

ceased, to an undivided one twelfth of the premises in question, except as such title may have been defeated by the adverse holding of the defendant herein, and his predecessors, or parted with by force of the agreement of date March 5, 1875, hereinafter set forth. The plaintiff proved and read in evidence an instrument of which the following is a copy: "Received from A. Couse his note of \$400 for the purchase price, with costs of suits, of an undivided two-thirds interest in 100 acres in the northwest corner of Great lot 24, Evans' Patent, known as the 'Wild Lot,' and being the same premises claimed to have been occupied by the said Couse for some years past; and I agree to forward to said Couse by mail, within ten days, a deed therefor. W. Youmans, Attorney for Bradstreet Heirs. Dated Delhi, N. Y., March 5, 1875,"—proved that the land therein mentioned was that in dispute; also gave evidence that the note had not been paid, and the recovery of a judgment upon the note which had not been paid. The defendant examined his grantor at considerable length to prove the defense of adverse possession of the premises, and that the defendant entered into the possession under a deed from his father, Alexander Couse, in 1882, who entered into the possession of the premises in 1849, under a deed from his father, Peter Couse, Sr., who some years before entered into possession under a written title from Joseph Nutter, and that such occupation had been continuous for over forty years, and none of the occupants had entered into possession under plaintiff, or anyone from whom plaintiff derived title, and was proceeding with the examination of other witnesses upon that subject, when the court ruled as follows:

"The Court. I think I must stop this evidence. You must make some other defense than the Statute of Limitations, or I must direct a verdict against you. The more I think of this question, the more I think the Statute of Limitations cannot prevail here." Defendant's counsel duly excepted to such ruling and decisions. "The court rules that under the contract of March 5, 1875, and the note of \$400 given therefor, and the various stipulations and contracts in connection with that, this defendant has lost his right to avail himself of the adverse possession of himself and of his predecessors, and declines to receive any further evidence of occupation and of adverse possession by the defendant and his predecessors." To which ruling and decision the defendant's counsel duly excepted.

After some additional evidence upon the part of the plaintiff in relation to a subsequent arrangement as to the time and condition of delivery of the deed and payment of the purchase price the court directed a verdict for plaintiff, to which defendant excepted. When the defendant was thus precluded from giving further evidence on the subject, that already given tended to prove title by adverse possession in the defendant's grantor at the time such instrument of March 5, 1875, was made. And there was presented a question of fact for the jury in that respect; and title so established may be as

18 L. R. A.

effectual as that created in any other manner for the purposes of remedy or defense founded upon it. *Barnes v. Light*, 116 N. Y. 34, and cases there cited. Upon this state of facts the question is presented whether the defendant should have been precluded or estopped from proving the defense of title to the premises by adverse possession. The plaintiff and Alexander Couse, at the time such contract was made, respectively claimed to be the owner of the premises; and for the purposes of the question it may here be assumed that Alexander Couse and his grantor had been in the actual and continuous possession of the premises for forty or more years, and the plaintiff, and those under whom she claimed, had not during that period, if ever, been in the actual possession, and that the said defendant, nor any of his grantors, had ever entered into or retained possession of the premises with any permission or privity with the plaintiff or her predecessors in title. In the absence of any of these relations the defendant and his grantors owed no duty or obligation to the plaintiff, and was therefore at liberty to fortify his title or purchase peace at any price and of whomsoever he chose. If, however, the adverse possession of the defendant's grantor, and those under whom he entered and claimed, had not ripened into a title at the time the contract of March, 1875, was made, the right to assert the continuance thereafter of such possession to perfect and support title as against the plaintiff would have been defeated by it. I am aware of the rule that where a lessee or vendee enters into possession of premises under a lease or contract he cannot, while he remains in possession, dispute the title of the lessor or vendor, but this case is lacking in the essential element which creates such estoppel. Neither the defendant nor his grantors entered into the possession by any manner of consent or contractual relation with the plaintiff or her ancestors or grantors. The rule in relation to estoppel does not apply "where, at the time of the purchase, the vendee is in as owner, claiming title, and his entry was not under the vendor." *Glen v. Gibson*, 9 Barb. 634-640.

Where a man is in possession of land as owner, having title, he is at liberty to purchase the land over again as often as claimants shall appear who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so." *Jackson v. Leek*, 12 Wend. 105; *Bain v. Matteson*, 54 N. Y. 666. Even in a consummated purchase the grantee in fee may purchase in an outstanding title hostile to his grantor, and fortify his own defective title. *Kenada v. Gurdner*, 3 Barb. 589. In *Watkins v. Holman*, 41 U. S. 16 Pet. 54, 10 L. ed. 885, it is said by the court in discussing such relations that "the relation of landlord and tenant in no sense exists between vendor and vendee." *Judge Bronson*, in delivering the opinion of the court in *Osterhout v. Shoemaker*, 3 Hill, 513-518, says: "The grantee takes the land to hold for himself, and to dispose of it at his pleasure. He

owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title."

These views lead to the conclusion that the exceptions before mentioned were well taken, and require a new trial.

Judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except Haight and Parker, *JJ.*, dissenting, and Follett, *Ch. J.*, not sitting.

Haight, J., dissenting:

This is an action of ejectment to recover an undivided one-twelfth part of the lands described in the complaint. The defense is adverse possession. It appears by the stipulation of the parties that "the plaintiff showed title in herself, as one of the heirs-at-law of Martha Bradstreet, deceased, to an undivided one twelfth of the premises in question except as such title may have been defeated by the adverse holding of the defendant herein and his predecessors, or parted with by force of an agreement between W. Youmans, attorney for the Bradstreet heirs, and Alexander Couse, dated March 5, 1875." It appears that on the 2d day of January, 1874, one Alexander Couse was in possession of the lands in question, and that on that day the plaintiff, with others, known as the "Bradstreet heirs," brought actions through W. Youmans, their attorney, against him, in ejectment, for the lands in question; that thereafter, and on the 5th day of March, 1875, an agreement was entered into between the parties, by which the actions were settled and discontinued, he agreeing to purchase the interests of the plaintiffs in the premises at a stipulated price, giving his note therefor, and they agreeing to deliver him a deed therefor within ten days. This agreement was subsequently modified so as to provide that the deed should be delivered upon the payment of the note. The note, although long past due, has never been paid. It further appears that on the 7th day of February, 1882, Alexander Couse quitclaimed the lands in question to his son, the defendant in this action, who thereupon entered into possession, and now claims to hold the same adversely to the plaintiff. The question thus presented for review is as to whether he can avail himself of that defense.

I shall not question the doctrine that one holding adversely, and defending upon that ground, may purchase of a third person an outstanding title to support his own, whether he doubts the validity of his previous title or not, and that such purchase will not affect his right to defend under his claim of adverse possession. But a very different question is presented by the facts under consideration. As we have seen, the plaintiff's record title is conceded. In 1874 she brought an action in ejectment to recover the possession of the premises, or of her interest therein, and that action was settled and discontinued, the defendant therein agreeing to purchase her interest in the premises. By such settlement and agreement the defendant in that action not only admitted and recognized her title and right to recover, but also waived his right or claim of adverse posses-

sion, and his possession in the premises thereafter must be deemed to be under the contract of purchase. By such agreement the plaintiff was induced to discontinue her action, and thus forego the establishing of her title by judicial decree. This action was brought eight years afterwards, and if the defendant is now permitted to avail himself of the defense of adverse possession he may now be able to prove and establish that which he could not have done eight years ago. He may thus be permitted to establish a defense, in consequence of the agreement and a breach thereof, which could not have been maintained had the settlement and agreement not been made. This cannot be allowed under the well-settled principles of estoppel. The agreement placed the plaintiff in a position where she could not maintain an action to oust the defendant's grantor until he had made a breach in his contract to purchase. The defendant gets no greater or better title than his father had, and if the defense was not available to the father it would not be to the son. There is no claim of fraud or deception in making the contract.

Sedgwick & Wait, in their treatise on "Trial of Title to Lands," at section 817, say: "When a person in possession of lands covenants with another to pay him for the land, he thereby acknowledges the title of the vendor, and is estopped from setting up an outstanding title or title in himself unless he can show that he was deceived or imposed upon in making the agreement."

In *Jackson v. Ayers*, 14 Johns. 224, where the defendant was in possession of land, and had agreed with the plaintiff to purchase and pay him therefor, it was held in a subsequent action of ejectment that the defendant was estopped from setting up a title by adverse possession in himself. In the case of *Jackson v. Britton*, 4 Wend. 507, it was held that, while an offer to purchase land by a party having title does not impair or affect his right, it, however, bars the defense of adverse possession. In *Corning v. Troy I. & N. Factory*, 84 Barb. 485-489, Hogeboom, *J.*, in delivering the opinion of the court, says: "Nor could they during the same period continue an adverse possession previously commenced. By taking a lease from the De Freests they acknowledged their title and right to convey. They held under this title, and recognized it as the true title. They must be deemed to have waived any previous imperfect rights which they had already acquired under a prior incipient adverse possession. The doctrine of cumulative disabilities does not apply. The defendants are prevented from setting up during this period an adverse possession, not for the reason that they could not purchase an outstanding title for the purpose of perfecting their right or quieting their possession, but because by taking a lease from the De Freests they have placed the latter under a disability, in a position where they cannot take proceedings to oust the defendants, and of course where the Statute of Limitations should not be permitted to run against them. It would seem, therefore, entirely clear that, as this lease did not expire until 1852, the defend-

ants cannot avail themselves of the defense of adverse possession." In *Jackson v. Cuerden*, 2 Johns. Cas. 353, the defendant wrote a letter to one Mary Clark the plaintiff's lessor, in which he offered to purchase of her lands of which he was then in possession. Subsequently, and in an action of ejectment, he offered to give evidence of more than twenty years' adverse possession in himself. This was excluded by the trial judge. On review it was held that the letter of the defendant was sufficient prima facie for the plaintiff to recover; that while the defendant was not precluded from showing that he grounded his letter on a mistake, he was precluded from setting up adverse possession or the Statute of Limitations; that the acknowledgment in his letter takes away the Statute. See also *Jackson v. Spear*, 7 Wend. 401; *Fosgate v. Herkimer Mfg. & Hydraulic Co.* 12 Barb. 352-356; *Tompkins v. Snow*, 63 Barb. 525-533; *Jackson v. Walker*, 7 Cow. 637-642; *Sayles v. Smith*, 12 Wend. 57; *Ingraham v. Baldwin*, 9 N. Y. 45-47; *Smith v. Babcock*, 36 N. Y. 167, 168; *McMath v.*

Teel, 64 Ga. 595; *Garlington v. Copeland*, 32 S. C. 57-67; 7 Am. & Eng. Encyclop. Law, 32, title, *Estoppel*.

As we have seen, the suits were settled and discontinued, and this furnished a good consideration for the agreement which thenceforth became binding upon the parties. Their rights were fixed by it, and the party in default cannot now go back and litigate questions that were disposed of in the settlement. Again, it appears that an action was brought upon the note given by Alexander Couse, and that he interposed the defense that it was given for the purchase price of the lands in question, and that the plaintiff had committed a breach of the contract in failing to deliver the deed in accordance with the terms of the contract. Upon this issue the plaintiff had judgment, thus forever disposing of the facts that the contract of purchase was made, and that there was no breach thereof on the part of the plaintiff. The judgment should be affirmed.

Parker, J., concurs.

CONNECTICUT SUPREME COURT OF ERRORS.

Samuel P. DAVIS, Appt.,

TOWN OF SEYMOUR.

(50 Conn. 581.)

1. **Claims in different counts** against a town for injuries to sheep under Gen. Stat., § 3752, not being based on contract, cannot be united to make up the amount necessary to give jurisdiction to the court of common pleas.
2. **A mere statutory obligation to pay money** does not raise an implied contract to pay it. The liability depends on the statute itself.

(December 15, 1890.)

APPPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County erasing from the docket his action brought to recover compensation for sheep which had been killed by dogs. *Affirmed*.

The facts are stated in the opinion.

Mr. Verrenice Munger, for appellant:

Section 812, Gen. Stat., permits the adding together of the different claims in case of implied contracts. Wherever, therefore, the law will imply a contract to pay a sum of money then this Statute applies.

Section 3752 creates the liability to pay certain sums of money. When the exact amount has been ascertained in the way pointed out by the Statute then the law implies a promise to pay it.

Pom. Rem. & Rem. Rights, § 512, p. 552; 1 Am. & Eng. Encyclop. Law, 886.

An implied contract is co-ordinate with duty, and whenever it is certain that a man ought to do a particular thing the law supposes him to do that thing.

Anderson, Law Dict. pp. 86, 248, 527; 2 Bl. Com. 159; 1 Wait, Act. & Def. 373.

Where it is the duty of a defendant to do an act, the law implies a promise to fulfill it.

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Bailey v. New York Cent. & H. R. R. Co. 89 U. S. 22 Wall. 639, 22 L. ed. 849; *Seena v. True*, 53 N. H. 628; Anderson, Law Dict. p. 527; *Farwell v. Rockland*, 62 Me. 296; *Bath v. Freeport*, 5 Mass. 826; *Waller v. Bank of Kentucky*, 3 J. J. Marsh. 201; 1 Chitty, Cont. 11th Am. ed. p. 87.

A liability imposed by statute is no greater than a common-law liability. In either case the duty to discharge it is the same. When, therefore, the Statute creates a debt, or gives to a party the right to demand from another a sum of money, the law raises an implied promise to pay it.

See 1 Comyn, Dig. p. 187.

The Statute in question does not provide a remedy to enforce the liability created by it. Under such circumstances the common law provides the remedy.

Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 517; 1 Swift, Dig. *585.

If no form of action is prescribed by the Statute, debt is the proper remedy. In this State, in such cases, an action, called an action on the Statute, will also lie.

1 Swift, Dig. *585, 586.

At common law debt would lie to recover money due, "upon simple contracts, express or implied, whether verbal or written, and upon contracts under seal; or of record, and on statutes by a party aggrieved."

1 Chitty, Pl. 108; 1 Swift, Dig. p. 572.

If debt would lie, so would assumpsit.

1 Chitty, Pl. 106.

The law implies a promise, "where a liability to indemnify is imposed by Statute."

1 Swift, Dig. *898. See *Milford v. Com.* 3 New Eng. Rep. 781, 144 Mass. 64; *Pawlet v. Sandgate*, 19 Vt. 623; *Bell v. Burrows*, Bull. N. P. 129; *Rann v. Green*, Cowp. 474; *Hillsborough County v. Londonderry*, 43 N. H. 452; *Metropolitan R. Co. v. District of Columbia*,

132 U. S. 1, 33 L. ed. 231; *Haigh v. United States Bldg. L. & L. Asso.* 19 W. Va. 792; *Shepherd v. Hills*, 11 Exch. 55; *Kellogg v. Union Co.* 12 Conn. 15; 1 Wait, Act. & Def. 877; *Childs v. Harris Mfg. Co.* 68 Wis. 231.

Messrs. Wooster, Williams & Gager, for appellee:

The amount of damage or matter in demand, as stated, is clearly and positively below the sum of \$100, and therefore below the jurisdiction of the Court of Common Pleas.

Hunt v. Rockwell, 41 Conn. 51; *Camp v. Stevens*, 45 Conn. 92.

The counts could not be added together so as to bring the case within the jurisdiction of the court.

Nichols v. Hastings, 35 Conn. 546; *Camp v. Stevens*, *supra*; *Denison v. Denison*, 16 Conn. 35; *Denton v. Danbury*, 48 Conn. 868.

Andrews, J., delivered the opinion of the court:

This action was brought to the Court of Common Pleas in New Haven County, under Gen. Stat., § 3752.* The complaint contains three counts. The first one alleges that on a day named certain sheep of the plaintiff, worth \$12, were killed by dogs within the Town of Seymour, and that he gave notice, and afterwards proved to the satisfaction of the selectmen, that the damage done to them thereby was \$12; and the count concludes "that, by force of the Statute in such case made and provided, said Town became liable to pay to the plaintiff and a right of action had accrued to the plaintiff to recover from said Town, the amount of said damage." The second and third counts are in form exactly like the first. The second alleges a killing of sheep on another day, and that the damage was \$77. The third alleges a killing on still another day, and lays the damage at \$24. The complaint claims damages to the amount of \$150. The court of common pleas has jurisdiction only when the demand exceeds \$100. On motion by the defendant that court erased the case from the docket for want of jurisdiction, and the plaintiff has appealed to this court.

It was decided in *Denison v. Denison*, 16 Conn. 38, that the combining of the claims in several counts would not give jurisdiction to a court, where the claim in the separate counts, taken each by itself, was not sufficient for that purpose. This ruling has been followed in numerous cases since, among which are *Nichols v. Hastings*, 35 Conn. 546; *Hunt v. Rockwell*, 41 Conn. 51, and *Camp v. Stevens*, 45 Conn. 92. The plaintiff does not deny the force of these decisions, but he seeks to avoid their application to this case. He says that each of the counts in the complaint sets forth facts from which the law implies a contract, and that any number of contracts may be joined, and the amounts claimed in all may be added together, for the purpose of conferring jurisdiction. Gen. Stat. § 812. If the plaintiff when he brought the action

believed as he now professes to believe, it is somewhat singular that he did not frame his complaint accordingly. The complaint declares that the Town is liable by direct force of the Statute, and says nothing about any contract. But does the law imply a contract from the facts stated in any of the counts? A contract is a promise made on a consideration. Without a consideration there can be no contract, express or implied. There must be a subject matter in respect to which there has been a meeting of the minds of the parties. A contract involves an offer and an acceptance. One party expresses his readiness to be bound to the performance of something concerning the subject matter, and the other party expresses his acceptance of that readiness. This is the meeting of their minds which is essential to the making of a contract. Where there is a consideration, such offer and acceptance is a contract. It is true that many times there is such a condition of facts that the law will imply, sometimes an offer by one party and sometimes the acceptance by the other, and so supply an element necessary to the completion of a contract which otherwise might be wanting.

The expression "implied contract" is perhaps open to objection, in that it seems to admit that an entire contract in all its parts may be implied. The parties to a contract can never be implied, nor the subject matter, nor the consideration. These must be shown. But the promise which is necessary to complete a contract may be implied. Thus in 1 Swift, Dig. p. 132, it is said: "The term 'implied contract' is generally used to denote a promise which the law, from the existence of certain facts, presumes that a party has made." And at page 397 the cases in which the law implies a promise are brought together and arranged under six heads. The sixth is, "where a liability to indemnify is imposed by statute." The plaintiff claims that, wherever a statute or the common law imposes a duty or an obligation to pay money, there the law implies a promise to perform that duty or pay that money. This claim cannot be maintained. Neither a statute nor a rule of law alone raises an implied promise. There must always be the fact of a consideration outside of and in addition to the Statute or the rule of law; and the promise is implied rather from the consideration than from the Statute. The Statute or the rule establishes the duty, but the consideration raises the implied promise to perform that duty. The authorities cited by the plaintiff illustrate this perfectly. Take the citation from Pomeroy, Remedies and Rem. Rights, § 513. The example there given is from Metcalf on Contracts, and is as follows: "A husband is bound to support his wife, and if he wrongfully discards her any person may furnish support to her, and recover pay therefor from the husband. In an action of assumpsit, the furnishing of the support must be alleged to have been by the plaintiff at the request of the husband, and a promise by the husband must also be alleged. But proof of the actual facts supports both the allegations. The husband, being by law liable to pay, is held to have

*That Statute provides that when any person shall sustain damage to his sheep, by reason of their being killed or injured by dogs, he shall inform the selectmen of the town in which the damage is done, who shall estimate the amount of the damage, which shall be paid by the town. [Rep.]

made both the request and the promise." pp. 203, 204. The furnishing the supplies to the wife is the consideration from which the law raises the promise to perform the legal duty. The citation from 1 Swift, Dig. 397, is to the same effect. It is that where an indemnity is imposed by a statute there the law implies a promise. The example that explains this rule is given at page 488, that "it is the foundation of suits brought by one town against another, or by an individual against a town, to recover expenses incurred in the support of a pauper." The support of the pauper is the consideration. Where one town has been compelled to expend money in the necessary support of a pauper who belongs to another town, there is an implied promise by the latter town to pay the former one, because the former has paid money which the latter ought to have paid. To be sure, without the Statute there would be no duty to perform. But the existence of a duty does not of itself raise any implied promise to perform it. There being a consideration for a promise in addition to the duty, the conditions exist from which the law presumes a promise to have been made. If the law implies a promise from a statute liability alone, to whom is such promise made? Who can sue upon it? The law requires a hus-

band to support his wife. If he wrongfully discards her, is there an implied promise to her? Could she bring a suit? Each town is required by statute to support its paupers. A is a pauper belonging to the Town of Seymour. Is there an implied promise to A? Could he sue the Town? If he could not, who could? Take another case. A statute says that every person who steals the property of another shall pay the owner treble its value. Suppose the plaintiff's sheep had been stolen, and he should bring an action for the treble value. Would he, or could he, sue on an implied promise?" Or suppose that the thief had been sentenced to pay a fine; that would be a statute liability of the most emphatic kind. Is it so that there is an implied contract on the part of the thief to pay the amount of the fine? Questions of this kind might be multiplied. But these are sufficient to show that the plaintiff's contention cannot be sustained. In the present case the Town is liable, if liable at all, by the direct force of the Statute. The elements of a contract are not set forth in the complaint, and do not exist in the case.

There is no error in the judgment appealed from.

The other Judges concurred.

VIRGINIA SUPREME COURT OF APPEALS.

M. J. DAY, Admr., etc., of Burr Garland,
Deceased, et al., Appts.,
v.

John F. SLAUGHTER, Admr., etc., of Samuel
Garland, Sr., Deceased, et al.,

(...Va....)

1. A gift by will of the use of the profits of a plantation to a person "under his super-

intendence," but not to be "bound for his past debts or for future debts and liabilities other than decent and comfortable support," does not give him any absolute property in the profits, but he holds them as trustee for the remaindermen except as to what he needs for "decent and comfortable support;" therefore such profits cannot be reached by his creditors.

2. A valid trust for the support of a person may be created which shall be free from his debts and liabilities.

NOTE.—Creator of estate may qualify its enjoyment
by annexing conditions and limitations.

A testator is under no obligation to provide for payment of the debts of devisee; he may condition his bounty as suits himself, if he violates no rule of law. He may provide that the estate shall cease upon bankruptcy of the donee, or upon filing of a creditor's suit to subject the estate to the debt of the first donee. *Bramhall v. Ferris*, 14 N. Y. 41.

A party may settle property on another in such manner that it cannot be alienated, and creditors and assignees cannot take it, or he may annex a proviso that on alienation or bankruptcy it shall shift over to a third person. 1 *Perry*, Tr. § 388, citing *Re Mugeridge's Trusts*, Johns. (Enr.) 625; *Kearsley v. Woodcock*, 8 Hare, 185; *Joel v. Mills*, 3 Kay & J. 458; *Large's Case*, 2 Leon. 82; *Churchill v. Marks*, 1 Coll. 441; *Sharpe v. Cosserrat*, 20 Beav. 470; *Shree v. Hale*, 12 Ves. Jr. 404; *Lewes v. Lewes*, 6 Sim. 304; *Cooper v. Wyatt*, 5 Madd. 462; *Lockyer v. Savage*, 2 Strange, 947; *Yarnold v. Moorhouse*, 1 Russ. & M. 364; *Stephens v. James*, 4 Sim. 499; *Ex parte Oxley*, 1 Ball & B. 267; *Rochford v. Hackman*, 9 Hare, 475; *Ex parte Hinton*, 14 Ves. Jr. 508; *Stanton v. Hall*, 2 Russ. & M. 175.

A spendthrift trust in which the grantor is himself the sole beneficiary for life, with power to dispose of the trust property at death, leaving neither 18 L. R. A.

the income nor the corpus of the estate subject to his debts, cannot be upheld. *Ghormley v. Smith*, 11 L. R. A. 566, 139 Pa. 584.

The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable, and it will suffice if the intention to so make it can be clearly gathered from the instrument construed in the light of the circumstances. *Slattery v. Wason*, 7 L. R. A. 338, 151 Mass. 266; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Baker v. Brown*, 5 New Eng. Rep. 904, 146 Mass. 369.

Where so much of the income of a trust fund is given to a person as shall be necessary for his support, his right thereto is in its nature inalienable and cannot be reached by his creditor. *Slattery v. Wason*, *supra*. See *Perkins v. Hays*, 8 Gray, 406; *Pope v. Elliott*, 8 B. Mon. 58; *Holdship v. Patterson*, 7 Watts, 547.

The interest and dividends of real estate, or personal property held in trust, may be enjoyed by the beneficiary without liability for his debts. *Nichols v. Eaton*, 91 U. S. 710, 23 L. ed. 254.

Limitation in trust estates.

A trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming in-

(April 30, 1891.)

APPEAL by defendants from a decree of the Circuit Court for the City of Lynchburg in favor of plaintiff in a suit brought to recover the amount alleged to be due from Burr Garland, deceased, to the estate of Samuel Garland, Sr., deceased, out of the surplus profits of an estate in which Burr Garland had an interest. *Reversed.*

The facts are stated in the opinion.

Messrs. William J. Robertson and Edward S. Brown for appellants.

Mr. E. C. Burke, for appellee:

If the intention of the testator was to bequeath by way of remainder to Mrs. Morriss and her children what of the profits of the estate had not been expended by B. Garland for his support, such bequest would be void for uncertainty.

May v. Joy nes, 20 Gratt. 692; *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Blair v. Muse*, 88 Va. 238.

The doctrine of *Brandon v. Robinson*, 18 Ves. Jr. 483, that "if property is given to a man for his life the donor cannot take away the incidents of a life estate" (alienability being one of the incidents), is the firmly established English doctrine; and the same doctrine prevails in all of our States, except two, in which the question has been decided.

Gray, *Restraints on Alienation*, §§ 134-277.

The doctrine has been recognized in Virginia.

Nickell v. Handly, 10 Gratt. 396; *Hulme v. Tenant*, 1 Lead. Cas. Eq. 4th Am. ed. 766; *Nixon v. Rose*, 12 Gratt. 429.

Mr. J. Singleton Diggs, also for appellee:

solvent and shall thereupon vest in another; but the *cestui que trust* cannot hold and enjoy his interest entirely free from the claims of creditors. *Nichol v. Levy*, 72 U. S. 5 Wall. 433, 18 L. ed. 590; *Hallett v. Thompson*, 5 Paige, 583, 3 L. ed. 840; *Bramhall v. Ferris*, 14 N. Y. 41; *Easterly v. Kaney*, 36 Conn. 18; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. See *White v. Thomas*, 8 Bush, 661; *Marshall v. Rash*, 87 Ky. 119.

Property may be given to a man until he shall become bankrupt, and in such case, neither the man nor his assignee can have it, beyond the period limited: but if it is given to a man for life, the donor cannot take away the incidents of a life estate. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Oldham v. Oldham*, L. R. 3 Eq. Cas. 404; *Shee v. Hale*, 18 Ves. Jr. 404.

An interest in property held in trust for a person during life, under a will providing that no part of it shall be assignable or in any way liable to be taken for his debts, is not property which can lawfully be sold, assigned or conveyed, or be taken on execution. *Billings v. Marsh* (Mass.) 10 L. R. A. 764.

A clause in a will diverting property upon alienation alone will embrace only the voluntary acts of the party, and will not apply to transfers by operation of law, as by bankruptcy. *Lear v. Leggett*, 2 Sim. 479, 1 Russ. & M. 990; *Wilkinson v. Wilkinson*, 3 Swanst. 528; *Whitfield v. Prickett*, 2 Keen, 608.

If a fund is devised to trustees with directions to pay the income to testator's son during his life, free from the claims of creditors, income which accrues prior to a decision of the court of last resort authorizing its application to his debts, does not apply to debts which accrue after such decision. *Bull v. Kentucky Nat. Bank* (Ky.) 12 L. R. A. 37.

If there is a clause against anticipation, an as-
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B. Garland's power of disposal, as to all the profits, was ample and absolute, so that if testator had intended and attempted to convey the surplus, not used and consumed by him, to Mrs. Morriss, etc., it would have been clearly void.

Carr v. Effinger, 78 Va. 197; *Cole v. Cole*, 79 Va. 251.

Messrs. Kirkpatrick & Blackford and R. G. H. Dean also for appellees.

Hinton, J., delivered the opinion of the court:

This is the sequel to the case of *Garland v. Garland*, reported in 84 Va. 181.

As the case was then presented, it appeared that Wm. H. Garland, executor of Burr Garland, deceased, had brought a suit in the proper court in Mississippi to settle the administration accounts of his testator as administrator *c. t. a.* of Samuel Garland, Sr., deceased; that the court in Mississippi ascertained the amount due to be \$64,130.88, and decreed that the domiciliary executor, the said Wm. H. Garland, should pay the same to John F. Slaughter, who had qualified in Virginia as administrator *de bonis non, c. t. a.*, of the said Samuel Garland, Sr. Burr Garland died in Virginia in December, 1869. On his death there was found in the hands of John T. Merrell, in Lynchburg, Va., the sum of \$1,421.52, which was the remains of a sum of money said Burr Garland had deposited with him on call, and subject to his (Burr Garland's) order. It also appeared that when Burr Garland died he was in possession of certain conveyances or assignments to himself from several legatees of the said

signment of arrears already accrued and not of future income is good. *Re Stulz's Trusts*, 4 DeG. M. & G. 404.

A declaration in a will establishing "a trust fund the income to be paid annually to a person for life, and not to be subject to the debts of the beneficiary, will not take it out of a statute making trust estates subject to the debts of the beneficiary, where the beneficiary is given power to dispose of the principal by will. *Haycraft v. Bland* (Ky.) 9 L. R. A. 599.

Where a will gives a beneficiary an unrestricted interest in the income of a fund during his life, he may, in the absence of statutory prohibition, alienate as a whole or in part, before the time fixed for its payment. *Caldwell v. Boyd*, 7 West. Rep. 403, 109 Ind. 447; *Martin v. Davis*, 82 Ind. 383; *Wood v. Wallace*, 24 Ind. 226; *Farmers & M. Sav. Bank v. Brewer*, 27 Conn. 600; *Perry, Tr.* § 396; *Story, Eq. Jur.* §§ 974, 1044.

Trustees may be clothed with discretion.

A will devising property in trust to pay such part of the proceeds to another as in the discretion of the trustee he may think best, does not vest in the beneficiary such an estate as may be subjected to the payment of his debts. *Marshall v. Rash*, 87 Ky. 118; *White v. Thomas*, 8 Bush, 662; *Davidson v. Kemper*, 79 Ky. 5.

The trustees may be clothed with a discretion as to the amount of income which they shall apply to the use of the beneficiary. *Keyser v. Mitchell*, 87 Pa. 473; *Rife v. Geyer*, 59 Pa. 903; *Shryock v. Waggoner*, 28 Pa. 430; *Brown v. Williamson*, 36 Pa. 338; *Eyrick v. Hetrick*, 13 Pa. 438; *Shankland's App.* 47 Pa. 113; *Girard L. Ins. & T. Co. v. Chambers*, 46 Pa. 485; *Norris v. Johnston*, 5 Pa. 287; *Vaux v. Parke*, 7 Watts & S. 19; *Fisher v. Taylor*, 2 Rawle, 33; 2 Pom. Eq. 537.

Samuel Garland, Sr., who were children of Nicholas Garland, a brother of the testator, of the legacies given to them in the will of Samuel Garland, Sr. Slaughter being unable, by reason of Burr Garland's insolvency, to make the money decreed by the Mississippi court in that State, and, finding these assets in Virginia, brought suit in Virginia to enforce the Mississippi decree. To that suit Charles Y. Morris, administrator with the will annexed of Burr Garland, deceased, and Mary Garland, his surety, were made defendants.

Upon this state of facts, this court held that the decree of the Mississippi court must be accepted as final and conclusive evidence of the fact and amount of indebtedness by Burr Garland, the Mississippi administrator of Samuel Garland, to Samuel Garland's estate. And further, that the decree of that court did not undertake to distribute it, nor to decree who are entitled to receive it under Samuel Garland's will, but decreed it to be paid over to the Virginia domiciliary executor, to be by him distributed to those entitled, according to the declared intention of the testator; "but this decision is without prejudice to any right of action which Paulina B. Morris may have in this or in an independent suit." When the case got back to the circuit court the plaintiff filed his amended bill, making Paulina B. Morris and her children parties.

After the case had been matured for hearing, on application for an order directing accounts, the court proceeded to construe the ninth clause of the will of Samuel Garland, Sr., upon the true construction of which the present controversy must turn.

That clause is in these words:

"9th. My favorite brother, B. Garland, raised by me, and long a resident of Mississippi, is, and has for a long time past been, embarrassed in debt by losses of trade in 1837, and liabilities as surety for others. It might be unsafe to devise property to him absolutely. I therefore set apart in trust in the hands of my executor, for the benefit of my said brother, either of my plantations in Hinds County, called 'Barrens' or 'Tudor Hall,' whichever he may choose, and forty slaves in families—say about twenty-five hands, balance heads of families, children, and house servants—to be selected out of the stocks in both places; mules, horses, stock, etc., sufficient for the cultivation of the place so selected by him, with provisions, house and kitchen furniture, plantation tools, etc., oxen, hogs, etc., to make a complete estate. The profits of the estate is set apart for his (B. Garland's) use, under his superintendence. But neither the estate nor profits shall be bound for his past debts or for future debts and liabilities, other than decent and comfortable support. At his death all the property in this clause is to pass to Charles Y. Morris, in trust, to the separate use of his wife, Paulina B. Morris, and her children."

The circuit court was of opinion, and decreed, "that the estate of the said Burr Garland, in the profits set apart by the said clause for the use of the said Burr Garland,

became and was, under the law, and by virtue of said will, his absolute estate, and, as such, liable not only for such debts as might be contracted for his decent and comfortable support, but for all his debts; and the said profits did not, nor did any part thereof, pass under the said will to the said Charles Y. Morris, in trust, for the separate use of the said Paulina B. Morris and her children, nor did they, or either of them, acquire any estate or interest therein under the said will."

This, however, is not, in our opinion, the interpretation to be put upon the clause of the will now under review. Burr Garland, as the very first words of this clause of the will say, was the favorite brother of the testator, by whom he had been reared. He had become so involved in debt, by reason of losses in business, doubtless occasioned by the financial panic of 1837, and by liabilities incurred as surety for others, that it appeared to the testator practically impossible for him ever to free himself from this load of debt.

In this condition the testator saw that an absolute gift or devise of property to him would be of no service to him, but would, in effect, be a gift of so much property to his creditors, who had not the slightest claim upon the testator. He therefore endeavored, by a carefully devised trust, to protect his brother in his declining years from penury and want, by giving him the mere right to "a decent and comfortable support" out of the profits of an estate, the legal title to which, as well as to the profits, he is careful to confer upon the trustee. And, having made this provision for his brother—a provision strictly limited to the use of so much of the profits as was necessary for "a decent and comfortable support"—and having declared that neither the estate nor profits shall be bound for his past debts or liabilities, or for future debts incurred on any other account, he gives all the property in this clause (clearly meaning the estate and any surplus profits) over to Charles Y. Morris, in trust, to the separate use of his wife, Paulina B. Morris, and her children.

Now, this being the purpose of the testator, too clearly manifested to require any verbal criticism upon the mere words of the will, the only remaining inquiry is, whether this intention shall be allowed to prevail or, to express the same idea differently, whether there is any rule of the court of chancery in this State which defeats it.

On behalf of the appellees, it is insisted that the testator, by his will, gave to Burr Garland the profits therein mentioned absolutely, and that the exemption of the profits from liability for Burr Garland's debts is void, because they say that it is a fundamental doctrine of the English chancery, and that the same rule prevails in America, that no such estate can be deprived of the incident of alienability or liability for the debts of the owner.

But this argument seems to me to be beside the mark. In this case the devisee and legatee, Burr Garland, did not take any absolute property in the profits of the estate which he might have assigned or aliened; but, on the contrary, he acquired the mere,

although exclusive, right to a preception of so much of said profits as would furnish a decent and comfortable support for himself, and this was so qualified and limited as to fence out all his creditors except those who furnished him supplies for his support. Had he undertaken to expend these profits in any other way he would have been guilty of a breach of trust, for there was in the eye of a court of equity as complete a trust in him to apply these profits in this one direction as there was in the trustee to hold the legal title. And while he (Burr Garland) took this qualified right, which we think it is a misnomer to call property, the remaindermen took a vested remainder in all the surplus or unexpended profits.

It is admitted that its exact question has never been decided in Virginia, although several cases have arisen in this State where the trusts were held to be blended, and therefore that donee had no interest that was divisible from the other *cestuis que trust*, and therefore no property that could be subjected to his debts.

But in *Nickell v. Handly*, 10 Gratt. 886, Judge Samuels, delivering the opinion of the court, said: "There is nothing in the nature or law of property which could prevent the

testatrix, when about to die, from appropriating her property to the support of her poor and helpless relations; nothing to prevent her from charging her property with the expense of food, raiment and shelter for such relations. There is nothing in law or reason, I conceive, which should prevent her from appointing an agent or trustee to administer her bounty.

But the question has been carefully considered by the Supreme Court of the United States in the case of *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254, and by the Supreme Judicial Court of Massachusetts in the case of *Broadway Nat. Bank v. Adams*, 133 Mass. 170, and in each case it was held that there was nothing in the doctrines of the American chancery which prohibits a trust like the present.

The reasoning of these cases commends itself to our judgment, and fully establishes the validity of this trust.

The decree of the court below being in conflict with these views, must be reversed, and the cause must be remanded for further proceedings to be had in accordance with this opinion.

Decree reversed.

Petition for rehearing overruled.

TEXAS SUPREME COURT.

PULLMAN PALACE CAR CO., *Appt.*

v.

A. L. SMITH.

(....Tex....)

1. **A sleeping-car company is liable for the mistake of its servants** in awakening passengers in its car and causing them to get off at a water tank half a mile from the depot in the dark and rain, where they were left by the train, and the consequent exposure resulted in serious damage to them.

2. **A witness's testimony that she knows of nothing else** which could have caused her illness except the exposure, on which her husband's action for damages is based, is admissible in connection with the details of her exposure and sickness.

3. **Evidence of the amount of plaintiff's salary** and the number of weeks that he lost is admissible in an action for damages, expressly claiming loss of time as an element of the damage.

4. **A physician's statement as to what a person told him** about her exposure as the basis of his opinion as to the cause of her sickness is not inadmissible on the part of the plaintiff in an action for damages sustained from the exposure.

5. **Error in charging on the rule of contributory negligence** is not prejudicial to defendant, where there is no evidence of plaintiff's negligence.

6. **The obligation to awaken and noti-**

fy a passenger in time for him to prepare safely and comfortably to leave the train at his destination is directly involved in his contract for the use of the sleeping berth.

(December 12, 1890.)

APPEAL by defendant from a judgment of the District Court for Kaufman County in favor of plaintiff in an action brought to recover damages for injuries, losses and expenses caused by the negligence of defendant's servants in causing plaintiff and his wife to leave defendant's car at the wrong place. *Affirmed.* Messrs. Percy Roberts and E. P. Willing for appellant.

Messrs. Shelton F. Leake and Word & Charlton, for appellee:

It was legitimate for Mrs. Smith to testify, if she knew, the cause of her illness, and her testimony, "that she knew nothing else that could have caused her illness, except the exposure to which she was subjected on the morning she left the car of defendant at Terrell," was proper.

St. Louis, T. & A. R. Co. v. Burns, 71 Tex. 481.

The time lost by plaintiff in attending his sick wife was certainly an element of damage; and the value of that time could best be estimated by what it was really worth to him.

Howard Oil Co. v. Davis, 76 Tex. 635.

The testimony of the physician was proper. *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 648; 1 Greenl. Ev. 14th ed. § 440, pp. 580, 581.

NOTE.—Railroad companies liable for acts of their agents and servants. See *note* to *Cincinnati, I. St. L. & C. R. Co. (Ind.)* 6 L. R. A. 241. 13 L. R. A.

Liable for injuries resulting from misconduct of their servants. See *note* to *Dillingham v. Anthony* (Tex.) 3 L. R. A. 684.

Contributory negligence, to defeat a recovery, must contribute to the injury.

Houston & T. C. R. Co. v. Smith, 52 Tex. 188.

It was the duty of the agents in charge of the Pullman Palace Car to notify passengers when and where to get off. The agents in charge of the car having put Mrs. Smith off before she reached Terrell Station, and at such time and place and under such circumstances as that she was injured thereby, the Pullman Car Company is liable for such damages, if any, as she sustained.

Pullman P. Car Co. v. Pollock, 69 Tex. 120; *Memphis & L. R. R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *Texas & P. R. Co. v. Garcia*, 62 Tex. 288; *Gulf, C. & S. F. R. Co. v. Greenlee*, Id. 844.

Henry, J., delivered the opinion of the court:

This suit was brought by the appellee against the Pullman Palace Car Company, a corporation, to recover damages. The petition alleges that plaintiff and his wife engaged passage on a train of the Texas & Pacific Railway Company to Terrell, in this State; that, being such passengers, they, at a point in the State of Louisiana, applied to the defendant corporation for, and obtained from it, berths on the Pullman sleeping-car, which was run in connection with the train on said railway; that shortly after entering said sleeping-car, plaintiff and his wife retired, and were asleep; that, under the rules and regulations of defendant, and by common usage and practice, defendant's agents in charge of said corporation were bound to awake plaintiff and his wife in time to enable them to dress and get off the train at Terrell, the place of their destination, and that they relied on them to do so; that said agents went to sleep and neglected their duty; that when said train reached the water-tank, about one-half mile east of the passenger depot at Terrell, which it did about 5 o'clock in the morning of February 5, 1889, it was stopped for the purpose of taking on a supply of water, and for other purposes, and that this fact was known or should have been known to defendant's agents; that, when said train had stopped at said water-tank, defendant's said agents awoke plaintiff and his wife, and told them that they were at the depot, and to hurry off; that said agents caused plaintiff and his wife to get off of said car at said water-tank; that in the excitement and rush incident to the announcement that the train was at Terrell, and that all must hurry off, plaintiff's wife was pushed and shoved off and down the car-steps to the ground, some three feet in distance; that his wife had no time to properly dress herself; that it was a cold and damp morning; that the ground and grass were wet from recent rains; that as soon as plaintiff and his wife were off the train, and before they had learned of the mistake, and that the depot had not been reached, the train moved off and left them standing in the rain, mud, and cold; that plaintiff and his wife were strangers in Terrell, and did not know where the depot and hotels were situated;

that it was so dark as to make it impossible to move with discretion; that they were forced to remain standing at the water-tank for a great while in the rain, mud, and cold; that plaintiff's wife was greatly frightened, and was made sick by the exposure; that she was confined to her bed and unable to care for herself for more than five weeks; that plaintiff was forced to provide medical aid for her, and pay therefor; that plaintiff was forced to remain away from his home, which was in the State of Louisiana, and his business, to give his attention to his wife, for more than two weeks, and suffered much mental anguish on account of his wife's condition; that his wife suffered greatly, and that her health was permanently impaired because of the premises.

We think that the petition states a good cause of action, and that there was no error in overruling defendant's demurrer. Judgment was rendered in favor of the plaintiff on the verdict of a jury for \$1,125.

The wife of plaintiff gave her deposition as a witness, detailing very fully the circumstances of her exposure and sickness, and, in reply to a question, said: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." There was no error in overruling defendant's objection to this evidence. The plaintiff, on his examination as a witness, made the following statement: "I was getting a salary of \$1,250 per annum, eight months' school, as professor in the state normal, and lost three weeks in attending my wife, which it was necessary for me to do." The defendant objected to the evidence, and now assigns error on its admission, upon the ground that it was irrelevant. One of the elements of damages stated in the plaintiff's petition was loss of his own time while attending and nursing his wife. Evidence tending to prove that issue cannot be considered irrelevant. We find no error in the action of the court in permitting the physician who attended Mrs. Smith during her illness to state what she told him while he was treating her, about her exposure at the place where she left the train, in connection with his own opinion as to the cause of her sickness. The statement was made as the basis of the doctor's opinion, and not as independent evidence to establish the fact of exposure; even had the latter been the purpose, it would furnish no ground for the reversal of the judgment, as both the wife and the husband had, as witnesses, themselves fully stated every fact upon the subject, and there was no opposing evidence with regard to the circumstances attending their leaving the train, and the exposure that followed it.

Appellant complains of the following extract from the charge of the court: "If defendant's agent was guilty of negligence to the plaintiff's damage, and plaintiff or wife were also guilty of negligence, which contributed to the injury or damage, the defendant cannot be held liable for such damage or injury, unless it has been shown that the negligence of defendant's agent was the direct and proximate cause of the damage."

Abstractly considered, this charge was erroneous. It relieved the plaintiff from the effect of the contributory negligence of himself and his wife, if such negligence had existed. The record, however, contains no evidence whatever tending to show negligence upon the part of the plaintiff or his wife at the time the wrong was committed, and therefore no charge upon contributory negligence was called for or proper. The charge as given could not prejudice defendant, under the proof. While it is true that the contract for carriage was with the Railroad Company, and not with the defendant, and that the Railroad Company was under obligations to plaintiff, as a carrier, for which it would have been liable to him for damage if it had failed in its duty, it still remains to be said that the defendant also owed certain duties to the passengers. *Pullman P. Car Co. v. Pollock*, 69 Tex. 120; *Pullman P. Car Co. v. Matthews*, 74 Tex. 654.

The evidence shows that the Pullman car was hauled by the Railroad Company, and that the porter and conductor on the sleeping-car were the servants, and under the control, of the Sleeping-Car Company. The record contains no evidence with regard to rules, regulations, or usages relating to the transportation of passengers on such cars. It does show that the defendant, and not the

Railroad Company, received the compensation for and undertook to furnish the sleeping accommodations, and that they at least were under the exclusive control of the defendant. Whatever may be the duty of the Railroad Company with regard to notifying its passengers, including such as may be in the sleeping-car, of its arrival at the station to which they are destined, we are not able to conclude that the servants of the defendant owe no such duty to the sleeping passenger; on the contrary, we think that the obligation to awake and notify the passenger in time for him to prepare to safely and comfortably leave the train at the point of his destination is directly involved in the contract for the use of the sleeping-berth. In this case, the servant of the defendant assumed the discharge of that duty, and from that fact, as well as the failure of the defendant to introduce any evidence explaining what the duties of its servants were, or as to what are the usages and rules in force on its cars, it may properly be presumed that the servant of defendant was acting within the scope of his employment. There can be no doubt that the negligent discharge of the duty resulted in damage to the plaintiff.

The judgment is affirmed.

Petition for rehearing overruled.

RHODE ISLAND SUPREME COURT.

Charles Sidney SMITH *et al.*, Comrs. of
Sinking Fund,
v.

Orin WESCOTT *et al.*, Comrs. of North
Burial Grounds.

(.....R. L.....)

**Municipal officers to whom, as such,
money has been given in trust, under au-**

thority of a statute, have no vested right therein which prevents the Legislature from transferring the trust to other officers, and this rule is not changed by the fact that the trust is private in its nature, and not one recognized as charitable.

(May 2, 1891.)

APPPLICATION by the Commissioners of the Sinking Fund of the City of Providence for

NOTE.—Municipal corporation may take and administer property in trust for charitable uses.

A city as a corporation is capable of taking in trust devises and bequests for charitable uses, and may carry into effect such devises and bequests. *Perin v. Carey*, 65 U. S. 24 How. 465, 16 L. ed. 701.

As to the capacity of municipal corporations to take by devise, they stand upon the same ground as natural persons. *Chambers v. St. Louis*, 29 Mo. 543; *Perin v. Carey*, *supra*.

Such corporations, unless especially restrained, are capable of taking property, real and personal, in trust for purposes germane to the purposes and objects of their institution. *Jackson v. Hartwell*, 8 Johns. 422; *Phillips Academy v. King*, 12 Mass. 548; *Pickering v. Shotwell*, 10 Pa. 27; *Chambers v. St. Louis*, *supra*; *Philadelphia v. Elliot*, 8 Rawle, 170; *McDonogh v. Murdoch*, 56 U. S. 15 How. 367, 14 L. ed. 732, 8 La. Ann. 171; *Bell Co. v. Alexander*, 22 Tex. 350; *Columbia Bridge Co. v. Kline*, Bright, Pa. 320; *Miller v. Lerch*, 1 Wall. Jr. 210; *Webb v. Neal*, 5 Allen, 575; *Green v. Ruthersforth*, 1 Ves. Sr. 432; 2 Dillon, Mun. Corp. 535.

They may hold property in trust under a will for charitable uses, and may be compelled to execute such trust. *Peynado v. Peynado*, 82 Ky. 5.

They may take and hold property in trust in the same manner and to the same extent as a private

person, even though the trust is not strictly within the scope of the direct purposes of their charters. *McDonogh v. Murdoch*, *supra*.

The law against perpetuities has no application to such devises and bequests. *Perin v. Carey*, *supra*.

On the contrary, courts of equity will protect such gifts and prevent alienation of the lands devised for charitable purposes. *Hillam's Case*, Duke, 80, 375; *Mayor of Bristol v. Whitton*, Id. 81, 377; *Mayor of Reading v. Lane*, Id. 81, 361; *Christ's Hospital v. Grainger*, 1 Macn. & G. 460; *Griffin v. Graham*, 1 Hawks, 130; *State v. Gerard*, 2 Fred. Eq. 210; *Lewis, Perpetuities*, 864.

A bequest to a town in trust in perpetuity for the benefit of the poor of the town, not confined to those for whose support the town is under a statutory liability, is invalid for want of an ascertained beneficiary. *Fosdick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 581; *Holland v. Alcock*, 11 Cent. Rep. 861, 108 N. Y. 312.

Legislative power over their administration of trusts.

The laws which establish and regulate municipal corporations are not contracts. They may be repealed or altered at the will of the Legislature, except so far as the repeal or change may affect the rights of third persons acquired under them. *Bos-*

a writ of mandamus to compel the transfer to them by the Commissioners of the North Burial Grounds of said city of certain funds held by the latter in trust to be applied to the care of burial lots and memorials to the dead. *Writ granted.*

The facts are stated in the opinion.

Mr. Nicholas Van Slyck for petitioners.

Mr. Cyrus M. Van Slyck for respondents.

Stiness, J., delivered the opinion of the court:

In the year 1861, by Pub. Laws R. I., chap. 367, of March 8, 1861, the General Assembly authorized gifts by deed or will to the Commissioners of the North Burial Grounds in the City of Providence, and their successors in office, for the purpose of constituting a fund to be held in perpetual trust, and the income thereof to be applied to the care of burial lots and memorials to the dead, as set forth in the instrument creating the trust. The Commissioners were directed to make investments of the trust property, to keep accounts, apply the income, and to make detailed reports to the municipal court of the city. At the January Session, A. D. 1889, by Pub. Laws R. I., chap. 781, of April 25, 1889, the General Assembly directed the Commissioners of the North Burial Ground to pay over to the Commissioners of the sinking funds of the City of Providence the perpetual care funds held by them, with such as should thereafter come to them, and changed the duty of investing the same from the Commissioners of the Burial Ground to the Commissioners of the Sinking Fund, the former to continue to receive and apply the income as before. Upon demand of the petitioners for payment to them, under this Act, of the perpetual care funds, the respondents refused to make the payment, upon the claim that they hold said funds as trustees under said chapter 367; and that chapter 781, so far as it directs the payment of the funds held prior to its passage, is inoperative, because the title had vested in them as trustees.

The question now comes before us on a petition for mandamus. The argument of the respondents is that chapter 367, and the Acts of the individuals making trust gifts under it, constitute a grant or executed contract; and that the later Act, changing the custody of

the fund and duty of investment, is within the meaning of the clause in the Constitution which prohibits the passage of a law impairing the obligation of a contract. They refer to *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162, and *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, in support of their position. These two noted cases are of undoubted authority, to the effect that vested rights, under an unrestricted grant to an individual or private corporation, when a law is in the nature of a contract, cannot be divested by a subsequent change or repeal of the law, because this would impair the obligation of an executed contract. The case before us is quite different, for it does not affect an individual or private corporation. The respondents are not here in defense of private vested rights, but as officers of a public municipal corporation, claiming certain rights, under a statute, as incidental to their office. As individuals, they can lay no claim to the administration of the fund, but only as Commissioners of the North Burial Ground. If one should go out of office, his title would be at an end. Hence they stand in the same relation to the fund that the city itself would if it were the trustee, in its own name, instead of its officers and agents. In regard to the power of the Legislature to alter or repeal a grant, a marked distinction has always been observed between private and public grants. Following the cases cited above, it has become settled that an unrestricted grant to an individual or private corporation becomes, when accepted, a contract which is beyond legislative control. It has also become settled that special powers conferred upon a municipal corporation or its officers are not vested rights as against the State. But questions have arisen with reference to the right of a municipal corporation to be a trustee, and also of the right of the State to control it, when it is acting as such. The leading case of this country upon the subject was *Vidal v. Girard*, 48 U. S. 2 How. 127, 11 L. ed. 205, where it was held that a municipal corporation, when authorized by law, may take and hold property in trust; and so the donation in the well-known will of Stephen Girard to the City of Philadelphia, in trust for charitable purposes, was sustained. In 1869 the management of this trust was, by Act of the Legislature, taken away from the city, and committed to a board of directors of

the Police Jury v. Shreveport, 5 La. Ann. 661; Louisiana State Bank v. New Orleans Nav. Co. 3 La. Ann. 294; Reynolds v. Baldwin, 1 La. Ann. 162; Haynes v. Municipality No. 2, 5 La. Ann. 760; Egerton v. Municipality No. 3, 1 La. Ann. 436; Board of Liquidators v. Municipality No. 1, 6 La. Ann. 21.

It is within the power of the Legislature to devest a municipal corporation of the power to administer a trust and to appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts. *Philadelphia v. Fox*, 64 Pa. 109; *Montpelier v. East Montpelier*, 29 Vt. 21.

Since the Legislature cannot alienate any part of its legislative power it cannot therefore by legislative Act or contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. *Philadelphia v. Fox*, 64 Pa. 109.

The doings between municipal corporations and 18 L. R. A.

the Legislature are in the nature of legislation rather than compact, and subject to all legislative conditions named, and therefore to be considered as not violated by subsequent legislative changes. *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 13 L. ed. 518; *New Orleans v. Hoyle*, 23 La. Ann. 740; *Trustees of Schools v. Tatman*, 13 Ill. 80.

As to the power of a municipal corporation to administer a public charity, see notes to *Cary Library v. Bliss* (Mass.) 7 L. R. A. 766; *Cottman v. Grace* (N. Y.) 3 L. R. A. 147.

What are public charities. See notes to *Fire Ins. Patrol v. Boyd* (Pa.) 1 L. R. A. 417; *Cottman v. Grace*, *supra*; *Stratton v. Physio-Medical Institute* (Mass.) 5 L. R. A. 33; *Bullard v. Chandler* (Mass.) 5 L. R. A. 105; *State v. Ladies of the Sacred Heart* (Mo.) 6 L. R. A. 84.

Municipalities as trustees. See note to *Cottman v. Grace*, *supra*.

city trusts. This action of the Legislature was contested, but was upheld in *Philadelphia v. Fox*, 64 Pa. 169, upon the ground that a municipal organization, trustees of a charity, cannot set up a vested right to maintain such organization in the form in which it was when the trust was created, and prevent the State from changing it as the public interests may require. These cases determine the right of a municipal corporation to act as a trustee, when duly authorized, and also the right of the Legislature to deplete the corporation of such rights, and to commit the administration of the trust to others. The same right has been recognized in other cases. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 58; *Montpelier v. East Montpelier*, 29 Vt. 12. Upon the authority of these cases, Judge Dillon, in his work on Municipal Corporations (§§ 80, 487), lays it down as unquestioned law that a municipal body may both act as trustee, and also be de-vested of a public trust, at the will of the Legislature.

But it may be urged that a trust for the care of one's private burial lot is not within this rule, because it is not a public charitable trust. This court has held (*Kelly v. Nichols*, 17 R. I. 105), that such a trust is a private, and not a charitable trust. Nevertheless the General Assembly, in 1852, specially authorized towns to receive and hold funds in trust for that purpose, which authority still continues, and, as has been stated, gave a like authority to the Com-

missioners of the North Burial Ground in 1861. If, when the trust is for a recognized charitable purpose, a municipal corporation, in its capacity as trustee, is subject to the will of the Legislature, *a fortiori* we think it is clear that it is equally subject in case of a private trust which it can only hold by authority of the Legislature; and, if the administration of the trust can be taken from the hands of the municipal corporation itself, certainly its officers and agents can hold under no stronger claim. If the respondents' position is correct, the city is bound to continue the office of Commissioners of the North Burial Grounds in order to support the trust. We think this could hardly have been contemplated by the donors of the funds, but rather in making the gifts, in the words of Judge Sherswood, in *Philadelphia v. Fox*, *supra*, "they must be held to have done so with the full knowledge that the trustee so selected was a mere creature of the State,—an agent acting under a revocable power." Our conclusion, therefore, is that the Legislature had power to change the custody of the funds from the respondents to the complainants. In reaching this conclusion we have taken the case as presented, without regard to the last section of chapter 867, which provides that the Act shall be subject to all future Acts in amendment or repeal thereof, although we see no reason why this section might not be regarded as conclusive of the question before us.

Petition granted.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Patrick DEMPSEY
v.
James CHAMBERS.

(....Mass.....)

Ratification by one of acts which another has, without authority, per-

formed, as his servant and for his benefit, will make him answerable for the latter's negligent acts which were so connected with the employment that he would have been liable for them as master if the latter had been his servant when committing them.

(September 3, 1891.)

NOTE.—General rules applied to ratification.

The ratification must be entire, or not at all; the principal is not permitted to ratify in part, and to reject in part. *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Cochran v. Chitwood*, 59 Ill. 53; *Widner v. Lane*, 14 Mich. 124; *Krider v. Western College*, 31 Iowa, 547; *Billings v. Morrow*, 7 Cal. 171; *Hardeman v. Ford*, 12 Ga. 206; *Menkens v. Watson*, 27 Mo. 163; *Henderson v. Cummings*, 44 Ill. 325; *Coleman v. Stark*, 1 Or. 115.

1. A ratification of a part of an authorized transaction of an agent, or of one who assumes to act as such, is a confirmation of the whole. *Farmers Loan & Trust Co. v. Walworth*, 1 N. Y. 433; *Fowler v. Trull*, 1 Hun, 409, 3 Thomp. & C. 522; *Krider v. Western College*, 31 Iowa, 547; *Menkens v. Watson*, 27 Mo. 163; 1 Wait, Act. & Def. 233.

Ratification of the unauthorized act of another operates upon the act ratified as if authority to do the act had been previously given, except where the rights of third parties have intervened. It is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. *Cook v. Tullis*, 85 U. S. 18 Wall. 333, 21 L. ed. 933, Field, J.; *Marsh v. Fulton County*, 77 U. S. 10 13 L. R. A.

Wall. 684, 19 L. ed. 1043; *Norton v. Shelby County*, 118 U. S. 451, 30 L. ed. 189.

It is not allowed by law, when the act ratified is itself forbidden at the time of ratification. *McCracken v. San Francisco*, 16 Cal. 591; *Bird v. Brown*, 4 Exch. 799; *Lord Audley's Case*, Cro. Eliz. 560, Moore, 457; *Margaret Podger's Case*, 9 Coke, 104a; *Cook v. Tullis*, 85 U. S. 18 Wall. 333, 21 L. ed. 933.

If a principal ratifies that part of a transaction which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 395, 23 L. ed. 486.

It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred in a mode not sanctioned by its terms and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. *Harrod v. McDaniels*, 126 Mass. 415.

It is an adoption of an unauthorized transaction by the party beneficially interested. *Schwartz v. Weber*, 6 N. Y. S. R. 693.

It is said that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the act of his agent, although it was unauthorized. But where

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County (Thompson, J.) made during the trial of an action brought to recover the value of a plate-glass window alleged to have been broken by the negligence of defendant's servant, which resulted in a judgment in favor of plaintiff. *Exceptions overruled.*

The facts are stated in the opinion.

Mr. W. S. Knox, for defendant:

Even if the acts of McCulloch in receiving the order for the coal and undertaking to fill it were fully ratified by the defendant with knowledge of his negligence, the defendant would not be liable for the negligence under the fact found that McCulloch was not the servant or agent of the defendant at the time his negligent act caused the injury.

Coomes v. Houghton, 102 Mass. 211.

Messrs. J. P. Sweeney and H. R. Dow, for plaintiff:

A subsequent ratification is equivalent to a prior authority, and renders the principal liable for all the acts of the agent, tortious or otherwise, done in the regular course of business, as fully as if he had originally given him direct authority in the premises.

Story, Ag. 9th ed. § 239; *Clement v. Jones*, 12 Mass. 60.

When a party assumes to act for another without any authority whatever, if that other subsequently ratifies his act he makes him his agent.

Y. B. 7 Hen. IV. p. 35; *Hagedorn v. Oliver-son*, 2 Maule & S. 485; *Rogers v. Kneeland*, 10 Wend. 218; *Kelley v. Munson*, 7 Mass. 319.

If the principal accepts the proceeds or benefits of the unauthorized act of the person assuming to act for him he is precluded from denying the latter's authority.

Woodbury v. Larned, 5 Minn. 339; *Gibson v. Norway Sav. Bank*, 69 Me. 579; *Veazie v. Williams*, 49 U. S. 8 How. 134, 12 L. ed. 1018.

The demand made upon the plaintiff for the proceeds and profits of the unauthorized acts of McCulloch, on the ground that the plaintiff "owed" the defendant for the coal, is a ratification; for a claim of debt would not, on any other ground, be maintainable.

Story, Ag. 9th ed. § 259, note 1, and cases cited.

A ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or some third person.

Condit v. Baldwin, 21 N. Y. 219, 225; *Watson v. Swann*, 11 C. B. N. S. 755; *Wilson v. Tumman*, 6 Man. & G. 236; *Farmers L. & T. Co. v. Walworth*, 1 N. Y. 433, 444; *Commercial & C. Bank v. Jones*, 18 Tex. 811.

And this is the distinction which must be made between the case at bar and the case of *Coomes v. Houghton*, 102 Mass. 211.

Holmes, J., delivered the opinion of the court:

This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCulloch, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant by his ratification of the delivery of the coal by McCulloch became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any

that act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of estoppel. *Workman v. Wright*, 38 Ohio St. 405, 31 Am. Rep. 548.

The meaning of ratification is, and always has been, the adoption of an act purporting to be done, or, at least, done in fact, on behalf of the ratifier. Y. B. 30 Edw. I. 123; 7 Hen. IV. 34, 35, pl. 1; Anonymous, Godbolt, 109, pl. 129; *Wilson v. Tumman*, 6 Man. & G. 236.

The mere silence of the owner, after his property has been taken by a trespasser, will not in law amount to a ratification and adoption of the unlawful act. *Thompson v. Craig*, 16 Abb. Pr. N. S. 32; Story, Ag. § 251; 2 Kent, Com. 12th ed. 616, note 1; *Wilson v. Tumman*, *supra*; *Watson v. Swann*, 11 C. B. N. S. 756.

As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act. Story, Ag. § 250; Paley, Ag. 13 L. R. A.

Lloyd's ed. 171; 3 Chitty, Com. Law, 197; *Bouvier, Law Dict.* title *Ratification*.

The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is illustrated by many cases to be found in the books, and set forth by all the text-writers upon the law of agency. Story, Ag. § 251a; 2 Greenl. Ev. §§ 66, 67; 2 Kent, Com. 616; *Thompson v. Craig*, 16 Abb. Pr. N. S. 32; *Wilson v. Tumman*, *supra*; *Watson v. Swann*, 11 C. B. N. S. 756.

But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority. One may wrongly take the property of another not assuming to act as agent, and sell it in his own name and on his own account, and in such case there is no question of agency, and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel. *Workman v. Wright*, 38 Ohio St. 405.

principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frank pledge. *Byington v. Simpson*, 184 Mass. 169, 170; *Fitzh. Abr. Corone*, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 881, 882; *Fuller & Trimwell's Case*, 2 Leon. 215, 216; *Sext. Dec. 5, 12*; *De Reg. Jur. Reg. 9*; *Dig. 43, 26, 13*; *Dig. 43, 16, 1, § 14*, gloss. and cases next cited.

The earliest instances of liability by way of ratification in the English law so far as we have noticed were where a man retained property acquired through the wrongful act of another. *Y. B. 30 Edw. I. 128* (Rolle, ed.); 38 Lib. Ass. 223, pl. 9; *S. C. 38 Edw. III. 18, 12th ed. IV. 9, pl. 23*; *Plowd. 8 ad fin. 27, 31*; See *Bracton*, 158 b, 159 a, 171 b.

But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. *Y. B. 7 Hen. IV. 34, pl. 1*. This decision is qualified in *Fitzh. Abr. Baylye*, pl. 4, and doubted in *Bro. Abr. Trespass*, pl. 86; but it has been followed or approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by *Chief Justice Gascoigne*. *Anonymous*, *Godbolt*, 109, 110, pl. 129, 2 Leon. 196, pl. 246; *Hull v. Pickersgill*, 1 Brod. & C. 282; *Muskett v. Drummond*, 10 Barn. & C. 153, 157; *Buron v. Denman*, 2 Exch. 167, 178; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 18 Moore, P. C. 22, 86; *Cheetham v. Manchester*, L. R. 10 C. P. 249; *Wiggins v. United States*, 3 Ct. Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitu mandato comparatur* of the Roman lawyers and the earlier cases (*Dig. 46, 3, 12, § 4*; 43, 16, 1, § 14; *Y. B. 30 Edw. I. 128*), has been changed to the dogma *equiparatur* ever since the days of *Lord Coke*, 4 Inst. 317; See *Bro. Abr. Trespass*, pl. 118; *Co. Litt. 207 a*; *Wingate Max. 124*; *Com. Dig. Trespass*, 18 L. R. A.

chap. 1; *Eastern Counties R. Co. v. Broom*, 6 Exch. 814, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. *Adams v. Freeman*, 9 Johns. 117, 118; *Anderson and Warberton, JJ.*, in *Bishop v. Montague*, Cro. Eliz. 824.

If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. *Sext. Dec. 5, 11, 23*. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit (*Wilson v. Barker*, 1 Nev. & Man. 409, 4 Barn. & Ad. 614; *Smith v. Looz*, 42 Mich. 6), as in other cases it has been on the ground that they did not amount to such a ratification as was necessary. *Tucker v. Jerrie*, 75 Me. 184; *Hyde v. Cooper*, 26 Vt. 552.

But the language generally used by judges and text-writers and such decisions as we have been able to find is broad enough to cover a case like the present when the ratification is established. *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, *supra*; *Sanderson v. Baker*, 2 W. Bl. 832; 3 Wils. 309; *Barker v. Braham*, 2 Bl. 866, 868; 3 Wils. 368; *Badkin v. Pocell*, Cowp. 476, 479; *Wilson v. Tunnan*, 6 Man. & G. 236, 242; *Lewis v. Read*, 13 Mees. & W. 834; *Buron v. Denman*, 2 Exch. 167, 188; *Bird v. Brown*, 4 Exch. 786, 799; *Eastern Counties R. Co. v. Broom*, 6 Exch. 814, 326, 327; *Roe v. Birkenhead, L. & C. J. R. Co.* 7 Exch. 36, 44; *Ancona v. Marks*, 7 Hurlst. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225; *Exum v. Brister*, 35 Miss. 391; *Galveston, II. & S. A. R. Co. v. Donahoe*, 56 Tex. 162; *Murray v. Lorejoy*, 2 Cliff. 191, 195. See *Lovejoy v. Murray*, 70 U. S. 8 Wall. 1, 9, 18 L. ed. 129-131; *Story*, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions *McCullock* took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to *McCullock's* assumption. The ratification was not directed specifically to *McCullock's* trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with *McCullock's* employment that the defendant would have been liable as master if *McCullock* really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning with all its incidents including the anomalous liability for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129. The ratification goes to the relation and

establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded and as he may be for those which he has expressly forbidden. In *Gibson's Case*, Lane, 90, it was agreed that if strangers as servants to Gibson but without his precedent appointment had seized goods by color of his office, and afterwards had misused the goods and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this

proposition is stated as law in Com. Dig. *Trespass*, chap. 1; *Elder v. Bemis*, 2 Met. 599, 605.

In *Coomes v. Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant and the decision was that a subsequent payment for his work by the defendant would not make him one.

For these reasons in the opinion of a majority of the court the exceptions must be overruled.

Exceptions overruled.

KANSAS SUPREME COURT.

HENDERSON

v.

Charles M. HOVEY, State Auditor.

HUBBELL

v.

Solomon G. STOVER, State Treasurer.

(....Kan.....)

*1. No money can be drawn from the treasury of the State, except in pursuance of a specific appropriation made by law.

2. Where the Legislature has made a specific appropriation of \$2,000 for the compensation of the secretary, stenographer, and other officers of the State Senate during the sitting of the Senate for an impeachment trial, neither the auditor nor Treasurer of State has the authority to allow or pay any compensation for such officers in excess of said specific amount so appropriated.

(July 2, 1891.)

APPLICATIONS for writs of mandamus to compel the State Auditor and Treasurer to audit and pay certain claims for services rendered by employes of the Senate during an impeachment trial. *Refused.*

*Head notes by HORTON, Ch. J.

NOTE.—Preliminaries necessary to the withdrawal of public funds.

Authority, for paying out the public money should be found in some law. One claiming to draw money out of the treasury of the county or the State should be able to point to a law that clearly authorizes the expenditure. *Kennedy v. Seamans*, 60 Ga. 612; *Maxwell v. Cumming*, 58 Ga. 384; *Houston County v. Kersh*, 82 Ga. 255.

Under La. Const., art. 53, the general appropriation bill may embrace several items or objects of expenditures of public moneys, but all other appropriations shall be made by separate bills each embracing but one object. *Keln v. State Treasurer*, 42 La. Ann. 174.

When the Legislature has clearly indicated its will as to a claim which is to be paid out of the general fund in the state treasury, the constitutional requirement as to appropriation by the legislative department is satisfied, and no particular form of words is essential to make the appropriation valid. *Humbert v. Dunn*, 84 Cal. 57.

Cal. Stat. 1889, 421, providing that each member of the examining commission of rivers and harbors shall receive a salary of \$2,400 per annum, payable 13 L. R. A.

The facts are stated in the opinion.

Mr. Chester I. Long for applicants.

Mr. J. N. Ives, Atty-Gen., for defendants.

Horton, Ch. J., delivered the opinion of the court:

These proceedings have been commenced in this court by mandamus to enable certain persons, who were employes of the Senate, acting as a court of impeachment, to recover their compensation for their services. The State Treasurer, in one case, has refused to register and countersign the warrant issued by the Auditor and has refused to recognize it. In the other case, the Auditor of State has refused to audit the claim of the employe, and has also refused to issue any warrant for his services. The court has examined the various provisions of the Statute which have been referred to. The claim is first made that under section 3, chap. 25, Sess. Laws 1891, the Senate had authority to transfer, from the appropriation made to it of \$8,000 for the *per diem* and mileage of its members, any balance not necessary for the pay of its members. They passed a resolution transferring a portion of the \$8,000 for the secretary, stenographer, and other officers of the Senate. The conclusion of the

monthly, and his traveling expenses while engaged in the performance of official duties, to be paid out of any money in the state treasury not otherwise appropriated, constitutes an appropriation without further action of the Legislature, within Cal. Const., art. 4, § 22, providing that no money shall be drawn from the state treasury except in consequence of appropriations made by law. *Ibid.*

An appropriation is "made by law" when it plainly declares what the amount of compensation shall be; and no legislative appropriation is necessary in such a case to authorize payment from the public treasury. *State v. Hickman*, 8 L. R. A. 408, 9 Mont. 370.

Under Mo. Const., prescribing the conditions and proceedings incident to the payment of money out of the state treasury, a reappropriation of an unused balance of a former appropriation is upon the same footing as the original appropriation, as to the necessity of stating the object for which such reappropriation is made. *State v. Seibert*, 90 Mo. 122.

In Nebraska, the appropriation made by the Legislature, where there is no provision limiting particular cases to a shorter period, extends to the end of the first fiscal quarter after the adjournment

court is, after giving the matter as much attention as it has been able to do in the time allowed, that section 8 of chapter 25 is a specific appropriation for the various amounts for the purposes therein named. For instance, there is no general appropriation for any amount to pay the whole expense of the trial. There are specific appropriations only. First, for the *per diem* and mileage of members of the Senate, and the president thereof, while sitting as a court of impeachment, \$8,000 is given. There is a specific appropriation for the compensation of the secretary, stenographer, and other officers of the Senate of \$2,000 only. Had the Legislature, as it had the power to do, simply provided that \$27,500 or any other general sum, was appropriated to pay the expenses of the trial, such an amount could be drawn out for that purpose. Section 3 of said chapter 25 reads as follows: "To pay the expenses incidental to the trial of Judge Theodosius Botkin, who has been impeached by the House of Representatives of high misdemeanors in office, there is hereby appropriated the following sums, or so much thereof as may be necessary, to wit: For *per diem* and mileage of the members of the Senate and president thereof while sitting as a court of impeachment, \$8,000; *per diem* and mileage of the board of managers of the House of Representatives and counsel and stenographer, to be appointed by said board, \$1,500; compensation of secretary, stenographer, and other officers of the Senate, \$2,000; for service of process, \$1,000; *per diem* and mileage of witnesses, \$15,000." Now, if the State Senate had the right to transfer from the \$8,000 any balance thereof for the compensation of its officers or employés, it had the same right, under said section 3, to transfer it for the purpose of paying counsel or anyone else employed in the trial. The Constitution of the State ordains that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Section 24, art. 2. Upon an examination of section 3, we find that specific appropriations

were made for several distinct and separate purposes, and this court has no authority to make any change in that section; and, the Legislature having specified the particular amounts for the several purposes, they can be used for those purposes, but those only.

It is next argued that if section 3 of chapter 25 cannot furnish money for these employés, they ought to be paid from the general appropriation for the expenses of the Legislature, under section 1 of said chapter 25. The cardinal rule of construction is that the intention of the Legislature must control, and, where there is appropriated a certain sum of money for the pay of members of the Legislature, and its officers and clerks, the ordinary conclusion would be that they are to apply to both Houses of the Legislature and its officers, while in session as a Legislature, and not while one body thereof is acting as a court of impeachment. Section 2 of said chapter 25 provides "that the pay warrants for the members of the Legislature for the last ten days of service shall not be drawn by the Auditor of State until three days after the expiration of the fifty days of regular session, or upon the final adjournment of the Legislature previous to the date herein fixed." We think that the proper construction of said section 3 is that the Legislature intended to make a specific appropriation for the expenses of the impeachment trial of Judge Botkin, and did not intend that any other moneys should be used for that trial than those appropriated in said section 3. In carrying out the intent of the Legislature, we must hold that there is no money appropriated to pay any compensation for the officers or employés of the Senate during the trial of Judge Botkin, excepting the specific sum of \$2,000. It may be possible that the Legislature intended that \$2,000 should be the limit of the expenses for those purposes, and, having appropriated \$2,000 only, this court cannot now say that the employés should be paid out of some other appropriation, or that more should have been appropriated. The

of the next regular session. *State v. Babcock*, 22 Neb. 88.

Public moneys.

No moneys can be paid from the treasury, except in pursuance of an appropriation by law, nor unless within two years after such appropriation; and every law making or continuing, etc., an appropriation, must distinctly specify the sum and the object. Const. 1846, art. 7, § 8.

A two-thirds vote of each branch of the Legislature is required to render valid appropriation bills. Const. 1882, art. 7, § 9; Const. 1846, art. 1, § 9; 1 Abb. N. Y. Dig. 227.

While it is customary to use the words, "there is hereby appropriated the sum," etc., in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used if the Legislature has clearly designated the amount and the fund out of which it is to be paid. *Humbert v. Dunn*, 84 Cal. 87.

The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the Constitution of the United States. Its object is to

secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty-Gen. 670.

To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the Legislature has clearly indicated its will as to the claim which is to be paid, and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid. *Proll v. Dunn*, 80 Cal. 220.

An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant, if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future years,—the law being so framed as to address itself to such future revenues. *Ristine v. State*, 20 Ind. 323. See note to *Henderson v. Soldiers & S. Mon. Comrs.* (Ind.) 13 L. R. A. 169.

State Treasurer and the Auditor must act in accordance with the specific appropriation named in said section 8.

It is further urged that the auditor should be required to issue his warrant whether there is any balance of the specific appropriation remaining in the treasury or not. An examination of the provisions of the Statute in regard to the duty of the auditor clearly shows that the auditor must take notice of what money has been appropriated for any specific purpose, and when that amount has been fully exhausted by claims presented and audited, he has no authority to allow or audit other claims, and issue warrants therefor. See paragraphs 6582, 6597, 6676, Gen. Stat. 1889. The warrant issued by the Auditor was not, in our opinion, issued in conformity with the provisions of said chapter 25. The Treasurer properly refused to recognize it. The Auditor has no right, in the absence of

a sufficient appropriation, to issue warrants generally, to be provided for by some future Legislature. Considering all the terms of chapter 25, we cannot find our way clear to allow this writ. "The laborer is worthy of his hire," and it is very unfortunate that provision was not fully made by the late Legislature for the payment of all the expenses of the impeachment trial. They provided that \$2,000 should be appropriated for the officers or employes of the senate during the trial, and, until further action is taken by the Legislature, no more than \$2,000 can be used to pay these parties. We cannot order the payment of the amounts prayed for, as this court cannot change the Statute.

The writs of mandamus in both cases will be denied. We regret this result, but we do not make the laws; we only interpret them. All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

John A. MORSE *et al.*

v.

Warner MOORE.

(....Me.....)

1. A contract to deliver ice of a certain described quality and thickness is an express warranty that the ice when delivered shall be of such quality and thickness.
2. Acceptance of merchandise under an executory contract of sale warranting it to be of a certain quality does not necessarily terminate the obligation of the vendor; but it is evidence of complete performance or of waiver, the conclusiveness of which is to be determined from all the circumstances of the case.
3. The vendee in a contract to sell and deliver at a certain place for shipment ice of a specified quality and thickness, who does not see the ice until it reaches its destination, and who then immediately notifies the vendor that it is not according to contract, may set up its inferiority in defense of an action for its price, although he receives, stores and attempts to dispose of it.

(May 26, 1891.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Sagadahoc County made during the trial of an action brought to recover the contract price of certain ice alleged to have been sold and delivered to defendant, which resulted in a verdict for plaintiffs. *Sustained.*

The facts sufficiently appear in the opinion. *Messrs. C. E. Littlefield and A. S. Littlefield* for defendant.

Mr. A. N. Williams, for plaintiffs:

Where the articles bargained for under an executory contract are to be delivered at a place certain named therein, the place of de-

livery is the place where the purchaser must exercise his right of rejection or acceptance of the articles tendered.

Defendant having received the ice on board his vessels at Water Cove without complaint, and carried it away, could not exercise the right of rejection at Richmond, Va., or at any other place.

Brownlee v. Bolton, 44 Mich. 218; 2 Benjamin, Sales, Corbin's ed. p. 916; *Pease v. Copp*, 67 Barb. 182. See also Benjamin, Sales, chapter on Acceptance; *Lincoln v. Gallagher*, 4 New Eng. Rep. 141, 79 Me. 189.

Defendant could not receive the ice and accept it, and then defend on the ground that it was not of the quality required under the contract.

Norton v. Dreyfuss, 7 Cent. Rep. 785, 106 N. Y. 90; *Brown v. Foster*, 11 Cent. Rep. 291, 108 N. Y. 887; *Parks v. O'Connor*, 70 Tex. 377; *Coplay Iron Co. v. Pope*, 10 Cent. Rep. 711, 108 N. Y. 232; *Smith v. New Albany Rail Mill Co.* 50 Ark. 81; *Sprague v. Blake*, 20 Wend. 61.

When the contract is in writing, an additional warranty, not expressed or implied by its terms, that the article is fit for a particular use, cannot be added either by implication of law or by parol proof.

Whitmore v. South Boston Iron Co. 2 Allen, 52; Chitty, Cont. 450; *Dutton v. Gerrieh*, 9 Cush. 89; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ottawa B. & F. Glass Co. v. Gunther*, 31 Fed. Rep. 208; Benjamin, Sales, Corbin's 4th Am. ed. §§ 985-988.

Peters, Ch. J., delivered the opinion of the court:

The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this State, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, witnesseth:

NOTE.—Effect of acceptance of goods under contract of sale. See note to *Jones v. McEwan* (Ky.) 12 L. R. A. 599.

18 L. R. A.

"That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove (Cape Small Point, opposite Burnt Coat Island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island and light-house), Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice, not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weighers' certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va., where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of *indebitatus assumpsit* for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial, for present purposes, wheth-

er it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally—our own cases included—that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. *Bryant v. Crosby*, 40 Me. 9; *Randall v. Thornton*, 43 Me. 226; *Hillman v. Wilcox*, 30 Me. 170; *Gould v. Stein*, 149 Mass. 570, 5 L. R. A. 213, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract, and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Prof. Wharton (Whart. Cont. § 564) expresses the idea in these words: "A substantial, though partial (defective), performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation (implying warranty), not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into

them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of *Smith's Leading Cases* (8th ed. vol. 1, pt. 1, p. 339) says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the purchaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond; evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. *Baldwin v. Farnsworth*, 10 Me. 414; *Lamb v. Barnard*, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although

even much inferior in quality to the description contained in the contract. Certainly it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice, which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present, or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms. Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly, and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture, and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin (Benjamin, *Sales*, 8d Am. ed. p. 888), in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for breach of the warranty of quality: *first*, the right to reject the goods if the property in them has not passed to him; *second*, a cross-action for damages for the breach; *third*, the right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are general, without any intimation that the procedure does not apply to warranties in executory sales. In the text such a distinction is not even noticed. In the notes to the text, however, it is re-

marked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies—that of rejecting the goods—seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been acceptance, and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor; "but," he adds, "a failure to return the goods or complain of the quality raises a strong presumption that the complaint of defective quality is not well founded." Prof. Parsons, in the text and notes of his work on Contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint will be a presumption against him on the question of damages. Parsons, Cont. 6th ed. *591, and notes.

Mr. Smith, in *Leading Cases*, in notes to the case of *Chandelor v. Lopus* (8th ed. vol. 1, pt. 1, p. 294), discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory as to fail of effect unless the bulk of the commodity corresponds with the sample." "Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale."

In the case at bar there was an ideal or descriptive sample,—a description equivalent to the exhibition of a sample. There can be no doubt that, if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money may now be regarded as established in England and in most of the courts in this country." "The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages, even when the original contract remains in full

force, and the suit is expressly or impliedly founded upon it." "In the case of *Withers v. Greene*, 50 U. S. 9 How. 213, 13 L. ed. 109, the Supreme Court of the United States receded from the ground taken in *Thornton v. Wynn*, 25 U. S. 12 Wheat. 183, 6 L. ed. 595, by holding that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract as a reason why he should not be compelled to pay the price in full. *Mondel v. Steel*, 8 Mees. & W. 858; *Babcock v. Trice*, 18 Ill. 420; *Dailey v. Green*, 15 Pa. 118."

We are unable to find in the English cases much support for any discrimination in the application of the above doctrine between sales executed and sales executory, although very many of the modern English cases arise out of sample sales and other contracts of an executory nature. The principal support for it is found in some of the New York cases and in those of a few other States that have followed the lead of the New York court in this respect. There are cases which hold to a modification of some of these forms of remedy, having no bearing, however, on the decision of the present case. Some courts have held that a rejection or rescission is not allowable if the goods tendered are of the kind or species contracted for, even though the quality be inferior; but in this State the doctrine of rescission in cases of warranty has been fully established. *Marston v. Knight*, 29 Me. 341. In a few cases there is a leaning towards the doctrine that an acceptance becomes a waiver after a long-continued acquiescence on the part of the vendee. 1 Smith, Lead. Cas. 8th ed. pt. 1, pp. 324, 326, 360, 362 *et seq.*

It is noticeable that in the more modern English cases the courts have preferred to regard executory contracts as based upon a condition precedent, rather than upon warranty. No essential difference of remedy follows from it, though a different style of pleading may be apposite. Instead of a breach of warranty and a suit upon warranty, it becomes, on the new idea, a failure to perform a condition precedent and a suit on the contract. In *Leading Cases*, before cited, the commentator expresses the theory in an alternative way in these words: "The right of a vendee to rely on a breach of a mere warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money, may now be regarded as established in England, and in most of the courts in this country." But the editor at the same time says (p. 334) that "such cases have generally proceeded on the ground of an express or implied warranty. See, also, in 2 Smith, Lead. Cas. pt. 1, the discussion under case of *Cutter v. Powell*, at pages 18, 20, 22 *et seq.* Mr. Benjamin inclines to the view taken in the English cases, quoting Lord Abinger as deprecating the prevalent habit of treating a condition precedent as a

warranty. Other writers incline favorably towards the views of *Lord Abinger* as expressed by him in the case of *Chanter v. Hopkins*, 4 Mees. & W. 399, although admitting that the prevailing theory continues the other way.

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether, in the present case, it be a condition or a warranty, and that might be at the election of the defendant to determine as he pleased, we think the defense set up to the action should have been heard upon the ground of a breach of condition, or of warranty, or upon both grounds.

The main question for our decision has not been the subject of much discussion in our own State, although the principle involved has been acted on in a great number of instances, and there have been judicial expressions and rulings affecting it. In *Folsom v. Mussey*, 8 Me. 400, it is allowed that evidence of consideration may be received in actions between parties to a contract, to reduce the damages. In *Herbert v. Ford*, 29 Me. 546, the doctrine is approved. *Rogers v. Humphrey*, 39 Me. 383, directly applies to the present facts. It is there held that "when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit." The case of *Peabody v. Maguire*, 79 Me. 572, 5 New Eng. Rep. 694, in its effect sustains the same principle. It is there decided that in a conditional sale the mere fact of delivery by the vendor without performance by the vendee, nothing being at the time said about the condition, might afford presumptive evidence of the waiver of the condition, but that the fact may be explained and controlled, and whether it be a waiver of the right of title or not would be a question of fact to be ascertained from the testimony. So in the present case, whether acceptance be a waiver of the full performance of the condition precedent or not is likewise a question to be settled upon testimony. The position of parties is reversed in the two cases, but the principle is the same.

The first case in this country, except a Maryland decision to the same effect, and perhaps the leading case in the recognition of the principle that affirmation of quality establishes warranty, is *Hastings v. Lovering*, 2 Pick. 214, where oil then in Nantucket was sold to be delivered in Boston in ten days, the vendor describing the same to be "prime winter oil." That was in fact as much of an executory contract as is the one under discussion, although not in form such. The point was taken in the trial that the contract, although executory, was settled by a bill of parcels given at delivery, the executory agreement having no further effect: but the court overruled the position. The case is effective on the present question as showing that acceptance has no greater effect as an estoppel in executory than in executed sales. Other Massachusetts cases bear, either directly or indirectly, upon the question. In none of them is there any judicial utterance indicating

that executory and executed sales do not, on this question, stand alike. *Perley v. Balch*, 28 Pick. 283; *Dorr v. Fisher*, 1 Cush. 274; *Henshaw v. Robins*, 9 Met. 83; *Mizer v. Coburn*, 11 Met. 559; *Morse v. Brackett*, 98 Mass. 205. Several Connecticut cases that are often cited as supporting the theory that description imports warranty, and that the defendant may recoup damages for a breach of contract if the vendor brings a suit, were cases of executory contracts or sales. *McAlpin v. Lee*, 12 Conn. 129; *Kellogg v. Denslow*, 14 Conn. 411. And of the same character is the leading case in the Supreme Court of the United States on the same question. *Lyon v. Bertram*, 61 U. S. 20 How. 150, 15 L. ed. 848. In that case the vendor was to deliver a cargo of flour within three weeks, the price to be according to the inspection to be made at delivery. The contract was in form a sale, but in effect a contract for future sale and delivery. The same deduction may be made from the cases of so many of the States that the rule may be fairly characterized as general; and the same result is producible from the English cases.

The New York court held in earlier cases that warranty in an executory contract did not in ordinary circumstances survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In *Leading Cases*, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating it as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly a thing cannot survive that does not exist. *Wilde, J.*, in *Henshaw v. Robins*, 9 Met. 90, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty, express or implied, and they therefore have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last-named rule of the New York cases was found to be so much at variance with the authorities elsewhere that in the case of *White v. Miller*, 71 N. Y. 118, all previous cases which held that warranty did not follow from description of quality were overruled; and, as a natural, if not necessary, consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule, that acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendor for a breach of the warranty, if the court has not already arrived at that point. There are late cases in that State, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should he be obliged to stand or fall upon the interpretation of the law of his

contract according to the New York authorities. In *Brigg v. Hilton*, 99 N. Y. 517, 1 Cent. Rep. 807, and in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 280, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered,—a warranty that survived an acceptance of the articles delivered; and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

Exceptions sustained.

Walton, Virgin, Libbey, Haskell, and Whitehouse, JJ., concurred.

Re William DEAN, Petitioner to be Admitted to Citizenship.

(....Me.....)

1. While a court, to have cognisance of applications for naturalization or to receive declarations of intention under the federal statute, must possess common-law jurisdiction, it is not necessary that it have all the common-law jurisdiction that pertains to all classes of actions, but merely that it exercise its powers according to the course of the common law.
2. A court, to have jurisdiction of applications for naturalization or to receive declarations of intention under the federal statute, must, in addition to possessing a seal, have a clerk distinct from the judge, charged with the

duty of keeping a true record of its doings and afterwards of authenticating them.

3. A court in which the judge thereof is charged with the duty of keeping its records, which must be authenticated by him, though having a recorder charged with the duty of keeping such records when requested by the judge, is not a court having a clerk within the federal statute regulating naturalization, and has no power to receive a declaration of intention to become a citizen.

(May 29, 1891.)

EXCEPTIONS by petitioner to rulings of the Supreme Judicial Court for York County (Whitehouse, J.), upon a petition by an alien praying for admission to citizenship, which resulted in the dismissal of the petition. *Overruled.*

The facts are stated in the opinion.

Mr. W. F. Lunt, for petitioner:

The term "common-law jurisdiction" means jurisdiction to try and decide causes which were cognizable by the courts of law, under what is known as the common law of England.

People v. McGowan, 77 Ill. 644, 20 Am. Rep. 256.

The Act establishing the court makes it a court of record. This is within the legislative power.

Const. art. 6, § 1.

The Legislature having a right to create and establish a court, certainly has a right to define its legal status.

United States v. Lehman, 89 Fed. Rep. 49.

At common law, the court has the characteristics of a court of record.

Bouvier, Law Dict. title *Court of Record*; Rapalje & Lawrence, Law Dict. title *Court of Record*; *Woodman v. Somerset County*, 87 Me. 29.

NOTE.—*Naturalization of aliens; jurisdiction of state courts.*

Congress may confer judicial powers on state courts (*Houston v. Moore*, 18 U. S. 5 Wheat. 27, 5 L. ed. 26); and there can be no doubt of the rightful jurisdiction of the state courts in such cases, until extinguished by some Act of Congress. *State v. Penney*, 10 Ark. 621; *Com. v. Fowles*, 5 Leigh, 748; *Re —*, 7 Hill. 141; *Re Clark*, 18 Barb. 444; *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 622, 10 L. ed. 1091; *Ex parte Knowles*, 5 Cal. 304.

The court of criminal correction, having exclusive jurisdiction of all misdemeanors, under the laws of the State, committed in the City of St. Louis, and which is expressly declared to be a court of record, is a court of common-law jurisdiction, within the meaning of the Act of Congress conferring power on courts to naturalize aliens. *United States v. Lehman*, 89 Fed. Rep. 49.

Congress intended to confer the power of naturalization on all courts of record of the several States that have power to administer justice under and in accordance with that system of jurisprudence known as the common law. *Re Conner*, 39 Cal. 98; *People v. McGowan*, 77 Ill. 649.

Process of naturalization.

The process of naturalization in the mode prescribed by the Act of Congress is a judicial act (*Spratt v. Spratt*, 20 U. S. 4 Pet. 393, 7 L. ed. 807; 13 L. R. A.

Morgan v. Dudley, 18 B. Mon. 714), and must be exercised by the court itself. *Re Clark*, 18 Barb. 444.

It is only the preliminary application of an alien declaring his intention under oath which is regarded merely as ministerial, and may be done before the clerk of the court as well as before the court itself. Act of May 23, 1824; *Re Butterworth*, 1 Woodb. & M. 323. See Conkling, U. S. Ct. Practice, 497.

Naturalization papers.

Where a certificate of naturalization is granted by a court of competent jurisdiction, evidence is inadmissible to show that it was improperly granted or was obtained by false and perjured testimony. *Behrensmeier v. Kreitz* (Ill.), Jan. 21, 1891.

Where such papers are not issued upon the order of any court, but made out and delivered by a county clerk or justice of the peace, they are void. *Ibid.*

But a misnomer contained therein does not vitiate the certificate, as the true name may be shown by parol evidence; and a certificate including the names of two persons, although informal, is not invalid. *Ibid.*

Parol evidence is not admissible to prove that a foreigner has been naturalized. Upon the question whether he is a voter, a certified copy of the record of the court in which he was naturalized is required. *State v. O'Hearne*, 2 New Eng. Rep. 786, 58 Vt. 718.

No one will contend that our statutory courts, although they may not have all the jurisdiction possessed by the old common-law courts of England, are none the less for that reason courts with common-law jurisdiction.

Morgan v. Dudley, 18 B. Mon. 698, 68 Am. Dec. 735; *Re Conner*, 39 Cal. 98, 2 Am. Rep. 427; *People v. McGowan*, *supra*; *State v. Whittemore*, 50 N. H. 245; *Gladhill, Petitioner*, 8 Met. 168; *Ex parte Cregg*, 2 Curt. 98; *United States v. Power*, 14 Blatchf. 228; *Ex parte Troedy*, 22 Fed. Rep. 84; *United States v. Lehman*, 39 Fed. Rep. 49; 2 Wharton, Digest International Law, 346.

Mr. H. H. Burbank, contra:

The Biddeford Court has no clerk or a person other than the magistrate presiding in the court, whose duties are such as to make him in effect a clerk or prothonotary, within the provisions of § 2165, U. S. Rev. Stat.

Ex parte Cregg, 2 Curt. 98.

The office of recorder in the Biddeford Municipal Court is that of vice-judge.

Laws 1855, chap. 151, § 5.

In *Re Langtry*, 31 Fed. Rep. 879, *Mr. Justice Field* expressed doubts of the legality of a declaration of intention made before the clerk of the United States Circuit Court in San Francisco, away from his office and outside the court-house, but in *Andres v. Arnold*, 6 L. R. A. 238, 77 Mich. 85, by the Supreme Court of Michigan, it was held that it was not necessary that such declaration should be made in the office of the clerk; but 80 Central Law Journal, 58, says that the opinion of the dissenting judge to the contrary appears unanswerable.

Whitehouse, J., delivered the opinion of the court:

This is an application by an alien seeking to become a citizen of the United States. As evidence of the previous declaration of his intention to be naturalized, required by the Act of Congress, the applicant produced a copy of a declaration made by him January 24, 1888, before Edwin J. Cram, recorder of the Municipal Court of the City of Biddeford, attested by "Edwin J. Cram, Recorder." Under the federal statutes, only those courts that are authorized to naturalize are authorized to receive and record this declaration of intention. The question here presented, therefore, is whether the Municipal Court of Biddeford was a court of competent authority, under the laws of the United States, to admit aliens to citizenship. The presiding judge ruled that it was not, and for that reason dismissed the petition.

The Federal Constitution confers upon Congress the power "to establish an uniform rule of naturalization." In the exercise of this authority, Congress enacted the Statute of April 14, 1802, prescribing the conditions of naturalization. By that Act the preliminary declaration might be made on oath or affirmation "before the supreme, superior, district, or circuit court of some one of the States." Then follows this provision in the third section of the Act: "And whereas, doubts have arisen whether certain courts of record in some of the States are included within the description of district or circuit

courts, be it further enacted that any court of record in any individual State having common-law jurisdiction, and a seal and clerk or prothonotary, shall be considered a district court, within the meaning of this Act." In section 2165 of the last revision of the United States statutes, the courts thus authorized to naturalize aliens are specified and described as follows: "A circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the States having common-law jurisdiction and a seal and clerk."

1. Was the Municipal Court of the City of Biddeford, January 24, 1888, a "court of record, having common-law jurisdiction," within the meaning of the Act of Congress of April 14, 1802?

Section 1 of chapter 151 of the Public Laws of 1855, and Acts amendatory thereof, establishing the Municipal Court of Biddeford as constituted January 24, 1888, provide that it "shall be a court of record, with a seal; and said court shall consist of one judge, to be appointed, qualified, and hold his office according to the Constitution; and shall exercise concurrent jurisdiction with justices of the peace and quorum over all matters and things, civil and criminal, within the County of York as are by law within the jurisdiction of justices of the peace and quorum in said county; and original jurisdiction concurrent with the supreme judicial court in all civil actions in which the debt or damages shall not exceed the sum of one hundred dollars; and shall have original jurisdiction concurrent with the supreme judicial court over crimes, offenses and misdemeanors committed in said county which are by laws punishable by fine not exceeding twenty dollars, and by imprisonment in the county jail not exceeding three months."

Section 4 provides that "it shall be the duty of the judge of said court to make and keep the records of said court, or cause the same to be made and kept, and to perform all other duties required of similar tribunals; and copies of the records of said court, duly certified by the judge, shall be legal evidence in all courts."

Section 5 is as follows: "The judge shall appoint a recorder, who shall be a justice of the peace and of the quorum, duly qualified, who shall be sworn by said judge, and who shall keep the records of said court when requested so to do by said judge; and, in case of absence from the court-room or sickness of the judge, or whenever requested by him so to do, or when the office of judge shall be vacant, the recorder shall have and exercise all the powers of the judge, and perform all the duties required in this Act of the judge, and generally shall be fully empowered to sign and to issue all processes and papers and do all acts as fully, and with the same effect, as the judge could do were he acting in the premises; and the signature of the recorder, as such, shall be sufficient evidence of his right to act instead of the judge, without any recital of the Act hereinbefore named, authorizing him to act. When the office of judge is vacant, the recorder shall be entitled to the fees; in all

other cases he shall be paid by the judge." Chapter 247 of the Special Laws of 1887 provides that the judge shall receive an annual salary of \$1,400, which shall be in full for all his services and the services of the recorder.

The "court of record" required by the federal statute is not simply a tribunal that has a recording officer and seal, and in fact keeps a permanent record of its proceedings; for the probate court and the court of the county commissioners would fulfill all of these requirements, and yet neither of these tribunals is deemed to be technically a court of record. It must be an organized judicial tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. It is distinguishable from the case of a justice of the peace on whom personally certain judicial powers are conferred by law. *Gladhill, Petitioner*, 8 Met. 168; *Anderson, Law Dict.*

Two centuries ago, in the case of *Groenvelt v. Burnell*, 1 Salk. 200, *Chief Justice Holt* said: "Whenever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; and whenever there is jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record." Blackstone adopts this statement, adding that the proceedings of a court of record are enrolled for a perpetual memorial; and then distinguishes a "court not of record" as one that can "hold no plea of matters cognizable by the common law, unless under the value of forty shillings, nor of any forcible injury whatever." 3 Bl. Com. 24. Thus in *Woodman v. Somerset County*, 87 Me. 38, *Chief Justice Shepley* says: "A court of record is one which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the course of the common law." It was a distinguishing feature of it that at common law its judgments were reviewable only by writ of error. Accordingly in *Gladhill, Petitioner, supra*, *Chief Justice Shaw* says of the Police Court of Lowell in 1844: "We are of opinion that it is a court of record, coming within the description of the Act of Congress. It possesses all the characteristics of a court of record. Section six directs the keeping of a fair record. It is not necessary to decide here whether a justice's court is a court of record. The point is left undecided in *Smith v. Morrison*, 22 Pick. 480. That a writ of error will lie on a justice's judgment is well settled, and the object of a writ of error is to remove a record. It will not lie to a judgment of a probate court, because not technically a court of record. Probably the result may be, from an examination of all the statutes regulating the jurisdiction of justices of the peace, that their courts will be regarded as courts of record for some purposes, but not in all respects. But we think the decision in this case does not depend upon the legal character of the courts held by justices of the

peace. Many powers are vested in the police court of Lowell not conferred on justices of the peace; its constitution is different and its mode of proceeding is different. That this court exercises a common-law jurisdiction there is no doubt: it is authorized to hear and determine all complaints and prosecutions in like manner as justices of the peace, and has jurisdiction of all civil suits and actions cognizable by a justice of the peace." In *Ex parte Cregg*, 2 Curt. 98, *Judge Curtis* says: "We see no sound reason to doubt that the police court of Lynn was a court of record having common-law jurisdiction." But it was held that the court did not have a clerk, and therefore did not possess authority to naturalize. To the same effect was the decision in *State v. Whittemore*, 50 N. H. 245, holding that the police court of Nashua was a court of record having common-law jurisdiction, but, not having a clerk, did not have jurisdiction over applications for naturalization. See also *Wheaton v. Fellows*, 23 Wend. 375, and *Hutkoff v. Demorest*, 108 N. Y. 868, 4 Cent. Rep. 773.

But does the Municipal Court of Biddeford have "common-law jurisdiction" to the extent contemplated by the federal statute? With respect to this inquiry, it is proper to remark that we have no national common law in the United States, distinct from that adopted by the several States, each for itself, except so far as the history of the English common law may be involved in the interpretation of the Federal Constitution. The judicial decisions, the usages and customs, of the respective States determine to what extent the common law has been introduced. What is common law in one State may not be so considered in another. *Wheaton v. Peters*, 33 U. S. 8 Pet. 658, 8 L. ed. 1079; *Smith v. Alabama*, 124 U. S. 478, 81 L. ed. 512. It must also be remembered that we have no state courts in this country deriving their existence from the common law. They are all established either by the provisions of the organic law or by legislative enactment. Their jurisdiction is not uniform. Some of them have only a special jurisdiction limited as to amounts or subjects in controversy. Of this character are the superior courts of this State; yet it would not be questioned that they have "common-law" jurisdiction. "By 'suits at common law,' in the Constitution," says *Judge Story* in *Parsons v. Bedford*, 28 U. S. 3 Pet. 448, 7 L. ed. 735, "is meant not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies administered."

Courts of "common-law jurisdiction" are such as "exercise their powers according to the course of the common law. It was not meant that they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If so, few courts could be found in this country having the requisite common-law jurisdiction." *People v. McGowan*, 77 Ill. 644. So also in *Re Conner*, 39 Cal. 98, the

court says: "The term 'common-law jurisdiction' is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the courts of law under what is known as the 'common law of England.' The Act does not require that courts shall have all the common-law jurisdiction which pertains to all classes of actions. It is enough if it has 'common-law jurisdiction.'" Again, in *United States v. Power*, 14 Blatchf. 223, the court says: "The statute of the United States does not require of courts, authorized to entertain applications for naturalization, that they shall have all the jurisdiction possessed by any court of law. If the court may exercise any part of that jurisdiction, it is within the language of the statute, and its meaning as well." To the same effect is *Morgan v. Dudley*, 18 B. Mon. 698. See also *People v. Pease*, 30 Barb. 588; *Ex parte Burkhardt*, 16 Tex. 470, and *Mills v. McCabe*, 44 Ill. 194.

2. It is admitted that the Municipal Court of Biddeford had a seal; and assuming, without deciding, that it was a court of record, having common-law jurisdiction, within the meaning of the Act of Congress, did it also have a clerk, within the meaning of the federal statute? The language of this statute seems to imply that there may be courts of record having common-law jurisdiction, and a seal, without a clerk, and that such courts are not embraced by the terms of the Act. And this is the construction which it has received from eminent judicial authority. The court must have a clerk distinct from the judge; not necessarily an officer denominated "clerk," but a permanent "recording officer, charged with the duty of keeping a true record of its doings, and afterwards of authenticating them." Shaw, Ch. J., in *Gladhill, Petitioner, Ex parte Cregg*, and *State v. Whittemore, supra*. The court contemplated by the Act of Congress has an organized existence. It is impersonal. The judge is one of the constituent parts of the organization; the clerk is another and a separate and an independent element. The essential function of the clerk is to make and keep the records, and give them legal verification by his attestation and the use of the seal.

By those sections of the Act establishing the Municipal Court of Biddeford, above quoted, the responsible duty of making and keeping the records of the court is imposed upon the judge and not upon the recorder. There is no duty of making and keeping the records imposed upon the recorder by law. He is to keep the records of the court only when requested so to do by the judge. Furthermore, the recorder of this court cannot authenticate by his attestation any copies

of records "made and kept" by the judge, or kept by himself at the request of the judge. Only such copies of the records as are "duly certified by the judge shall be legal evidence in all courts." The authority to appoint a recorder was conferred upon the judge, not for the purpose of creating a fixed and permanent clerical office distinct and separate from that of the judge, but primarily to provide for the judge a substitute who should be empowered to act in his stead in the contingencies named in the Act. "His signature as recorder is sufficient evidence of his right to act instead of the judge." When thus acting in a judicial capacity, exercising the powers and performing the duties of the judge, the recorder is the court, and must personally make, keep, and authenticate the records of the court. The recorder's court has no clerk other than the recorder himself. Accordingly, in the attestation of the copy of William Dean's declaration of intention, the signature of "Edwin J. Cram, Recorder," by the very terms of the Act, is presumptive evidence that he was acting instead of the judge in some of the contingencies named in the Act.

The process of naturalization, in the mode it is required to be performed by the federal statutes, is a judicial act. *Spratt v. Spratt*, 29 U. S. 4 Pet. 393, 7 L. ed. 897. And "the importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight to any requirement by Congress which tends to restrict this power to those tribunals which may be supposed most competent to exercise it. Certainly, there would seem to be no propriety in intrusting to a court which, in the exercise of its common-law jurisdiction, cannot pass finally on any matter of law or fact affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it." Curtis, J., in *Ex parte Cregg*, above cited.

We are accordingly of opinion that the Municipal Court of the City of Biddeford, January 24, 1888, did not have a clerk, within the intent and meaning of the federal statute, and therefore had no jurisdiction over applications for naturalization, and no authority to receive and record the declaration of intention made by William Dean. The application for admission to citizenship was properly dismissed.

Exceptions overruled.

Peters, Ch. J., and Walton and Virgin, JJ., concurred; Libbey and Haskell, JJ., concurred in the result.

NORTH DAKOTA SUPREME COURT.

James C. CLARK, *Resp't.*,

v.

James O. SULLIVAN, Impleaded, etc., *Appt.*

(....N. Dak.)

* **A surety jointly bound with his principal** may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent.

(July 16, 1891.)

APPEAL by defendant Sullivan from an order of the District Court for Morton County sustaining a demurrer to his counterclaim in an action brought to enforce the joint liability of the sureties on an appeal bond. *Reversed.*

The facts are stated in the opinion.

Messrs. Louis Hanitch and B. W. Shaw, for appellant:

The facts alleged in the answer are sufficient to justify the allowance of the set-off upon equitable grounds.

Hobbs v. Duff, 23 Cal. 597-629; *Howard v. Shores*, 20 Cal. 282; *Pomeroy, Remedies & Remedial Rights*, § 761; *Lindsay v. Jackson*, 2 Paige, 581, 2 L. ed. 1088; *Simson v. Hart*, 14 Johns. 68; *Gillespie v. Torrance*, 25 N. Y. 306; *Smith v. Felton*, 48 N. Y. 419; *Seligmann v. Heller Bros. Clothing Co.* 69 Wis. 410; *Becker v. Northway*, 44 Minn. 61.

Mr. H. G. Voss, for respondent:

The obligation on the bond is joint and not joint and several, and no several judgment can be rendered in the action.

Comp. Laws, §§ 8425, 8574, 4901; *Kelly v. Van Austin*, 17 Cal. 564.

The term "counterclaim," as employed in our Code, includes both "set-off" and "recoupment."

Estee, Pl. § 8364.

The first essential of a counterclaim is, that it "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

*Head note by CORLISS, Ch. J.

NOTE.—Surety may offset joint indebtedness where insolvency exists.

A solvent surety for a hopelessly insolvent principal is entitled to set off his claim for payment of such debt against debts due from him to the insolvent. See *Merwin v. Austin*, 7 L. R. A. 84, and note, 68 Conn. 22.A surety may in equity avail himself of all existing claims in favor of the principal, where the latter is insolvent; but proof of the insolvency is essential to the right. *Schickie v. Hazard* (Sup. Ct.) 35 N. Y. S. R. 364; *Levy v. Steinbach*, 43 Md. 217; *Marshall v. Cooper*, 48 Md. 80; *Chance v. Isaacs*, 2 Edw. Ch. 356, 6 L. ed. 428.Equity, whenever necessary to prevent irremediable injustice, will allow a set-off although the debts are not mutual, as where a joint debt is a mere security for the separate debt of the principal. *Wulschner v. Sella*, 87 Ind. 75; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Hoffman v. Zollinger*, 39 Ind. 461; *Keightley v. Walls*, 27 Ind. 18 L. R. A.Comp. Laws, § 4915; *Thalheimer v. Crow*, 13 Colo. 897; *Matteson v. Ellsworth*, 28 Wis. 258.

The Code permits defendant to plead such matters as would defeat the plaintiff's right to recover in the action—such as pleas in bar or that the defendants did not execute the bond—but all new matter must be pleaded under the counterclaim.

Bliss, Code Pleading, 366.

The defense counterclaim or set-off, whether legal or equitable, must be one in favor of a defendant and against a plaintiff between whom a several judgment may be had in the action.

Roberts v. Donovan, Dec. 28, 1885; *Wood v. Brush*, 72 Cal. 224.

Aside from the Statute the general doctrine in equity, as to set-off, is the same as at law, and separate debts cannot be set off in equity any more than at law against joint debts.

Jackson v. Robinson, 3 Mason, 138; *Murray v. Toland*, 8 Johns. Ch. 569, 1 L. ed. 719; *Dale v. Cooke*, 4 Johns. Ch. 11, 1 L. ed. 746; *Elde v. Lasswell*, 2 Blackf. 349; *Howe v. Sheppard*, 2 Sumn. 409; *Robbins v. Holley*, 1 T. B. Mon. 191; *Robbins v. McKnight*, 5 N. J. Eq. 648; *Davis v. American L. Ins. & T. Co.* 4 Edw. Ch. 807, 6 L. ed. 888; *Birdsall v. Fischer*, 17 Minn. 108; *Story*, Eq. Jur. § 1437.

Defendants' liability on the appeal bond was fixed and the bond forfeited as soon as judgment was rendered on the appeal in the court below.

Wood v. Derrickson, 1 Hilt. 410; *Murdock v. Brooks*, 88 Cal. 604.

If it be true that Sullivan bought this worthless judgment against an insolvent for practically nothing after his liability on the appeal bond became fixed, with a full knowledge of Clark's insolvency, for the purpose of using the same as a set-off, certainly a court of equity would grant him no relief.

Case v. Cannon, 23 La. Ann. 112.

Before a court of equity will invoke its powers and grant relief not attainable at law, natural and inherent equity must be shown.

Duncan v. Lyon, 3 Johns. Ch. 354, 1 L. ed. 646; *Flanders v. Chamberlain*, 2 Mich. N. P. 182; *Gordon v. Lewis*, 2 Sumn. 148.

384, 24 Ind. 205; *Stevens v. Songer*, 14 Ind. 342.In cases of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious and a set-off will be allowed. *Carter v. Compton*, 79 Ind. 41; *Cosgrove v. Cosby*, 86 Ind. 615; *Vulliamy v. Noble*, 3 Meriv. 508; *Dale v. Cooke*, 4 Johns. Ch. 11, 1 L. ed. 746; *Blake v. Langdon*, 19 Vt. 485; 2 *Story*, Eq. Jur. § 1437; *Van Wagoner v. Paterson*, G. L. Co. 23 N. J. L. 238.A court of equity has power to permit an equitable set-off in cases not within the statute, if, from the nature of the claim or the situation of the parties, justice cannot be obtained by a cross-action; even though the debt of the complainant to the defendant is not due if the defendant is insolvent. *Rothschild v. Mack*, 43 Hun, 75; *Gay v. Gay*, 10 Paige, 360, 4 L. ed. 1015; *Smith v. Fox*, 48 N. Y. 674; *Davidson v. Alfaro*, 80 N. Y. 660; *Shipman v. Lansing*, 28 Hun, 280.

If Clark is insolvent and possesses less than \$1,500 of personal property, the money due to him on this appeal bond could not be applied to the satisfaction of the Fairbank, Morse & Co's judgment and to allow Sullivan to circumvent the Exemption Laws is a fraud upon Clark and the Exemption Laws of this State.

Smith v. Hill, 8 Gray, 572.

Corliss, Ch. J., delivered the opinion of the court:

The demurrer of plaintiff to counterclaim of defendant Sullivan having been sustained, he challenges by this appeal the ruling of the trial court in this respect. It is not pretended that the answer does not state a good cause of action in favor of defendant Sullivan and against the plaintiff; but it is insisted by plaintiff that, as the plaintiff's cause of action is a joint debt of defendant Sullivan with his co-defendant King, and as the claim sought to be offset against it is the debt of the plaintiff to the defendant Sullivan alone, it is not the proper subject of counterclaim; that Sullivan must sue upon it in an independent action. The complaint states a cause of action arising out of the execution of an undertaking on appeal by Mead as principal and the two defendants herein, King and Sullivan, as sureties, followed by the affirmance of the judgment appealed from. The claim set forth in the answer is a judgment recovered against the plaintiff, Clark, by Fairbanks, Morse & Co., which was assigned to defendant Sullivan before the commencement of this action. The liability of the two sureties on the undertaking is joint. No words expressing a several liability appearing on the face of the instrument, it was the joint, and not the joint and several, obligation of the parties executing it. *Wood v. Fisk*, 63 N. Y. 245; 1 Parsons, Cont. 11; 1 Story, Cont. § 53; 1 Pom. Eq. Jur. § 409; *Pickersgill v. Lahens*, 82 U. S. 15 Wall. 140, 21 L. ed. 119.

Statutory enactment in this State has left this rule unaltered, where at least one of the parties liable upon the obligation is a mere surety. Comp. Laws, §§ 3425, 8574.

The counterclaim, therefore, cannot be sustained under the Statute. The statutory counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Comp. Laws, § 4915. See *Roberts v. Donovan* (Cal.) 9 Pac. Rep. 180; *Wood v. Brush*, 72 Cal. 224.

No several judgment against the defendant Sullivan could be rendered. Had plaintiff failed to make his co-defendant, King, a party, this defect of parties would have abated the action as thus commenced, the defect being legally brought to the attention of the court by demurrer or by answer, according as the defect might or might not appear upon the face of the complaint. Although only one of two joint debtors is served, the judgment must be against both jointly, to be enforced against their joint property and the separate property of the defendant served. Comp. Laws, § 4901, subd. 1. The plaintiff having no right to a several judgment against defendant Sulli-

van, the latter could not, therefore, under the Statute, offset his separate claim against the plaintiff. But we may look elsewhere for the proper rule to govern this question. The right to offset a claim is recognized by equity independent of any statute. We are very clear that the facts alleged in the answer bring this case within this principle of equity jurisprudence. The defendant avers the insolvency of the plaintiff. This creates an equity, for it is unconscionable that the plaintiff should insist that the defendant pay him, and then leave the defendant powerless because of plaintiff's insolvency to enforce his (defendant's) claim against the plaintiff. But a further equity appears. Defendant alleges the insolvency of his principal in the undertaking. Therefore not only will he be without the ability to collect his judgment from the plaintiff, but he will be without ability to reimburse himself out of his principal, who should save him from all loss. It would not be creditable to an enlightened administration of justice to deny the operation of this equitable rule under these facts, which appeal so strongly to the conscience. It is well established that the surety, when sued upon the joint obligation of himself and his principal, may offset the separate claim of the latter against the plaintiff in case of insolvency. *Coffin v. McLean*, 80 N. Y. 560; *Becker v. Northway*, 44 Minn. 61.

Certainly this court would be open to the criticism of sacrificing substance to form if it refused to allow the surety to set off his own separate demand against the plaintiff when the latter is insolvent. May he reach out, and, seizing without assignment, interpose this principal's claim as an offset, and yet is he powerless, under the same circumstances, to plead his own demand as a counterclaim? Had defendant Sullivan been principal, his claim, upon the favorable consideration of a court of equity, would have been trifling when compared with that high claim to the favor of equity which all the adjudications agree is the peculiar property of a surety. One of the very elements of the law is that he is a favorite of a court of equity; and yet, as a principal debtor, Sullivan could have offset this separate claim against the plaintiff under the Statute without showing any equity, because he would have been severally as well as jointly liable to plaintiff on the undertaking under our Statute, and therefore a several judgment between him and plaintiff could have been rendered. But as surety, the favorite of the court, with strong equities pleading in his behalf, he may not, it has been decided, in this case, even under an equitable rule, have the same measure of relief and justice. The doctrine on which that decision must rest can have no place in the more advanced system of jurisprudence, which, unlike the old system,—before equity achieved its memorable triumph, ere reform in procedure had supplanted technical rules,—subordinates in large measure every other consideration to the accomplishment of justice. It is true that it sometimes has been thought that insolvency was not sufficient to create such an equity as would warrant a departure from

the statutory rule. See 2 Smith, Lead. Cas. pt. 1, p. 355, and cases. But the doctrine of *Lindsay v. Jackson*, 2 Paige, 581, 2 L. ed. 1038, commends itself with greater force to the reason and the conscience of man. Said Chancellor Walworth, in this leading case: "There is a natural equity that cross-demands should be offset against each other, and that the balance only should be recovered. This was the rule of the civil law, and it is now adopted and preserved as the law of those countries where the principles of the civil law prevail. . . . By the common law of England, however, this natural equity was not allowed or enforced in the courts of law, but each party was left to recover his demand in a separate action. As a general rule the court of chancery followed the rule of law; and after the Statute had permitted set-offs to a certain extent in suits at law, this court also adopted and acted on that principle. But the courts of chancery, even before the Statute, recognized the principle of natural equity, and acted upon it, in cases where the law could not give a remedy in a separate suit in consequence of the insolvency of one of the parties." To same effect are *Smith v. Felton*, 43 N. Y. 419; *Seligmann v. Heller Bros. Cloth. Co.* 69 Wis. 410; *Becker v. Northway*, 44 Minn. 61; *Coffin v. McLean*, 80 N. Y. 560; *Davidson v. Alfaro*, Id. 660; *Hiner v. Newton*, 80 Wis. 640-644; *Hobbs v. Duff*, 23 Cal. 597-629.

We are not called upon to decide on this appeal whether it was proper for the defendant to urge his equity by answer, or whether he should not have filed his complaint in equity to enforce his equitable set-off. Nor are we asked to determine whether he should have waited until the recovery of judgment against him in this action, and then by motion or by action had one judgment set off against the other. Only the question of right has been discussed on this appeal. What is the proper procedure has not been touched. It might be well in passing, however, to refer

to the fact that in New York, where the provisions of the Code relating to this question are the same as in this State, the practice, as apparently sanctioned by the courts, has been to insist upon this equity by answer. *Coffin v. McLean*, 80 N. Y. 560; *Smith v. Felton*, 43 N. Y. 419. This is true of Minnesota also, but the Statute there was somewhat different. *Becker v. Northway*, 44 Minn. 61. See also *Dempsey v. Rhodes*, 93 N. C. 120. But see *Duff v. Hobbs*, 19 Cal. 646.

It was contended on the oral argument that equity would not decree the offsetting of defendant's judgment against plaintiff's claim because the plaintiff's claim was exempt; that, in effect, this would be the seizure of his exempt property to pay a judgment against him. The point is not without force, but it is not involved on this appeal, as there is nothing to show that plaintiff has not a large amount of property in excess of his exemptions. An insolvent may own a large estate. No cases were cited on this point. An investigation of it has brought to light the following decisions, which we cite for the benefit of counsel without further comment: *Puett v. Beard*, 86 Ind. 172; *Temple v. Scott*, 3 Minn. 419 (Gil. 306); *Curlee v. Thomas*, 74 N. C. 51; *Duff v. Wells*, 7 Heisk. 17; *Wilson v. McElroy*, 32 Pa. 82.

It was also said that no equity could arise in favor of defendant, because he purchased the judgment he now seeks to offset with knowledge of plaintiff's insolvency, and for the express purpose of using the judgment as an offset, and that plaintiff paid practically nothing for it. These facts do not appear on the face of the answer to which plaintiff has demurred. A reply embracing them would, if sustained by proof, or demurred to, raise this question. We do not decide it now.

The order appealed from is reversed, plaintiff to have ten days after the remittitur is filed in which to reply to defendant's offset.

All concur.

OHIO SUPREME COURT.

Salathial BETZ, *Plff. in Err.*,
v.

Charles M. SNYDER, Assignee, etc., of James N. Hape.

(....Ohio St....)

***1. A mortgage of real property, which has not been deposited for record with the recorder of the proper county, before an as-**

***Head notes by the COURT.**

signment of the property by the mortgagor for the benefit of his creditors takes effect, is not a valid lien upon the property, as against the assignee or the creditors, nor does it become so by being subsequently recorded.

2. Such assignment takes effect, as to all persons, from the time of its delivery to the probate court in the county in which the assignor resided at the time of its execution. It is not necessary that it be also filed for record with the recorder of deeds.

NOTE.—Legislative control over Recording Acts.

It is in the power of the State Legislature to pass Recording Acts, by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the Recording Act. Though the effect of such an Act is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280, 7 L. ed. 679.

13 L. R. A.

Primary object of these enactments.

The object of all Registry Laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. *Patterson v. De La Ronde*, 75 U. S. 8 Wall. 232, 19 L. ed. 415.

The sole purpose of Registry Laws is to protect subsequent purchasers against prior and unrecorded conveyances. In the absence of such laws prior grantees and mortgagees are superior in right,

(June 16, 1891.)

ERROR to the Circuit Court for Columbiana County to review a judgment reversing a judgment of the Court of Common Pleas establishing a mortgage as a valid lien upon the property of James N. Hape, and directing its payment out of the proceeds of such property in the hands of an assignee for the benefit of his creditors. *Affirmed.*

Statement by **Williams, Ch. J.:**

On the 1st day of December, 1885, James M. Hape executed a mortgage, on all of his real estate situated in Columbiana County, to Salathiel Betz, to secure an indebtedness of \$3,000 due in one year, with 6 per cent interest. Josephine M. Hape, the wife of the mortgagor, joined in the execution of the mortgage. On the 21st day of December, 1885, the mortgage was delivered to the recorder of the county for record, and was duly recorded. On the 16th day of December, 1885, said James M. Hape, who then resided in Columbiana County, made an assignment for the benefit of his creditors to Charles N. Snyder. The deed of assignment, which embraced all the property, real and personal, of the assignor (including that mortgaged to Betz), was executed, attested, and acknowledged in conformity to the requirements of the Statute relating to conveyances of real estate, and was filed in the probate court of the county on the 17th day of December, 1885, when the assignee qualified, and entered upon the execution of his trust. He

thereafter filed his petition in the probate court of that county, to have the validity and priority of the liens determined, and the property sold. Betz, who was made a party defendant, filed an answer, setting up his mortgage, and asking for its payment out of the proceeds of the sale. The cause, after having proceeded to judgment in the probate court, was appealed to the court of common pleas, where it was submitted upon an agreed statement of facts, substantially as above stated, upon which that court adjudged the mortgage to be a valid lien, and ordered the amount found to be due on it to be paid out of the proceeds of the sale, before any distribution to the general creditors. This judgment was reversed by the circuit court, which held that, as the mortgage was not filed for record until after the deed of assignment was filed in the probate court, it was invalid as against the assignee, and not entitled to preference over the general creditors. Whether there was error in that judgment is the question presented to this court.

Messrs. Wallace & Billingsley, for plaintiff in error:

An unrecorded mortgage is a lien as against an assignee of the mortgagor in trust for the benefit of creditors; he is neither a creditor nor purchaser for value.

Mellons' App. 32 Pa. 121.

The statutes of Pennsylvania as to the recording of mortgages are substantially the same as ours.

1 Brightly, *Purd. Dig.* § 122, p. 588.

as they are in time, and will be protected as against subsequent deeds and mortgages. *Reeves v. Hayes*, 95 Ind. 644. See *Ely v. Scofield*, 35 Barb. 330; *James v. Morey*, 2 Cow. 246.

The acknowledgment and registry of the mortgage are not necessary to its validity, as between the original parties; nor would an entire omission to record the power affect the sale as between them. *Jackson v. Colden*, 4 Cow. 278. See *Jackson v. Dubois*, 4 Johns. 216; *Bergen v. Bennet*, 4 Cal. Cas. 17, 18.

There is no case holding that a mortgage to secure future advances, or the liability to be incurred by future indorsements, must be recorded to protect the mortgagee against subsequent judgments. *Thomas v. Kelsey*, 30 Barb. 275.

The policy of the Registry Law is that the title and all that affects it should be disclosed by the public records, and upon the theory that it is thus shown, the rule obtains that a purchaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens and conditions of which he has no notice. *Williams v. Jackson*, 107 U. S. 478, 27 L. ed. 529; *Testart v. Belot*, 31 La. Ann. 795; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Hathorn v. Maynard*, 65 Ga. 168; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 239, 118 Ind. 373, 3 Am. St. Rep. 655; *Newton v. McLean*, 41 Barb. 285; *Cogan v. Cook*, 22 Minn. 137; *Ramsey v. Jones*, 41 Ohio St. 685; *Harrington v. Erie County Sav. Bank*, 2 Cent. Rep. 170, 101 N. Y. 257; *Pancake v. Cauffman*, 5 Cent. Rep. 205, 114 Pa. 113; *Bailey v. Myrick*, 50 Me. 171; *Farmers & M. Nat. Bank v. Wallace*, 45 Ohio St. 152; *Columbia Bank v. Jacobs*, 10 Mich. 349; *Hart v. Farmers & M. Bank*, 33 Vt. 262; *Hoyt v. Jones*, 31 Wis. 389; *Newhall v. Burt*, 7 Pick. 187; *Ashbrook v. Roberts*, 33 Ky. 298; *Eulett v. Mutual Ins. Co.* 4 Cent. Rep. 767, 114 Pa. 142; *Wright v. 18 L. R. A.*

Lassiter, 71 Tex. 640; *Roll v. Rea*, 11 Cent. Rep. 322, 50 N. J. L. 266; *Doherty v. Stimmel*, 40 Ohio St. 294; *Kearnes v. Hill*, 21 Fla. 185.

Registry of mortgage as notice.

Equitable estates and interests, as well as legal, are embraced within the intent and operation of the Recording Acts. *Digman v. McCollum*, 47 Mo. 372; *Tarbell v. West*, 86 N. Y. 287. See *Doyle v. Teas*, 3 Ill. 202; *Alexander v. Webster*, 6 Md. 359; *Alderson v. Ames*, 6 Md. 52; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517; *Wilder v. Brooks*, 10 Minn. 50; *Dickinson v. Glenney*, 27 Conn. 104; *Russell's App.* 15 Pa. 319; *Boyce v. Shiver*, 3 S. C. 515; *Siter v. McClanahan*, 2 Gratt. 280; *Johnson v. Stagg*, 2 Johns. 509; *Hunt v. Johnson*, 19 N. Y. 231; *Stoddard v. Whiting*, 48 N. Y. 627; *United States Ins. Co. v. Shriver*, 8 Md. Ch. 381; *Belias v. McCarty*, 10 Watts, 13; *Neligh v. Michenor*, 11 N. J. Eq. 539. *Contra*, *Doswell v. Buchanan*, 3 Leigh, 365; *Lewis v. Baird*, 3 McLean, 56; *Grimstone v. Carter*, 3 Paige, 421, 3 L. ed. 214; 2 Pom. Eq. Jur. § 649.

The record becomes constructive notice, not only that the instrument exists, but of its contents, and of all the estates, rights and interests, legal and equitable, created by it, or arising from its provisions (2 Pom. Eq. Jur. § 655; *Burrell v. Bull*, 3 Sandf. Ch. 15, 7 L. ed. 735); but where any of the preliminaries of execution, acknowledgment, and certificate attached are entirely omitted or defectively performed, it is a mere voluntary act, of no effect as to rights of subsequent purchasers or incumbrancers. See 2 Pom. Eq. Jur. § 652.

The registry of a mortgage is notice to all subsequent purchasers and mortgagees of the lien created thereby. *Teft v. Munson*, 63 Barb. 36.

It is notice of the contents of the instrument and not of any secret condition, trust or equity.

When Hape made the assignment on December 16, 1885, he could only assign what rights he held in the land previously mortgaged to Betz.

1 Am. & Eng. Encyclop. Law, p. 854.

The assignee takes only such rights as the assignor had at the time of the assignment.

Legmon v. Hutchins, 1 Ohio C. Ct. Rep. 388; *Hodgson v. Barrett*, 33 Ohio St. 63.

A mortgage not recorded till after the death of the mortgagor is not for that reason inoperative as against the general creditors of the estate.

Gill v. Pinney, 12 Ohio St. 38. See *Giauaque*, Assignm. § 15, p. 44, and *notes*, p. 46, *note*; 1 Jones, Mortg. 2d ed. p. 468; Burrill, Assignm. 5th ed. § 391; *Morgan v. Kinney*, 38 Ohio St. 610.

Messrs. W. G. Wells and Charles N. Snyder, in *propria persona*, for defendant in error: .

The principle running through all the cases since the Recording Act of 1831 is that the subsequently acquired legal rights of title of third persons cannot be displaced by any unrecorded mortgage, a defectively executed mortgage, or any specific though merely equitable lien.

1. Cases where junior recorded mortgages with notice were preferred to prior unrecorded mortgages:

Stansell v. Roberts, 13 Ohio, 149; *Mayham v. Coombs*, 14 Ohio, 429.

2. Cases where a lien by judgment has been preferred to a prior unrecorded mortgage, a defectively executed mortgage, or a contract for a mortgage:

Houston v. McCluney, 18 W. Va. 150. See *note* to *Frost v. Beekman*, 1 Johns. Ch. 238, 1 L. ed. 143.

The statute speaks of any writing in the nature of a mortgage, and any agreement creating an equitable incumbrance. *Churchill v. Little*, 23 Ohio St. 309.

Record of a trust deed is notice of the trust to everyone, and there is no difference, as to consequences, between actual and constructive notice. *Bourne v. Hall*, 10 R. I. 143. See *Oliver v. Platt*, 44 U. S. 3 How. 333, 11 L. ed. 622; *Ellis v. Woods*, 9 Rich. Eq. 19.

If in examining the title to the property the person proposes to buy, he is led directly to a deed that puts him on inquiry as to the remaining part, it is sufficient constructive notice. *Iglehart v. Crane*, 42 Ill. 299; *Chase v. Woodbury*, 6 Cush. 143; *LaFarge F. Ins. Co. v. Bell*, 22 Barb. 54; *Montgomery v. Dorion*, 6 N. H. 255; *French v. Gray*, 2 Conn. 108.

A mortgage duly recorded will be preferred to a subsequent bona fide deed without notice. *Crane v. Turner*, 7 Hun. 359; *Wadsworth v. Wendell*, 5 Johns. Ch. 229, 1 L. ed. 1066; *Williams v. Birbeck*, Hoffm. Ch. 375, 6 L. ed. 1178; *Fleming v. Townsend*, 6 Ga. 112, 50 Am. Dec. 323.

As to effect of registry, see *note* to *Frost v. Beekman*, *supra*.

Public records, by construction of law, are notice to all persons of what they contain. Their contents are matters of public knowledge, because the law requires them to be kept, authorizes them to be used, and secures to all persons having access to them that knowledge of them may be public; and thence imputes to all interested persons that knowledge the opportunity to acquire which it has provided. *Neslin v. Wells Fargo Co.* 104 U. S. 433-441, 26 L. ed. 804-807; *Moore v. Simonds*, 100 U. S. 145, 26 L. ed. 590; 1 Greenl. Ev. § 484; 1 Story, Eq. 18 L. R. A.

Jackson v. Luce, 14 Ohio, 514; *Mayham v. Coombs*, 14 Ohio, 429; *White v. Denman*, 16 Ohio, 60; *White v. Denman*, 1 Ohio St. 111; *Fosdick v. Barr*, 8 Ohio St. 471; *Van Thorniley v. Peters*, 26 Ohio St. 471. See also 2 C. C. Rep. 485.

An assignee for the benefit of creditors comes within this rule.

Bloom v. Noggle, 4 Ohio St. 45; *Erwin v. Shuey*, 8 Ohio St. 510.

A mortgage void as to creditors is void as against an assignee for the benefit of creditors.

Hanes v. Tiffany, 25 Ohio St. 549; *Kilbourne v. Fay*, 29 Ohio St. 264; *Lindemann v. Ingham*, 36 Ohio St. 11; *Blandy v. Benedict*, 42 Ohio St. 299.

Williams, Ch. J., delivered the opinion of the court:

The common-law rule, that an assignee for the benefit of creditors succeeds only to the rights of the assignor in the property at the time of the assignment, and takes it subject to all equities and liens which could have been asserted against it had the assignment not been made, is not without important exceptions in this State, growing out of our legislation. It is well settled that chattel mortgages which fail to conform, in any substantial requirement, to the provisions of the Statute, relating to their execution or registry, though good against the mortgagor and the property while it is retained by him, are ineffectual as liens upon the property after it has passed into the hands of an assignee for the benefit of creditors of the mortgagor, under an assignment made subse-

§§ 403, 404; *McArthur v. Browder*, 17 U. S. 4 Wheat. 487, 4 L. ed. 622; *Anderson*, Law Dict. title, *Record*.

Statutory forms of registration.

A knowledge of the statutes, at least as to their leading features of similarity and dissimilarity, is essentially necessary to a proper understanding of the American Law of Registration. See 2 Pom. Eq. Jur. § 646, and *notes* thereto; also Stimson, Am. Stat. Law, §§ 1570-1632; Webb, Record of Title, chap. 11.

In every State, registration is held to impart constructive and absolute notice of the contents of instruments authorized by law to be recorded. *Edwards v. Barwise*, 69 Tex. 84; *Stevens v. Morse*, 47 N. H. 532; *Van Rensselaer v. Clark*, 17 Wend. 25; *Thomas v. Kennedy*, 24 Iowa, 397; *Shove v. Larsen*, 22 Wis. 142; *Irvin v. Smith*, 17 Ohio, 223; *Cushing v. Ayer*, 25 Me. 383; *James v. Morey*, 2 Cow. 216.

Who is a purchaser for value.

A purchaser for a valuable consideration, within the meaning of the Acts, is one who has paid the consideration of the conveyance, or some part thereof, or has parted with something of value upon the face of the conveyance. 3 Washb. Real Prop. 3d ed. 299; *Tourville v. Nalsh*, 3 P. Wms. 306; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304; *Webster v. Van Steenberg*, 46 Barb. 211; *Weaver v. Barden*, 49 N. Y. 236; *De-lancey v. Stearns*, 66 N. Y. 157; *Dickerson v. Tillinghast*, 4 Paige, 215, 3 L. ed. 409; *Westbrook v. Gleason*, 79 N. Y. 23.

It is settled everywhere that unrecorded assignments of mortgages are void as against subsequent purchasers, whose interests may be affected thereby, and whose conveyances are duly recorded, provided such assignments are embraced by the Re-

quent to the execution of the mortgage. *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295. In *Hanes v. Tiffany*, it was contended in behalf of the mortgagee that, as the mortgage was good against the mortgagor, it was also good against the assignee for the benefit of his creditors; for the latter, it was claimed, stood in no better situation than the assignor. In disposing of this contention, White, J., in the opinion of the court, said: "The correctness of this position at common law is admitted, but not so under the Statute." It was held in *Blandy v. Benedict* that where the affidavit, which the Statute requires the mortgagee to make on his chattel mortgage before filing the same with the proper officer, was defective in the statement of the liability the mortgage was given to secure, but the mortgage was otherwise properly executed and filed, and the mortgagor subsequently made an assignment of his property for the benefit of his creditors, the mortgage was not entitled to priority over the general creditors under the assignment, although the assignment contained a provision expressly excepting from its operation all liens, and though the mortgage was good as against the mortgagor, constituting a valid lien while the property remained in his possession. With respect to the purpose of that provision of the assignment which excepted all liens from its operation, and its effect upon the assignment and the rights of the creditors, it is said in the

opinion by McIlvaine, J.: "We think there can be no doubt that the intention was to secure the mortgagees the full amount of their liens, to the extent that such liens were valid as against the assignor. Can such purpose be accomplished by such means? We think not. Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors."

These decisions rest upon the provisions of the Chattel Mortgage Statute, which enacts that such mortgages, when not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property mortgaged, shall be void as against the creditors of the mortgagor, unless the mortgage, or a true copy, with the necessary affidavit of the mortgagee thereon, as prescribed by the Statute, be deposited with the proper officer. The right of the creditors to subject the property to the payment of their claims is in no way affected by such void mortgages, and an assignment of the property by the mortgagor for the benefit of his creditors clothes the assignee, not only with the assignor's title to the property, but also with all the rights of the creditors with respect to it. As was said in *Blandy v. Benedict*: "By the assignment, the rights of the creditors passed to the assignee as matter of law," and they are thereafter to be worked out through him, in the administration of his trust. Up to the time of the assignment, the creditors might seize the property by

ording Acts. *Bacon v. Van Schoonhoven*, 87 N. Y. 446; *Decker v. Bolce*, 83 N. Y. 215; *Swartz v. Leist*, 18 Ohio St. 419; *Yerger v. Barz*, 58 Iowa, 77; *Henderson v. Pilgrim*, 22 Tex. 464; *Boone, Mortg.* § 92; 1 *Jones, Mortg.* § 472; *Reeves v. Hayes*, 95 Ind. 521, and authorities there cited.

Legislative intent, how ascertained.

In ascertaining the intent of the Legislature in the enactment of a statute, courts will take judicial notice of such contemporaneous history as led up to and probably induced the passage of the law. *Stout v. Grant County Comrs.* 5 West. Rep. 635, 107 Ind. 343.

Result of failure to record.

A statute which has for its purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the Registry Acts, which enable him to give notice to all the world of his claim, to the claim of a subsequent purchaser who acted on the faith of a public record. *Kenyon v. Stewart*, 44 Pa. 179; *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280, 7 L. ed. 679; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 239, 118 Ind. 373.

The protection of the Recording Act is not confined to a subsequent purchaser immediately from the same grantor; but applies to one who takes from him through mesne conveyances. *Fallas v. Pierce*, 30 Wis. 479. See *Ledyard v. Butler*, 9 Paige, 132, 4 L. ed. 637.

The younger recorded mortgage could not have preference to the older unrecorded mortgage. To have that advantage the younger must both be taken in good faith and be first recorded. This was always the rule between grantor and grantee, by deed, and between mortgagor and mortgagee. *Fort v. Burch*, 5 Denio, 191. See *Jackson v. Given*, 8 Johns. 137; *Jackson v. Van Valkenburgh*, 8 Cow. 264.

18 L. R. A.

Parties dealing in real estate may always lawfully assume that the title is completely disclosed upon the records, unless there is some circumstance of which they are bound to take notice, which would apprise a reasonable man, not merely that the records may be defective, but that they actually are so in the particular case in hand. *Roll v. Res*, 11 Cent. Rep. 362, 50 N. J. L. 293.

Under the Registry Laws of Iowa, the holder of an unrecorded deed has a complete title except against a subsequent good-faith purchaser without notice. *Davis v. Lutkiewicz*, 72 Iowa, 254.

Actual notice of a claim to real property dispenses with the necessity of notice by registry. *Hoge v. Hubb*, 18 West. Rep. 637, 94 Mo. 439.

Illustrations of the scope, nature and effect of the Recording Acts.

The responsibility of seeing that a deed is actually recorded rests upon the grantee, and he is not relieved therefrom by receiving from the recorder a certificate stating that the record has been properly made. *Ritchie v. Griffiths*, 12 L. R. A. 384, 1 Wash. 429; *Mangold v. Barlow*, 61 Miss. 538.

A deed sent to a clerk to be recorded without payment of his fees, and which he "pigeon-holed," is not "lodged" for record within the New Jersey Recording Act. *Dickerson v. Bowers*, 7 Cent. Rep. 372, 42 N. J. Eq. 235.

The Registration Laws apply as well to purchasers by, and from married women as to other persons. *Nicholson v. Condon*, 71 Md. 621.

A mortgage is within the provisions of the Act to register mortgages, which extends to every deed of mortgage, or conveyance in the nature of a mortgage, of or for any lands, tenements or hereditaments. Such mortgages are not only within the description of the Act, but they are also within its reason and spirit. *Decker v. Clarke*, 26 N. J. Eq. 165. See *Johnson v. Stagg*, 2 Johns. 510, 523; *Breese v. Bange*, 2 E. D. Smith, 474.

attachment or other process, and their lien, so acquired, would undoubtedly be superior to such a mortgage; and, in the language of McIlvaine, J., in *Blandy v. Benedict*: "Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment." The assignment, therefore, as effectually fixes the rights of the creditors to the property, and establishes their priority over the mortgage, as if they had taken the property on execution or attachment. This operation of the assignment upon the rights of the creditors must, of course, be the same, whether the property embraced in it be real or personal, or both; and hence, upon the principle established by the cases referred to, the creditors are entitled to priority over a mortgage of real property which has not been deposited for record when the assignment is made, unless, under our Recording Acts, the effect of the failure to deposit the mortgage for record is substantially different from that which results from the like failure to properly file a chattel mortgage. Is there a substantial difference in this respect?

The Statute regulating the execution and registry of mortgages of real property does not, in terms, declare that such mortgages, when not deposited for record, shall be void as against the creditors of the mortgagor; but it does enact that they shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and that they shall take effect from the time the same are delivered to the recorder of the proper county for record. Mortgages of real property, which are not so filed for record, like unfilled chattel mortgages, are good between the parties; and, while the latter are declared void as to creditors, the former do not take effect as to third persons until they are filed for record. A mortgage which has no effect is no better than a void one; for a void mortgage is simply without effect. It has been held as often as the question has been presented, and it has been made in a variety of forms, as well as in numerous cases, that mortgages of real property have no effect, either at law or in equity, until they are delivered to the recorder of the proper county for record, as against third persons acquiring a legal interest in, or lien upon, the property. In *Stansell v. Roberts*, 13 Ohio, 148, it was decided that, as between a prior unrecorded mortgage and a subsequent one which was recorded, the latter had priority. In the cases of *Mayham v. Coombs*, 14 Ohio, 429; *Jackson v. Luce*, Id. 514; *White v. Denman*, 16 Ohio, 60; *Holliday v. Franklin Bank of Columbus*, Id. 588; *White v. Denman*, 1 Ohio St. 110, and *Fosdick v. Barr*, 3 Ohio St. 471,—it was held that an unrecorded mortgage, or one defectively executed, so as not to be entitled to record, was not entitled to preference over a subsequent judgment recovered against the mortgagor. It was not doubted that such mortgages were good as against the mortgagor, and but for the Statute would have been entitled to preference over the judgments, under the general rule that the lien of a judgment attaches only

to the interest which the debtor has in the property at the time of its rendition. But, as is said in the last case cited above, while such unrecorded instruments are good and effectual between the parties, they are "entirely nugatory as to third parties, both at law and in equity, until they are recorded." It was held in *Bloom v. Noggle*, 4 Ohio St. 45, that a valid agreement in writing for a mortgage on real property gave to the party entitled to the mortgage no priority over the general creditors under an assignment made by the other contracting party for the benefit of his creditors. And in *Erwin v. Shuey*, 8 Ohio St. 510, this court held that a mortgage of lands, defective because not under seal, but otherwise properly executed and recorded, created no lien, in favor of the mortgagee, against an assignee under a general assignment, subsequently made by the mortgagor for the benefit of his creditors, although the assignee had notice of the mortgage at the time of the assignment.

These cases, like those of *Hanes v. Tiffany*, and *Blandy v. Benedict*, *supra*, afford instances of the exceptions, which obtain in this State, to the rule of the common law that an assignee for the benefit of creditors takes the property assigned subject to all equities which could have been enforced against it in the hands of the assignor at the time of the assignment; and it is shown by them that the exceptions grow out of the similar effect given to the recording statutes applicable to the different classes of mortgages. In *Bloom v. Noggle*, Ranney, J., speaking of the effect of the Statutes upon the rules of the common law, and the rights of the parties before and since their enactment, said: "If the case could be decided upon general principles, the right of the complainants to the relief they seek would seem to us as clear as it now seems clear that it cannot be given consistently with statutory provisions bearing upon the questions stated. Upon general equity principles, unaffected by statutory provisions, an agreement in writing for a mortgage is a valid contract, fixing a specific lien upon the property agreed to be mortgaged, and will be specifically enforced by a court of chancery, against the party and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law, for the benefit of his creditors. These principles may be regarded as well settled, and the jurisdiction of courts of equity in such cases has been exercised, without question, from a very early period, as is abundantly shown by the cases cited in argument. It rests upon the same foundation, and has all the reasons for its support that exist in favor of a like interference upon contracts for the execution and delivery of absolute deeds. As between the parties to such contract, the agreement is valid and effectual in this State, and we see no reason to doubt that a specific performance may be enforced by our courts of chancery, in the same manner and to the same extent that such relief has been given in England and other States of the Union. But while these principles and remedies have their full application and effect, as between

the parties to such a contract, we are clear in the opinion that no effect whatever can be given to it consistently with section 7 of the Act of June 1, 1881 (Swan's Rev. Stat. §10), to provide for the proof, acknowledgment, and recording of deeds, etc., as against third persons who have subsequently acquired the legal title to, or lien at law upon, the property to which it relates. By the positive provisions of that section, as construed by the Declaratory Act of March 16, 1888 (Swan's Rev. Stat. §11), and repeated decisions of this court, as against such third persons, mortgages have no effect, either at law or in equity, until delivered to the recorder of the proper county for record. "To give them any effect before," says the learned judge, "as against the persons intended to be protected by the Statute, would be to repeal it. It was not made for the mortgagor, and therefore, as to him, the record of the mortgage was wholly unnecessary; but it was designed to protect third persons who might acquire legal interests in, or liens upon, the property. As to them, the record was made conclusive; and they are only bound to regard such mortgage liens as the record discloses at the time their rights accrue. The principle deducible from all the cases is that the legal rights of such persons cannot be displaced, at the instance of the holder of a prior unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage, or of the existence of such contract; the object of the law being to avoid all vexed questions of notice, actual or constructive, in determining priorities of lien."

We have quoted at some length from the opinion in *Bloom v. Noggle*, because we think the case before us comes within the principle established by it, and subsequently approved in *Erwin v. Shuey*, *supra*, which is that the essential condition to the validity of a mortgage of real property, as against an assignee of the mortgagor for the benefit of his creditors, is that the mortgage shall be deposited for record with the proper officer before the assignment takes effect. It can make no difference, in the application of the principle, whether the want of such record, or deposit for record, results from the defective execution of the mortgage, by reason of which it is not entitled to record, or from the voluntary withholding from the record of a mortgage properly executed. There can be no doubt that an assignment for the benefit of creditors operates as a conveyance, and not as a mere power. Nothing remains in the assignor but the incidental right to discharge the trust by the payment of the debts, or to claim whatever residue may remain after the debts are paid. That the deed of assignment, when properly executed, clothes the assignee with the legal title, is settled by the cases just referred to, and, according to those decisions, against the legal title thus acquired, the prior unrecorded mortgage cannot prevail. If the conveyance was made directly to the creditors, for the payment or security of their debts, it could not be claimed that either their title or their rights under the conveyance would be displaced or affected

by a prior unrecorded mortgage, nor by its subsequent record; and their rights, we apprehend, are none the less when the conveyance is made to the assignee for their benefit. The subsequent record of the mortgage could, of course, give it no validity as against rights which had been acquired before. We therefore hold that a mortgage of real property, which has not been deposited with the recorder of the proper county for record, before an assignment of the property by the mortgagor for the benefit of his creditors takes effect, is not a valid lien upon the property, as against the assignee or the creditors, nor does it become so by being subsequently recorded. It has been suggested, though it is not so contended by counsel in the argument, that the assignment lost its priority, because the deed of assignment was not deposited for record with the recorder of the county, while, soon after it was filed with the probate court, the mortgage was duly recorded. The record now under review does not show that the deed of assignment was not filed with the recorder. But, assuming that it was not, does the result suggested follow? The consequences of the failure to record deeds differ from those attending a like failure with respect to mortgages. As to deeds, the Statute simply declares that until recorded, or filed for record, they "shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser, having at the time of purchase no knowledge of the existence of such former deed." If it were conceded, though we do not deem it necessary to so decide, that by recording his mortgage, after the deed of assignment was properly filed in the probate court, the mortgagee, Betz, then became a subsequent bona fide purchaser, within the meaning of the Statute, it was still essential, in order to bring him within its protection, that at the time of filing his mortgage for record he had no knowledge of the assignment; and this it is incumbent upon him to show. He makes no claim of that kind in his answer, and the record of the courts below is silent on the subject.

But is it essential to the validity of an assignment of real property, as to third persons, that the deed should be recorded in the office of the county recorder? As a deed conveying real property, it falls within the class of instruments whose record is provided for by section 4134 of the Revised Statutes, and is subject to its provisions, unless controlled by other statutory regulations made especially applicable to such assignments. The whole subject of assignments by insolvent debtors for the benefit of their creditors is specifically provided for, and regulated, in detail, by chapter 4 of title 2 of the Revised Statutes. By the first section of that chapter (§ 6335), it is made the duty of every assignee, within ten days after the delivery of the assignment to him, to cause it to be filed in the probate court of the county in which the assignor resided at the time of its execution; and it enacts that every "such assignment shall take effect only from the time of its delivery to the probate judge, and the exact time of such de-

livery shall be indorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court; and it may be delivered by the assignor to the probate judge, either before or after its delivery to the assignee." Upon the filing of the assignment, the assignee is required to enter into a bond for the faithful performance of his duties; and from that time the administration of the assignment becomes a pending proceeding in the probate court, and so continues until the trust is fully executed. Notice that the assignee has qualified is required to be given by publication, and notice must also be given by publication, or otherwise, of various steps in the proceedings. The probate court is invested with complete jurisdiction of the whole subject matter of the assignment, and of its administration to final completion. Its records, equally with those of the courts of common pleas, and of the records of deeds and mortgages, are constructive notice of what they are required to contain. It is a rule of construction that special statutory provisions for particular cases operate as ex-

ceptions to general provisions which might include the particular cases. The object of those provisions of section 6335, to which we have referred, was not, we think, simply to provide when and how assignments should become operative as between the parties to the instrument. They were not necessary for that purpose. As between them, the conveyance is complete without a compliance with those provisions. Their design evidently was to fix definitely a time from which such instruments should take effect as to all persons. And, it having been so specially enacted that assignments for the benefit of creditors shall take effect from the time of their delivery to the probate judge, the courts are not at liberty to annex, as a further condition to their taking effect, that they shall also be deposited with the recorder of deeds. This conclusion is sustained by the decision of the Supreme Court of Massachusetts in *Guilford v. Childs*, 22 Pick. 484, which involved the interpretation of statutes very similar to ours.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

SAINT NICHOLAS BANK of New
York, *Appt.*,

v.

STATE NATIONAL BANK, *Resp't.*

(.....N. Y.....)

1. **A bank which has received for collection a check** which it forwards to its correspondent for that purpose, cannot fulfill its obligation to the owner by delivering to him the correspondent's draft on a third person, drawn and used for transmitting the proceeds of the check, not to the owner but to itself, and which has become worthless because of the insolvency of both drawer and drawee.
2. **The courts of New York will construe the common law** as applicable to a contract made and to be performed in another State, according to their own precedents, although they will follow the courts of such other State in the construction of its statute law.
3. **The sending of a check by a New York bank to a Tennessee bank for collection in Texas** does not constitute the contract for collection a Tennessee contract.

(June 2, 1891.)

APPPEAL by plaintiff from an order of the General Term of the Supreme Court, First Department, reversing a judgment of the New York County Circuit in favor of plaintiff in an action brought to recover the proceeds of a draft which had been sent to defendant for collection. *Reversed.*

Statement by **Earl, J.**:

This action was brought to recover the proceeds of a draft for \$478.57 sent for col-

lection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded. Upon appeal to the general term, the judgment entered upon the verdict was reversed, and a new trial ordered. From the order of reversal the plaintiff appealed to this court. There is no controversy as to the facts, which for the most part were set forth in a stipulation read upon the trial. They may be summarized as follows: The plaintiff is a corporation organized under the laws of the State of New York, and engaged in the business of banking in the City of New York; and the defendant is a corporation organized under the National Banking Act, and doing business in the City of Memphis. For two years prior to the 18th day of November, 1884, the plaintiff had been accustomed to send checks, notes, and drafts to the defendant for collection, including such as were drawn upon persons residing at a distance, in the State of Texas and elsewhere. The commercial paper was inclosed in letters, consisting of printed forms, filled out by the insertion in writing of the date, the name of the defendant's cashier, and a description of the inclosure. The checks and drafts were collected by the defendant, and the proceeds were remitted to the plaintiff, less one fourth of 1 per cent, the defendant's commission, and the expense incurred in making distant collections. On November 10, 1884, the plaintiff was the owner and holder of a check for \$478.57 dated November 6, 1884, drawn upon the City National Bank of Dallas, Tex., by A.

NOTE.—Collecting agent; acceptance in payment. See note to *Fifth Nat. Bank v. Ashworth* (Pa.) 2 L. R. A. 491.

13 L. R. A.

Collecting bank as agent of owner of bill sent for collection. See note to *Freeman's Nat. Bank v. National T. W. Co.* (Mass.) 8 L. R. A. 42.

D. Aldridge & Co., and payable to the order of Henry Levy & Son. This check was indorsed by the plaintiff to the defendant for collection, and was sent to the latter in the usual course of business. The defendant received the check on November 13, 1884, and on that day indorsed it for collection, and forwarded it by mail to the firm of Adams & Leonard, at Dallas, Tex. They were at the time, and had been for many years, bankers in good standing at Dallas, and the correspondents of the defendant. They received the check on November 17, 1884, and on that day duly presented it for payment to the Bank upon which it was drawn, and it was immediately paid, and the proceeds were received by them. They then remitted to the defendant a sight draft for the amount collected, drawn by them upon Jemison & Co., of the City of New York. This draft was sent by the defendant for collection to the First National Bank of New York, and on November 24, 1884, was presented to Jemison & Co., who, in the mean time, had suspended payment. The draft was accordingly protested, and returned to the defendant. Thereupon the defendant, on November 28, 1884, mailed the protested draft to the plaintiff, and the plaintiff refused to accept it. Adams & Leonard had failed in business before the draft on Jemison & Co. was presented for payment. The only evidence offered by the defendant in opposition to these facts was proof of a decision of the Supreme Court of Tennessee, in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101, which will be referred to in the opinion.

Mr. Charles E. Hughes, with **Mr. William Tharp**, for appellant:

A bank receiving a bill of exchange in one State for collection from a drawee residing in another State, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents, selected to effect the collection.

Allen v. Merchants Bank, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. First Nat. Bank*, 116 N. Y. 498; *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 282, 28 L. ed. 724; *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 588; *Wingate v. Mechanics Bank*, 10 Pa. 104; *Reeres v. Ohio State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Simpson v. Waldby*, 6 West. Rep. 158, 63 Mich. 439; *Power v. Bank*, 6 Mont. 251, 35 Alb. L. J. 185; *Mackerey v. Ramsays*, 9 Clark & F. 818.

The liability of a collecting bank extends not only to the acts of its correspondents by which the collection is defeated, but to a failure to remit the proceeds of the commercial paper when collected.

Bradstreet v. Emerson, 72 Pa. 124.

The insolvency of its correspondents furnishes no excuse for the defendant's failure to remit the proceeds of the collection.

Mackerey v. Ramsays, *Simpson v. Waldby*, *Bradstreet v. Emerson* and *Reeres v. Ohio State Bank*, *supra*; *Hoover v. Wise*, 91 U. S. 308, 23 18 L. R. A.

L. ed. 392. See also *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, *supra*.

The draft drawn by Adams & Leonard to the order of the defendant and tendered by the latter to the plaintiff was not a remittance of the proceeds of the collection.

Simpson v. Waldby, *supra*; *People v. Bank of Dansville*, 39 Hun. 187.

If the question involved were to be decided by local law, they would not be determined by the law of Tennessee.

Dickinson v. Edwards, 77 N. Y. 573.

Texas was the principal place of performance.

As to the law of Texas we have no information. It will therefore be assumed, with reference to a question of this sort, that it is in accord with the law of New York.

Leavenworth v. Brockway, 2 Hill. 202, *note*; *First Nat. Bank of Meadville v. Fourth Nat. Bank*, 77 N. Y. 320.

The question involved is one of general commercial law, and the courts of this State will not in such a case defer to the views prevailing in other jurisdictions, in opposition to principles here established.

Swift v. Tyson, 41 U. S. 16 Pet. 19, 10 L. ed. 871; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Faulkner v. Hart*, 82 N. Y. 413.

Mr. A. Walker Otis, for respondent:

The contract was made in Tennessee, and was to be performed in Tennessee. It was a Tennessee contract to be governed by Tennessee law.

The duties of an agent who is made such for the purpose of collecting a claim and remitting the proceeds are to collect, and in the exercise of ordinary care intrust the proceeds to some proper carrier for transmission to his principal. That done, his whole duty is accomplished, and the contract is performed.

Buell v. Chapin, 99 Mass. 594; *Gurney v. Howe*, 9 Gray, 404; *Crane v. Pratt*, 12 Gray, 348; *Kingston v. Kincaid*, 1 Wash. Terr. 357; *Mechanics Bank of Baltimore v. Merchants Bank of Boston*, 6 Met. 26; *Indig v. National City Bank*, 80 N. Y. 100.

Referring to the law of Tennessee, which exempts the defendant from responsibility in this case, it may be remarked that the courts of a majority of the States are on that side of the question. The following are the States which so hold: Massachusetts, Connecticut, Maryland, Illinois, Wisconsin, Iowa, Mississippi, Missouri, Tennessee, Pennsylvania and Louisiana,—eleven in all.

On the other side we have New York, New Jersey and Ohio.

Morse, Banks & Banking, §§ 265, 287; *Mechan. Ag. ed.* 1839, § 515.

Plaintiff by volunteering to do business with the Memphis Bank, by implication, consented to do so, subject to the rules under which it did business and subject to the laws of Tennessee, by which it was exempted from liability for the defaults of sub-agents.

Wharton, Conf. L. ed. 1881, § 405; *Owings v. Hull*, 34 U. S. 9 Pet. 607, 9 L. ed. 246; *Morse, Banks & Banking*, §§ 9, *note* 3, 270; *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25, 7 L. ed. 87; *Ayrault v. Pacific*

Bank, 47 N. Y. 570; *Walls v. Bailey*, 49 N. Y. 464.

Earl, J., delivered the opinion of the court:

The rule has long been established in this State that a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents or other agents selected by it to effect the collection. *Allen v. Merchants Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. First Nat. Bank*, 116 N. Y. 498. And the same rule prevails in some of the other States, in the United States Supreme Court, and in England. *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 588; *Wingate v. Mechanics Bank*, 10 Pa. 104; *Reeves v. Ohio State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Simpson v. Waldbly*, 63 Mich. 439, 6 West. Rep. 158; *Mackersy v. Ramsays*, 9 Clark & F. 818.

In such a case the collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking-house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect, or other default. Here, when this money was received by Adams & Leonard, the defendant's agents, it was, in law, received by it, and it became absolutely bound to pay or remit the same to the plaintiff. It is difficult to see upon what principle the defendant could be held liable if Adams & Leonard, its agents, had carelessly failed to collect the draft, or had collected it, and then purposely misappropriated the proceeds thereof, and yet not liable for their failure to pay over the proceeds in consequence of their unexplained insolvency. Upon what principle can the defendant be held liable for one default of its agents, and not for every default? That the insolvency of the sub-agent in such a case does not shield the collecting agent from responsibility for the loss has been decided in several cases quite analogous to this. *Reeves v. Ohio State Bank*, *Simpson v. Waldbly* and *Mackersy v. Ramsays*, *supra*; and *Bradstreet v. Everson*, 72 Pa. 124. It is not needful now to vindicate the principle upon which these cases rest, as that has been sufficiently done by learned judges writing the opinions therein. They are well supported by many analogous cases in other branches of the law, and it is believed they lay down the best and safest rule, and subscribe the wisest commercial policy. The case of *Indig v. National City Bank*, 80 N. Y. 100, is not opposed to these views. There the defendant received a note for collection which was payable at the Bank of Lowville, and it sent the note directly to the bank for payment, which on the next day sent a draft for the amount of the note to the defendant, and failed before the draft reached its destination, and it was held that the loss

did not fall upon the defendant. That conclusion was reached by holding that the Lowville Bank was not the agent of the defendant, but that the defendant was in the same position as if it had sent the note to some agent, and he had received the proceeds thereof, and had then bought a draft on New York of the Lowville Bank for the amount, and the Bank had then failed before the draft was paid. The defendant there would have been held liable if the Lowville Bank had been its agent for the collection of the note. *Briggs v. Central Nat. Bank*, 89 N. Y. 182. After Adams & Leonard had received payment of the draft, they drew a draft upon Jemison & Co. for the amount, and sent that to the defendant for the purpose of discharging their obligation to the defendant. That draft was not made for the purpose of remitting the proceeds of the collection to the plaintiff, and was not used by the defendant for that purpose. It sent the draft to the First National Bank of New York for collection, intending afterwards to remit the proceeds of the collection to the plaintiff in some other way. After Adams & Leonard and Jemison & Co. had failed, it sent the worthless draft to the plaintiff. By so doing it did not discharge its obligations to the plaintiff. If Adams and Leonard had purchased a draft of the Dallas Bank, and sent that to the plaintiff, or if it had sent the draft to the defendant, and the latter had then sent it to the plaintiff, then, according to the doctrine of *Indig v. National City Bank*, the defendant would not have been responsible for the continued solvency of the Dallas Bank. That case was much discussed here, and there was much difference of opinion about it. It is a border case, and its doctrine should not be much extended.

The defendant, however, claims that the contract with the plaintiff is to be treated as a Tennessee contract, and that by the law of that State it cannot be made liable for this loss. Upon the trial, for the purpose of showing the law of that State, it put in evidence a decision of the supreme court in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101. In that case a bill of exchange, payable at the First National Bank of Knoxville, was sent by a New York Bank to the Bank of Louisville for collection. It was transmitted by the Louisville Bank to the Knoxville Bank, was received by the latter, and was subsequently returned unpaid. The cashier of the Knoxville Bank delivered the bill to a notary public in good repute at the time, who failed to protest it, by reason of which the right of action against the drawer was lost. The Louisville Bank paid the amount of the bill to the New York Bank, and then brought suit to recover against the Knoxville Bank, and failed. It was held that, "where a bank receives a bill of exchange for collection, payable at a distant place, its liability is discharged by transmitting the same, in due time, to a suitable and responsible bank or other agent, at the same place of payment; and in such case the principal's assent to the employment of a sub-agent is implied," and that, "if a debt be lost by negligence of an agent to

whom a bill of exchange is sent for collection, the principal or home bank (having complied with its duty, and not being liable to the holders) cannot, by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the sub-agent. Such right accrues only to the holder or payee of the bill, under the circumstances." That decision was not based upon any statute law, but upon the principles of the common law, supposed to be applicable to the facts of the case. It did not make or establish law, but expounded the law, and furnished some evidence of what the law applicable to that case was,—evidence which other courts might or might not take and receive as reliable and sufficient; and even the same court, upon fuller discussion and more mature consideration, might, in some subsequent case, refuse to take the same view of the law. There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here. The courts of this State, and of other States, and of the United States would follow the courts of that State in the construction of its statute law. But the courts of this State will follow its own precedents in the expounding of the general common law applicable to commercial transactions, and so it has been repeatedly held. *Faulkner v. Hart*, 82 N. Y. 418; *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Ray v. Western Pa. Gas. Co.* 138 Pa. 576, 12 L. R. A. 290 (decided in Pennsylvania Supreme Court, Jan. 12, 1891). We must therefore hold that the obligation resting upon the defendant was that which the principles of the common law, as expressed by the courts of this State, placed upon it. If it be said that the contract between these parties was made in view of the common law, then we must hold that it was the common law as expounded here.

But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear, even, that it can be held that the contract was made there. It does not certainly appear where it was made. It cannot be said that a new contract was made every time a piece of paper was sent by the plaintiff to the defendant for collection. There was a general contract between the parties, which was either created

by some negotiation, or which grew out of the course of business between them, that the defendant should collect the paper sent to it for the compensation to be allowed. If that contract was made by correspondence, the plaintiff making a proposition by mail, and the defendant accepting it by mail, then, when the acceptance was put in the mail at Memphis, the contract was complete, and had its inception there. If the proposition came from the defendant, and was accepted in the same way in New York, then it would have to be treated as made in New York. In the absence of more proof than we have here, it cannot be assumed that this contract was made in Tennessee. Nor is this to be regarded as a Tennessee contract, for the reason that it was to be performed there, so that the defendant can claim that its obligations and interpretation are to be governed by Tennessee law. We cannot perceive how any substantial part of the contract was to be performed in Tennessee. The defendant was to collect this draft in Texas, and pay its proceeds, less its compensation, to the plaintiff in New York, and so the contract was to be performed in Texas and New York. Adams & Leonard collected the draft for the defendant in Texas, and sent it their own draft on *Jemison & Co.* This draft the defendant sent to the First National Bank of New York for collection and credit. If the draft had been paid, then the defendant would have had credit for the amount with that Bank, and would probably have sent its own draft on that Bank to the plaintiff for the amount of the collected draft, less its compensation, and that Bank would have paid that draft on presentation, and thus the proceeds of the collected draft would finally have reached the plaintiff, and the obligation of the defendant would then, and not until then, have been fully discharged. So, always, the defendant having collected a draft sent to it by the plaintiff, and received the proceeds thereof, would, in the ordinary course of business, discharge its obligation to the plaintiff by payment through its corresponding bank in New York. Therefore we think it is quite clear that this contract cannot, in any view, be treated as a Tennessee contract, subject in any way to the law of that State.

Our conclusion, therefore, is that the order of the General Term should be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur.

MISSOURI SUPREME COURT.

GEORGE D. BARNARD & CO., *Appt.*,

v.

KNOX COUNTY, *Respnt.*

(.....Mo.....)

A constitutional limitation on the amount of county indebtedness applies

NOTE.—Constitutional inhibition against counties contracting debts. See note to *Barnard v. Knox County* (Mo.) 2 L. R. A. 428.

18 L. R. A.

to a debt for necessary books and stationery which it is made by statute the duty of the county clerk to purchase for his office, as well as to any other obligation.

(June 29, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendant in an action brought to enforce payment of a county warrant. *Affirmed.*

The facts are stated in the opinion.

Mr. H. M. Pollard for appellant.

Mr. William Clancy, with **Mr. Charles D. Stewart**, *Pros. Attys.*, for respondent:

A Constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. What a court is to do is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

Cooley, Const. Lim. 4th ed. 67, and cases cited.

A county cannot levy taxes to pay judgments against it, founded on warrants issued since the adoption of the present Constitution, to meet current expenses incurred since said adoption, where such levy is in excess of the rate prescribed for county purposes in art. 10, § 11, of said Constitution.

Arnold v. Hawkins, 14 West. Rep. 759, 95 Mo. 569; *Black v. McGonigle*, 108 Mo. 192.

This warrant was clearly issued for county current running expenses, and is clearly in violation of the Constitution.

Arnold v. Hawkins, *supra*.

Every person is presumed to know the law, and so knowing county officers and all those dealing with them are to contract and buy and sell within the prescribed limits of the law; and if any person so deals with the county and gets a county warrant, it is his duty to see that faithful county officers do not issue county warrants in excess of the revenues of that year. On any other theory of the law, the said sections 11 and 12 of article 10 of the Constitution of Missouri would be defeated and deprived of their clear and plain object and intention of making officers carry on the county governments within said maximum running annual expenses; but this court says the said Constitution is self-enforcing.

State v. Van Every, 75 Mo. 537; *St. Joseph Board of Pub. Schools v. Patten*, 62 Mo. 444, 450.

Black, J., delivered the opinion of the court:

This is a suit upon a duly protested warrant issued by the County Court of Knox County to George D. Barnard, dated the 7th day of May, 1885, for \$83.90, payable "out of any money in the treasury appropriated for contingent fund." Barnard assigned the warrant to the plaintiff corporation. The defense is that the debt for which the warrant was issued was created after the county court had issued warrants in excess of the revenue for 1885. In anticipation of this defense, it is alleged in the petition that though the county court had issued warrants in excess of the total revenue for that year, still the plaintiff's debt was created by law, and not by the act of the county court, and that the county debts for that year created by law were less than the county revenue for the same year. The case was tried on the following agreed facts: "That on the 7th day of May, 1885, the clerk of the County Court of Knox County, Missouri, bought from Geo. D. Barnard certain books and stationery for \$83.90. That said books and stationery were suitable and necessary for the use of said

clerk in his said official capacity. That thereupon said Barnard presented said bill for said books and stationery to the county court of said county, which said court audited and allowed said bill, and issued the warrant filed herein. . . . That there is no money in defendant's treasury now to pay the same. That at the time of issuing said warrant the said county court had issued warrants in excess of the total revenue of said county, for the year 1885, raised by a levy of 50 cents on the \$100 and from licenses and other sources; but excluding the warrants issued during said year for support of paupers, and roads, and bridges, the remainder did not exceed such 50 cents on the \$100.

That no vote of the people of the county on the question of paying this warrant, or the creation of the debt evidenced thereby, has ever been had. The annual revenue of the county, to the extent of the 50 cents on the \$100 valuation, is now entirely consumed by the ordinary annual expenses of the county government." The provisions of the Constitution to be considered in the disposition of this case are found in sections 11 and 12 of article 10.

The first provides: "For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the one hundred dollars valuation." The same section fixes the maximum annual rate of taxes for city and town purposes and for school purposes, and contains these exceptions: (1) the annual rate for school purposes may be increased to a designated amount by a majority vote of the taxpayers; (2) the rate may be increased by a two-thirds vote for the purpose of erecting public buildings. The rate allowed to each county is to be ascertained by the amount of taxable property therein, according to the last assessment. "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." Section 12 declares: "No county . . . shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein," etc. The Statute makes it the duty of the county court, at its May term in each year, to divide the revenue collected, and to be collected, into five designated and described funds, one of which is a contingent fund, not to exceed one fifth of the total revenue of the county for county purposes for any one year; and each fund is declared to be a sacred fund for the purpose for which it is designated. Sections 6818, 6819, Rev. Stat. 1879.

In 1875, and prior thereto, many of the counties and cities in this State were bur-

dened with debts because of bonds issued in aid of railroads, some of which were never built, and on account of extravagance, frauds and defalcations of officials. To put an end to this state of affairs, the Constitution adopted in that year denied to any county or city the right to thereafter take stock in or loan its credit to any railroad company or other corporation, and, by the two sections before mentioned, sought to bring the administration of county affairs to a cash basis. As said in *Book v. Earl*, 87 Mo. 246, the evident purpose of the framers of the Constitution, and the people in adopting it, was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system, by limiting the amount of tax which might be imposed by a county for county purposes, and by limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury. We do not understand counsel for the appellant to dispute these propositions; but the claim is made, and pressed with much vigor, that section 12 does not include debts like that for which the warrant in question was given. The line of argument is this: As the Statute makes it the duty of the county clerk to provide suitable books and stationery for his office (§ 623, Rev. Stat. 1879), a debt created for such a purpose is not one incurred or created by the county court, but is a debt created by law, and such debts are not within the prohibition. Authorities are cited which give support to such a distinction: *Grant County v. Lake County*, 17 Or. 453; *Barnard v. Knox County*, 87 Fed. Rep. 568, 2 L. R. A. 426, and *Rollins v. Lake County*, 34 Fed. Rep. 845. The case last cited, it may be observed, was reversed by the Supreme Court of the United States. 130 U. S. 662, 32 L. ed. 1060.

On the other hand, the Constitution of Colorado contains this provision: "And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above limited, unless," etc. The supreme court of that State said, when speaking of this clause: "The limitation being applicable to all debts, irrespective of their form, it follows that, in determining the amount of county indebtedness, county warrants are to be taken into account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void." *People v. May*, 9 Colo. 80-98. The Circuit Court of the United States, in *Rollins v. Lake County*, *supra*, when having under consideration the clause of the Colorado Constitution before quoted, held that warrants issued for fees of witnesses, jurors, constables, and sheriff were not within the prohibition, because issued in payment of compulsory obligations; and hence it was no defense, in an action upon such warrants, that at the time they were issued the limit fixed by the Constitution had been reached. The Supreme Court of the United States, when speaking upon this question in the

same case, said: "Neither can we assent to the proposition of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the Legislature of the State, even if it can be said correctly that the compulsion was to incur debt; and the Legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the Constitution provided for certain county officers, and authorized the Legislature to fix their compensation and that of other officials, affect the question.

In short, we conclude that article six, aforesaid, is a limitation upon the power of the county to contract any and all indebtedness, including all such as that sued upon in this action; and therefore, under the stipulation already set forth, the county is entitled to judgment." *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060. A clause in the Constitution of Illinois declares that "no county, city," etc., "shall be allowed to become indebted in any manner or for any purpose" beyond a stated amount. Yet the decisions of the supreme court of that State recognize no such distinction as that sought to be made in the case at bar. The result of the decisions of that court is that it can make no difference whether the debts be created for necessary current expenses or for something else. *Prince v. Quincy*, 105 Ill. 188, 215. The Supreme Court of Iowa, when speaking of the same clause in the Constitution of that State, says: "The language of this provision is very general and comprehensive. It includes indebtedness incurred in any manner, or for any purpose." *Council Bluffs v. Stewart*, 51 Iowa, 385. It is true, the clauses in the Constitutions of the States just named prohibit the incurring of indebtedness beyond a specified per cent of the assessed value of the taxable property, while in our Constitution the prohibition is against the incurring of an indebtedness in excess of the revenue of the particular year; but we do not see that this difference affects the question in hand. The object of all these provisions is to fix a limit to county and municipal indebtedness.

Our Constitution, it will be seen, first limits the rate of taxation for county purposes to 50 cents on the \$100 valuation in counties like the one in question. This rate may be increased, by the assent of the qualified voters, for the purpose of erecting public buildings, but it cannot be increased, even by such assent, for any other purpose. We have held that a county court cannot levy a tax in excess of the 50 cents for any purpose, except for the purpose of erecting public buildings, and for the purpose of paying indebtedness existing at the date of the adoption of the Constitution. *Arnold v. Hawkins*, 95 Mo. 569, 14 West. Rep. 759; *Black v. McGonigle*, 103 Mo. 192. The maximum limit of the rate of taxation for county purposes being thus fixed, section 12, to repeat, declares: "No county, city, shall be allowed to become indebted in any manner, or for any purpose, to an amount

exceeding in any year the income and revenue provided for such year." As to counties the only exception is that, with the assent of the voters, the expenditures may be increased for the erection of a court-house or jail. The language just quoted is clear and explicit, and construes itself. It is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created in any manner, or for any purpose. This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense, all county debts are created by law; for the counties possess those powers, and those only, which are conferred upon them by the Constitution and laws of the State. While it is the duty of the county court to care for paupers and insane persons, and to build bridges and repair roads, still the county court is governed by the Statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law, as well as debts incurred by the county clerk for books and stationery. Nor does it make any difference that the debt in question was created by the clerk instead of the county court. The clerk, in the purchase of the books and stationery, acted as a county officer. The debt incurred by him, if he did not exceed its authority, is just as much a county debt as one incurred by the county court. The law confers upon various county officers the power to create debts for designated purposes, but the debts are all county debts when chargeable to the county. The county clerk, county court, and other county officers must take notice of these constitutional limitations, and exercise the powers conferred upon them in subordination to such restrictions. To hold otherwise is to say the clerk and other officers may execute statutory powers in excess of constitutional restrictions, and thus make the statute laws override the Constitution. It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such a surface view of the matter. The Constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the Constitution. 1 Dillon, Mun. Corp. 4th ed. § 134a.

Soliciting agents, contractors, and others who deal with county officials, must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless this is so, there is an end to all effort to bring about an economical and honest administration of county affairs. If this scheme of county

finances, built up by the Constitution, is a mistake, or if it produces great hardships in some counties, the remedy is with the people, and not with the courts. "What a court has to do is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley, Const. Lim. 4th ed. 67.

The plaintiff insists that there is no substantial difference between this case and *Potter v. Douglas County*, 87 Mo. 240. In that case the plaintiff sued Douglas County for services performed by him as jailer of Greene County, in keeping, boarding, clothing, and taking to court prisoners. The indebtedness was incurred under section 6090, Rev. Stat. 1879. The agreed statement showed "that, at the time the fee-bill was presented to the county court, the revenue for said years was expended, and the same could not be paid without issuing warrants in excess of the income and revenue for said years." On this statement we held that plaintiff could recover. It is to be observed that the agreed statement in that case did not show that the revenues had been expended when the indebtedness was incurred. For aught that appears, there may have been revenues unexpended and set apart to the proper fund when the indebtedness was contracted. Our opinion, however, is not placed on any such ground. It is placed upon grounds which would include the case in hand, and which are inconsistent with what has been said on the present occasion. There is, of course, a difference between the facts in that case and the facts in the present one; but the Constitution takes no notice of such differences. That case is therefore overruled.

Now, the agreed statement in this case does not, in terms, say that the contingent fund set apart for 1885 had been exhausted when the books and stationery were purchased; but it does show that the warrant was issued at the date of the purchase, and that at that time the county court had issued warrants in excess of the total revenue for that year. This statement must be taken in connection with the petition, which is framed upon the theory that the whole of the revenue had been consumed, unless warrants issued for the support of paupers and for building bridges and repairing roads are to be excluded. We think it sufficiently appears that the contingent fund had been consumed when the debt sued for was incurred. Indeed, this proposition is not questioned in the briefs. The warrant was issued in violation of the Constitution, and is void.

Judgment affirmed.

Barclay, J., absent. The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Reginald E. DANIELS

v.

NEW YORK & NEW ENGLAND R.
CO.

(.....Mass.....)

A railroad company owes a boy who is a mere trespasser on its land no duty to keep its turn-table in safe condition; and no inducement or invitation to him to go upon the premises can be implied from the fact that the situation and condition of the turn-table were such as to be likely to attract or allure a boy of his age.

(September 8, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County (Mason, *Ch. J.*) made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in the direction of a verdict in defendant's favor. *Overruled.*

The facts are sufficiently stated in the opinion.

Messrs. Everett W. Burdett and Charles A. Snow for plaintiff.

Messrs. Charles A. Prince and R. D. Weston-Smith for defendant.

Lathrop, J., delivered the opinion of the court:

The plaintiff does not contend that he had any express invitation from the defendant to

enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table.

The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident, the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about one thousand feet from the turn-table; that they then asked some train-men who were switching cars on the tracks adjacent to the turn-table to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-

NOTE.—*Railroad company; duty to avoid injury to trespassers on its premises.*

A railroad company is under no obligation to locate its tracks, construct fences, and adjust the running of its trains so as to make it safe for children unlawfully to trespass on its right of way. *Morrissey v. Providence & W. R. Co.* 1 New Eng. Rep. 806, 15 R. I. 271.

Extra precautions are not required of a railroad company, in anticipation of the intrusion of trespassers, even though they be children. (*Biddle v. Hestonville, M. & F. P. R. Co.* 3 Cent. Rep. 405, 112 Pa. 551); but when they do so intrude and are known to be in an improper place, they must not be so wholly neglected as to leave them in danger of their lives and limbs. *Ibid.*; *Rine v. Chicago & A. R. Co.* 3 West. Rep. 800, 88 Mo. 832.

Ordinary care must be used to avoid injury, even to a trespasser. *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Hydraulic Works Co. v. Orr*, 88 Pa. 332; *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 375.

Although a child may be on a car by invitation of the driver, yet where the driver had no authority to give such invitation, the child is a trespasser. *Duff v. Allegheny Valley R. Co.* 91 Pa. 468.

A railroad company, in moving its trains upon the track, does not owe to one unlawfully upon the track any duty except to not purposely or willfully injure him. *Chicago & E. I. R. Co. v. Hedges*, 3 West. Rep. 392, 105 Ind. 398; *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 497; *Barstow v. Old Colony R. Co.* 8 New Eng. Rep. 747, 143 Mass. 532; *Kentucky Cent. R. Co. v. Gastineau*, 88 Ky. 119; *Messer v. Chicago, R. I. & P. R. Co.* 63 Iowa, 602.

The liability of a railroad company to a trespasser 18 L. R. A.

on its track must be measured by the conduct of its employees after they become aware of his presence there, and not by their negligence in failing to discover him. *Brown v. St. Louis, I. M. & S. R. Co.* 52 Ark. 120.

When the trespasser is an infant, the railway company is held bound to exercise a higher degree of care and caution than is required as to adults; and the infant is not required to exercise a discretion and prudence beyond its years. *Indianapolis, P. & C. R. Co. v. Pitzer*, 4 West. Rep. 256, 7 West. Rep. 396, 109 Ind. 179.

In such case it is their duty to use all the means in their power to prevent injury to the child, and a failure so to do is negligence for which the company will be liable. *Payne v. Humeston & S. R. Co.* 70 Iowa, 584; *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 396, 109 Ind. 179.

A railroad company is not liable for negligently causing the death of a boy who was a trespasser on the track, in the absence of evidence that the servants of the company could have avoided the injury after discovery of his perilous position. *Bell v. Hannibal & St. J. R. Co.* 4 West. Rep. 391, 86 Mo. 609.

Injury from unguarded turn-table.

If a minor, not having sufficient judgment or discretion to know her danger, is injured while riding upon the turn-table, the company is liable if guilty of negligence in not enclosing or securing the turn-table; and it is not necessary to prove wilful intention to inflict injury. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421. See *Woodbury v. District of Columbia*, 3 Cent. Rep. 793, 5 Mackey, 127.

table was attractive is that it had large upright standards or guys, twelve to fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that if a turn-table is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. *Stout v. Sioux City & P. R. Co.* 2 Dill. 294; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 31 L. ed. 745.

The decision of the Supreme Court of the United States was apparently approved of in *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, and followed in *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103, in *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, in *Ecan-sich v. Gulf, C. & S. F. R. Co.* 57 Tex. 123, and in *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356. See also *Bridger v. Asherville & S. R. Co.* 25 S. C. 24; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is that if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser. And it is held that leaving a turn-table unguarded is such an act. *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Nagel v. Missouri Pac. R. Co.* 75 Mo. 653.

The decision of the Supreme Court of the United States in *Sioux City & P. R. Co. v. Stout* rests upon the proposition stated by Mr. Justice Hunt, "that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are *Lynch v. Murdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Bird v. Holbrook*, 4 Bing. 628.

With the exception of *Daley v. Norwich & W. R. Co.*, all of these cases come within other rules or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser except he must not wantonly or intentionally injure him or expose him to injury.

Lynch v. Murdin, *supra*, rests upon the doctrine that if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes v. Macfie*, 2 Hurlst. & C. 744, and in *Mangan v. Atterton*, L. R. 1 Exch. 239. In *Lane v. Atlantic Works*, 111 Mass. 186, the plaintiff was found to be without fault, 13 L. R. A.

and not a trespasser. See also *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Powell v. Deveney*, 3 Cush. 300.

Birge v. Gardiner, *supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works Co. v. Orr*, 83 Pa. 332.

Bird v. Holbrook, *supra*, decides that a landowner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same though no notice is given. *Johnson v. Patterson*, 14 Conn. 1. This, as pointed out by Morton, J., in *Marble v. Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. *Marble v. Ross*, *supra*.

The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. *Larue v. Farrer Hotel Co.* 116 Mass. 67; *Beck v. Carter*, 68 N. Y. 283.

The case of *Daley v. Norwich & W. R. Co.*, *supra*, so far as it tends to support the result reached in *Sioux City & P. R. Co. v. Stout*, *supra*, must be considered as overruled by *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461.

The Court of Appeals of New York has stated in a well-considered case that it does not uphold the decision in *Sioux City & P. R. Co. v. Stout*, *supra*, and although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. *McAlpin v. Powell*, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire-escape and fell through a trap door therein, which was insecurely fastened. The defendant was the landlord of the house and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure; and that the defendant was not liable.

In *Frost v. Eastern R. Co.*, 64 N. H. 220, 4 New Eng. Rep. 527, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of *Sioux City & P. R. Co. v. Stout*, *supra*.

On the question whether the defendant was liable on the ground of an implied invita-

tion, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. *Hounsell v. Smyth*, 7 C. B. N. S. 731, and cases cited. *Clark v. Manchester*, 62 N. H. 576; *Klitx v. Nieman*, 68 Wis. 271; *Gramlich v. Wurst*, 86 Pa. 74; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398; *Gillespie v. McGowan*, 100 Pa. 144; *Hargreaves v. Deacon*, 25 Mich. 1. See also *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368; *Metcalfe v. Cunard Steamship Co.* 147 Mass. 66, 6 New Eng. Rep. 309, and cases cited; *Barstow v. Old Colony R. Co.* 143 Mass. 525, 8 New Eng. Rep. 746.

In *Johnson v. Boston & M. R. Co.*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation, which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars and went to a house nearby, intending to take a later train for Lawrence. After remaining at the house for awhile, she returned to the station, and, while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passageway; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it; and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passageway by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See also *Wright v. Boston & M. R. Co.* 129 Mass. 440.

In *Morrissey v. Eastern R. Co.*, 126 Mass. 377, a child, four years of age, was run over by the cars of a railroad corporation while using the track as a playground. There was a footpath across the tracks which was used

by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant.

In *Wright v. Boston & A. R. Co.*, 142 Mass. 296, 2 New Eng. Rep. 725, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passageway for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track.

The case of *McEachern v. Boston & M. R. Co.*, 150 Mass. 515, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable upon receiving a slight touch to fall to the ground; that the defendant well knew that said car then was, and would be, an enticing, attractive, and inviting object to children; and well knowing that children there were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks; that the plaintiff, being then upwards of eleven years of age, was traveling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit.

In *McCarty v. Fitchburg R. Co.*, 153 Mass.

—, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street and there was no fence between. It was held, in the absence of evidence that a fence was required by Pub. Stat., chap. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff.

The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The superior court rightly directed a verdict for the defendant.

Exceptions overruled.

ATTORNEY-GENERAL, by Information,

v.

George C. ABBOTT.

(.....Mass.....)

1. An intention to dedicate land for parks is shown where a corporation formed for establishing a summer resort procures land and records plats thereof with open spaces left thereon marked "park," copies of which are, for the purpose of selling lots, hung in public places and distributed about the country as circulars, and assurances are freely given by those having

charge of the sale that the parks shall always be kept open.

2. One holding a bond for one half the share in the proceeds of sales to which a stockholder in a corporation formed for establishing a summer resort will be entitled, has no such interest as to give him a voice in determining the policy of the company or to make his assent to, or dissent from, its proposed plans material.

3. Four of the six directors who own in equal shares all the stock of a corporation formed for establishing a summer resort upon its land may make a binding dedication of portions of such land to the public for parks.

4. The facts that very little has been done to adorn land claimed to have been dedicated by the originator of a summer resort for park purposes, and that that little was done by the originator himself, who exercised some control over the land, are not of much weight to show absence of intention to dedicate.

5. The acceptance of a dedication of land for park purposes need not, at common law, be by the town, nor need it be very specific. Acts by the public at large showing an acceptance are sufficient to devote the owner of the easement.

6. Purchasers of real estate are bound by a prior dedication thereof to the public.

7. One who before purchasing land makes a laborious investigation of facts tending to show its dedication to public use will not, in case it proves to have been so dedicated, be protected as a purchaser without notice, although he came to the conclusion upon either the law or the facts that it had not been dedicated.

(September 3, 1891.)

NOTE.—Dedication of lands for public parks.

The vital principle of a common-law dedication for public use is the intention, which must be unequivocally manifested, and clearly and satisfactorily appear (*White Bear v. Stewart*, 40 Minn. 284); but this intention may also be gathered from the owners' acts and conduct in respect to the property. *Harding v. Jasper*, 14 Cal. 647; *People v. Reed*, 81 Cal. 70; *Phillips v. Day*, 82 Cal. 80.

An owner of land who lays off a town or village thereon, and sells lots with reference to a map showing the town site to be divided into streets, etc., and upon which public squares or plazas are represented, thereby makes an irrevocable dedication of the spaces represented as streets, squares, etc., to the use of the public. *San Leandro v. Le Breton*, 72 Cal. 170.

Where certain owners of a tract of land laid the same off into blocks and lots, as an addition to the City of St. Louis, and the same was platted and recorded, and there was written upon the plat the words, "The land marked 'A' (describing it), is to be and remain a common forever," and known on the record as "Exchange Square" it is a dedication by the proprietor; of this parcel of property to public use for a common. For all other purposes, then, it remains the property of the owners. The word "common" is used by the dedicators in its popular signification, as a parcel of land set apart for common and public use. *Cummings v. St. Louis*, 7 West. Rep. 274, 90 Mo. 259.

It is beyond the power of the Legislature to authorize any other use of property dedicated by private owners than that specified in the act of dedication; nor can it extend or enlarge the uses, much less authorize an out-and-out sale of property. *Ibid.* 13 L. R. A.

The difference between a statutory and common-law dedication is that one vests the legal title to the ground set apart for public purposes in a municipal corporation, in trust for the public; while the other leaves the legal title in the original owner, charged with the same rights and interests in the public which it would have if the fee was in the corporation. *Maywood Co. v. Maywood*, 5 West. Rep. 529, 118 Ill. 61.

An acceptance will be presumed if the gift is beneficial; and user is evidence that it is beneficial. *Abbott v. Cottage City*, 3 New Eng. Rep. 773, 143 Mass. 521.

It will not be contended that any formal acceptance on the part of the public is necessary, or even practicable. When a proprietor lays off a town, makes and publishes a plat of it, showing the blocks, lots, streets and public squares, and sells to various parties blocks and lots, referring to such plat in describing them, the acceptance will be implied. The proprietor in such case deals with the public. In every sale of a lot or block under such circumstances he gives an assurance that the ground, as platted, shall remain intact. *Carter v. Portland*, 4 Or. 389; *Ang. & D. Highways*, 3d ed. § 149.

The sale of lands by the owner according to a map showing a street 150 feet in width, and the user of 80 feet in width of such street by the public for years, constitutes a complete dedication and acceptance which cannot be affected by a deed from a subsequent owner. *Logan v. Rose*, 88 Cal. 263.

The owner of lands may devote and dedicate them to public use, and it is now well-settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid, with-

RESERVATION by the Supreme Judicial Court for Bristol County (Field, J.), for the opinion of the full court of a proceeding instituted to enjoin defendant from interfering with the right of the public to use and enjoy certain parks in the Town of Cottage City. *Decree for plaintiff.*

The facts sufficiently appear in the opinion. *Messrs. Thomas M. Stetson and Hosea M. Knowlton* for plaintiff.

Messrs. J. D. Ball, L. W. Howes and George C. Abbott, for defendant:

A part of tenants in common cannot make a dedication. It requires all.

Scott v. State, 1 Sneed, 629; *Adam v. Briggs Iron Co.* 7 Cush. 361-369; Washb. Real Prop. 4th ed. p. 654; *Marks v. Sewall*, 120 Mass. 176; *Bartlet v. Harlow*, 12 Mass. 348; *Blossom v. Brightman*, 21 Pick. 283-285; *Baldwin v. Whiting*, 18 Mass. 57; *Peabody v. Minot*, 24 Pick. 829.

The four associates by their most solemn act placed on record, viz., their deed, have not only said the property was free and clear, but have warranted it to be so, and ought now to be estopped and held incompetent to testify that this solemn act of theirs was false.

1 Greenl. Ev. § 22.

Mr. Abbott is a bona fide purchaser for value, and without notice. A purchaser has a right to rely upon such evidence as the registry of deeds affords, and if there is no recorded deed, to assume that the record title is the true title.

Dow v. Whitney, 6 New Eng. Rep. 276, 147 Mass. 6; *Atty-Gen. v. Merrimack Mfg. Co.* 14 Gray, 601; *Colorado C. & I. Co. v. United States*, 123 U. S. 807, 31 L. ed. 182.

Neither recording plans with the word "park" upon them nor circulating such plans amounts to a dedication on the part of the owner.

Com. v. Fisk, 8 Met. 238; *Atty-Gen. v. Merrimack Mfg. Co. supra*; *Light v. Goddard*, 11 Allen, 5; *Boston W. P. Co. v. Boston*, 127 Mass. 874; *Coolidge v. Dexter*, 129 Mass. 167; *Williams v. Boston W. P. Co.* 184 Mass. 406; *Regan v. Boston Gas Light Co.* 137 Mass. 87; *Atty-Gen. v. Whitney*, 137 Mass. 450.

There is no suggestion in any deed in the case at bar that any plan is referred to as exhibiting any squares, parks, public parks or public areas. The purposes for which the plans are referred to are defined (to ascertain easily the location of the land conveyed and its dimensions and boundaries); and unless these specified objects are necessarily dependent upon, or to be construed with other portions of the plan, such other portions are not brought within the scope of the conveyances.

Boston W. P. Co. v. Boston, *Light v. Goddard*, and *Atty-Gen. v. Whitney, supra*.

To constitute dedication there must be some unequivocal act of the owner uniting with the intent to divest himself of the control of the property, and to vest an irrevocable interest in some other body.

Atty-Gen. v. Merrimack Mfg. Co. 14 Gray, 604; *Atty-Gen. v. Lord Foley*, 1 Dick. 363.

The acts shown by plaintiff in this case are, at the best, of the most equivocal kind, and show a most decided intention on the part of the owners not to divest themselves of title and not to vest an irrevocable interest in any body.

See *Beatty v. Kurtz*, 27 U. S. 2 Pet. 566, 7 L. ed. 521; *Atty-Gen. v. Merrimack Mfg. Co. supra*.

There can be no such thing as a dedication to the lotowners. Whatever rights they have they have by grant, and if they have any rights by reference to plans or by representations or

out any specific grantee in existence at the time the dedication is made. The public is an ever existing grantee, capable of taking a dedication for public uses. *Rutherford v. Taylor*, 83 Mo. 817; *M. E. Church Trustees v. Hoboken*, 33 N. J. L. 16.

A person who, for seven years after obtaining his majority, has knowledge of the action of a village in opening and improving a street partly his property, and permits it to be used without objection, may be presumed to have made a dedication of so much of the land as is within the street. *McKey v. Hyde Park*, 37 Fed. Rep. 389.

Where the owner of land lays it off into blocks, lots, and streets, platting it as an addition to a city, and causes the plat, although not acknowledged so as to entitle it to record, to be recorded in the book of deeds in the office of the clerk of the county in which the land is situated, and sells and conveys any of the lots or blocks by a reference, in the description thereof, to such plat, it constitutes an irrevocable dedication to the public of the streets shown upon it. *Meler v. Portland C. R. Co.* 1 L. R. A. 866, 18 Or. 500.

One who has sold lots with reference to a certain named avenue, and has dedicated the avenue to the public, cannot afterwards revoke the dedication, after its acceptance, by conveying the strip covered by the avenue to another. *Brown v. Stark*, 88 Cal. 636.

To make such dedication complete, no formal acceptance by the town authorities is necessary. The owner of the land holds the title to the property dedicated in trust for the public. *San Leandro v. Le Breton*, 72 Cal. 170.

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Where a strip of land has been dedicated and accepted as an avenue, and lots sold with reference thereto, the former owner cannot vary the nature of the strip by her own statement that she intended it only as a private alley. *Brown v. Stark, supra*.

A general dedication of land for public squares implies that they are to be enjoyed by the public at large, and they cannot rightfully be appropriated by city authorities for the use of the city in the management and conduct of its economic affairs. *Church v. Portland*, 6 L. R. A. 259, 18 Or. 73.

An owner of land around a public park, the fee of which is owned by the city, has no vested interest therein, such as will enable him to prevent the city, under sanction of the Legislature, from discontinuing the park and converting the land to other uses. *Clarke v. Providence*, 1 L. R. A. 725, 16 R. I. 337.

Where a parcel of ground in a city of the third class in Kansas is dedicated for a public park, the city, and not the board of county commissioners, is entitled to its control and possession. *Hurd v. Harvey County*, 40 Kan. 92.

Where a person has long enjoyed the use of land on a public square as appurtenant to his hotel, which right was granted to a former owner of the hotel lot, weighing scales cannot be erected thereon to his annoyance and injury, under an order of the trustees of the town granting the privilege of setting up such scales on condition that they should not interfere with the use of other private property. *Gibson v. Black (Ky.)* Sept. 20, 1888.

otherwise, they are the parties to enforce them, and not the Commonwealth.

Pool v. Huskinson, 11 Mees. & W. 827; *Bermundsey v. Brown*, L. R. 1 Eq. Cas. 215.

No public way can be established by dedication merely, and without the assent, express or implied, of the city or town bound by law to keep it in repair.

Bowers v. Suffolk Mfg. Co. 4 Cush. 840. See also *Pool v. Huskinson*, *supra*.

To constitute a dedication there must be an abandonment by the owner to the use of the public exclusively, and not a mere user by the public in connection with a user by the owners in such measure as they may desire.

Washb. Easem. p. 205

An acceptance is necessary.

Townson v. Tickell, 3 Barn. & Ald. 37.

In this case, the Town voted not to accept, or, what is the same thing, to indefinitely postpone the consideration of an offer. Express acceptance by the town and repairs made by its officers are admissible to prove acceptance.

Rees v. Chicago, 38 Ill. 322.

There was none in this case. Direct recognition by the proper authorities is required.

Hyde v. Jamaica, 27 Vt. 448; *Tillman v. People*, 12 Mich. 401; *Jordan Trustees v. Otis*, 37 Barb. 50.

The owner of the land must intend to make the gift, and it must be accepted by the public authorities.

Princeton v. Templeton, 71 Ill. 68; *Hayden v. Stone*, 112 Mass. 846; *Derby v. Alling*, 40 Conn. 410; *Fairfield v. Morey*, 44 Vt. 289; *Portland v. Whittle*, 8 Or. 126.

It is necessary, in the very nature of things, that in order to constitute a dedication, there must be an acceptance by the city or town in which the land dedicated is located. Somebody that has a tangible existence must assume the responsibility or obligations which may from time to time attach in respect to that land.

Bowers v. Suffolk Mfg. Co. 4 Cush. 832, 840; *Hayden v. Stone*, 112 Mass. 846-851; *Guild v. Shedd*, 150 Mass. 255; *Morse v. Stocker*, 1 Allen, 154.

C. Allen, J., delivered the opinion of the court:

A perusal of the voluminous evidence, aided by the full briefs of counsel, shows to our satisfaction that there was an intention on the part of the owners of the parcels of land called Ocean Park, Hartford Park, and Waban Park, to dedicate them to the use of the public as parks, and that the same were used by the public enough to show an acceptance thereof, prior to the year 1880.

It will not be useful to state in much detail the evidence which leads to these results, or to discuss the particulars in which witnesses disagree or contradict each other. The general features, however, are as follows: In 1866, six persons united in a plan for making a place of summer resort at Oak Bluffs in Edgartown. One of them already owned a large lot of vacant land which was deemed suitable for the purpose. Each of the five others purchased an undivided sixth part thereof. A professional landscape gardener, Mr. Copeland, was employed to lay out the grounds in such a manner as would be likely

to attract people who would come there only for the summer, and to induce them to buy lots, build cottages, and establish a village. In 1867, a deed of the premises was made to two of their number as trustees, for the benefit of the six owners: and in 1868 an Act of incorporation was obtained, and the land was conveyed to the corporation. The sole purpose of the corporation was the holding, improving and disposing of the land and a wharf then held by the two trustees, with power, also, to purchase, hold, improve and dispose of other adjacent lands. Stat. 1868, chap. 60. At the outset, the original six owners constituted all of the stockholders of the corporation, and they all became directors. According to the by-laws, four directors constituted a quorum, with full power to do all that the full board of directors could do; and the directors were to prepare the real estate of the company for sale, make sales thereof, expend all moneys, and dispose of all other property of the company in such manner as they should judge best calculated to promote the object of the company, and advance the interest of the stockholders, and make such improvements as they might deem advisable. Plans for laying out the proposed village were prepared by Mr. Copeland showing open spaces not divided into lots. These plans underwent certain changes in matters of detail. One plan, recorded August 20, 1867, showed such an open space, to which on later plans the name of "Ocean Park" was given, though with a change of limits. After this, and after the corporation was formed, other land was bought, and a new plan was made, which was recorded May 7, 1870, showing the three parks now in controversy described by their names. After this, there was no change in the boundaries of Hartford and Waban Parks, but there was a change in Ocean Park. A new plan was made, dated June 1, 1871, showing Ocean Park with somewhat modified boundaries, and the other parks as in the earlier plan, and this was recorded July 5, 1871. Still another plan was made in 1871, showing the three parks without change of limits, and this was recorded in 1873. A few lots were bargained for in 1867, but no sales were actually completed till 1868, after which lots were rapidly sold, to the number of five hundred within three years. Copies of the several plans were struck off, and widely circulated. The printed copies of the plan which was recorded August 20, 1867, had the name of "Ocean Park" added. Some of these were framed, and hung up in hotels, steamboats, railroad stations, and other public places. Very many were distributed through the mails. During all the period of settling the plans, great pains were taken to give wide publicity to them, not only in the above methods, but by circulars and advertisements calling attention to them, and by printing a reduced copy of one or more of them upon letter sheets. Copies of the plans were also kept in the directors' room for free distribution.

The testimony makes it very plain that the establishment of open spaces or parks was deemed an important feature of the scheme

for selling lots. At the outset it was a matter of discussion among the parties interested. Lots fronting upon the parks or having an unobstructed view of them, were deemed more attractive. Assurances were freely given by those having charge of the sale of the lots that these spaces or parks should always be kept open. Four of the original owners testify in distinct terms that it was the intention of those interested in the enterprise to make them open parks, free to the public forever. This is so extremely natural and probable, and any other course would be so unlikely, that evidence of a contrary intention on the part of any one of them would be received with some distrust. If the corporation had announced at the time of making the sales that it reserved the right to cut up the open spaces into building lots to sell them, after the village should be established, it would no doubt have diminished the sales. If the corporation had an intention to reserve this right, the course pursued of inviting purchasers was inconsistent with common honesty.

The defendant concedes that some of the original owners and stockholders in the corporation gave such assurances to purchasers and in various ways gave wide publicity to the plan of having these places kept open as public parks; but he contended that two of them did not assent to this course. One of these, Mr. Darrow, died in 1871; the other was a witness in the case. As to both of these, the evidence is satisfactory to show that they assented to the plan in manner and form as it was put forth to the public. Mr. Darrow at the outset thought too much land was devoted to the parks, but after discussion, acquiesced in the opinion of the majority. The other one, while in his direct testimony he denied that he ever assented to the plan, or that there was ever any authority to bind the owners of the land or the corporation by a dedication of the parks to the public, yet admitted that he knew of the existence of the plans and of their being on record, that he had seen them at many places, and that he gave away some of them himself; probably some of each.

The defendant also suggests that one Worth was interested, and never assented to the dedication. Worth held a bond from Bradley for one half of Bradley's share of the proceeds of sales, but his title was not such as to give him a voice in the proceedings, or to make his assent or dissent material. He did not become a stockholder in the corporation till 1877.

Without dwelling upon various other particulars of the evidence, which tend in the same direction, we cannot doubt that it was a part of the scheme of the enterprise or speculation that the public should understand that these spaces should be left open for public use, and that no right was reserved to sell them for building lots; and that the corporation held out to the public this assurance, and at the time fully and fairly intended to give up this right; and that the two persons upon whose supposed dissent the defendant relies did not in fact dissent at the time. If they had done so, their dissent

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would be overborne by the action of the other four; but it seems to us more reasonable and probable to suppose that at the time they acquiesced, if they did not fully concur, in the views of the majority.

It is not necessary to go nicely into the question, at what time the intention to devote these open spaces to the public became fully formed. There certainly was an intention that some spaces should be left open, at an early day. Before the corporation was created a plan showing such spaces was prepared and put on record. Some changes were afterwards made in the boundaries. The land containing "Waban Park" was subsequently purchased.

The limits of these three several open spaces were finally settled after the corporation was formed. For a time, there was a somewhat fluctuating intention, so far as limits and boundaries were concerned. But the limits as shown on the last two plans may be taken as representing the final conclusion of the corporation as to the limits of the spaces that were to be left open.

The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent it seemed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park, in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later if at all. The corporation did a little toward improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the municipal authorities exercise control over them. It was not so here. Whatever was done was done by the corporation, which to some extent did what municipal authorities usually do. Washb. Easem. *146, 147, 156. The corporation was interested in pushing its speculation, and as long as it had many lots left for sale it did something for the parks; but afterwards they were much neglected.

On the whole, we think the evidence is sufficient to show an offer to the public of the spaces shown on the last two plans, as Ocean, Hartford and Waban Parks.

In *Atty. Gen. v. Whitney*, 187 Mass. 450, where a majority of the court thought there was not sufficient evidence of such an intention, the evidence of dedication was far less strong.

The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is used by the public. Washb. Easem. *128, 139, 140. There is no need of a formal grantee. The fee remains in the original owner. *Cincinnati v. White*, 81 U. S. 6 Pet. 431, 8 L. ed. 452. No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. The improvements upon a park thus dedicated are left to be made by those who are interested. The town may take it up, or it may be left to individuals. If in a

seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

The defendant contends that such acceptance must have been by the Town of Edgartown originally, or by the Town of Cottage City afterwards. The chief argument in support of this view is, that there must be somebody who can be held responsible for the abatement of a nuisance, if one should exist upon the property; and that if the dedication is not to the town, and accepted by the town, there is virtually no owner of the property. This argument is of force, but the technical answer is that the fee remains in the original owner. The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine, in cases which are supposable and possible, but the doctrine itself has been widely adopted, and has been expressly recognized as in force in this Commonwealth. *Abbot v. Cottage City*, 143 Mass. 521, 8 New Eng. Rep. 773. We need not consider whether this mode of accepting a park has been done away with by Stat. 1882, chap. 154.

The defendant further contended that he was a bona fide purchaser for value, without notice, and that his title should therefore be protected. This argument, however, cannot prevail, for two reasons. In the first place, purchasers of real estate must take notice of such a fact as a dedication to the public, in like manner as they must take notice of a title gained by adverse possession. There are various infirmities to which titles which appear good on the records are exposed. *Gillespie v. Rogers*, 146 Mass. 610, 6 New Eng. Rep. 297, and cases there cited. If a dedication has become complete, the original owner cannot afterwards resume control or convey the land free from the easement of the public, any more than if the easement had been gained by prescription. Washb. Easem. *139; Goddard, Easem. 181; 2 Greenl. Ev. § 662; *M. E. Church Trustees v. Hoboken*, 33 N. J. L. 13.

But, moreover, in the present case, the defendant was fully put upon inquiry as to the facts, and made a laborious investigation of them, but came to a conclusion either upon the law or upon the facts different from that which we have reached. Under such circumstances, it cannot be held that he was a purchaser without notice. The price which he paid was far less than the value of the land, provided the title was clear, and whatever may have been the defendant's opinion as to the validity of his title, he certainly had reason to know that it was liable to be questioned.

Decree for the plaintiff.

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WATUPPA RESERVOIR CO.

2.

CITY OF FALL RIVER.

TROY COTTON & WOOLEN MANUFACTORY

2.

SAME.

(.....Mass.....)

1. **The title to great ponds** passed under deeds from Plymouth Colony, which plainly intended to convey them although the intention appears only from the habendum clauses of the deeds, no mention of them being found in the granting clauses.
2. **The fact that a town was incorporated two years after the Colonial Ordinance of 1647**, declaring the public rights in great ponds, became law, with boundaries nearly coincident with those of a prior private land grant, will not cause the territory embraced thereby to be treated as town property in determining the application of the ordinance to ponds situated therein, where the town is not shown to have ever assumed proprietorship over the land or ponds, and they appear to have been always dealt with as private property.
3. **The rights in a great pond which had been appropriated to private persons**, and was held by them as private property at the time the Colony Ordinance of 1647, declaring the public rights in great ponds, became operative, were not affected by that ordinance.
4. **Where a colony conveyed a portion of a great pond to private owners** prior to the taking effect of the Ordinance of 1647, which declared the public rights in great ponds, neither it nor its subsequent grantee of the remaining portion could, as owner and apart from the exercise of sovereign powers, draw off the water of the pond to the detriment of the prior grantees.
5. **Although the Ordinance of 1647, declaring the public rights in great ponds, became applicable in Plymouth Colony** as part of the common law, the fiction that the common law has existed immemorially does not require its application to transactions which arose prior to the Province Charter which made such law applicable therein.
6. **A corporation composed of representatives of the several mills** owning water-power on a river, which has built and maintains a dam at the outlet of the reservoir, and controls the whole waterpower in the interest of the owners for their benefit, may sue to enjoin third persons from drawing water from the reservoir.

(September 3, 1891.)

APPEALS by complainants from decrees of the Superior Court for Bristol County dismissing bills filed to enjoin defendant from drawing water from the Watuppa Ponds. *Reversed.*

NOTE.—This subject has received extended treatment in a note appended to *Henry v. Newburyport* (Mass.) 5 L. R. A. 179. See also *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 566; *Proprietors of Mills v. Braintree Water Supply Co.* 4 L. R. A. 272, 149 Mass. 478; *Fernald v. Knox Wool Co.* 7 L. R. A. 459, 82 Me. 42; *Atty-Gen. v. Revere Copper Co.* 9 L. R. A. 510, 152 Mass. 444.

The facts are stated in the opinion.

Messrs. E. R. Hoar and Jennings & Brayton, for appellants:
The title to the Watuppa Ponds was in the Colony of Plymouth.

It owned the soil and the waters and had a right to convey the same.

If it imposed no conditions or restrictions in its deed, the grantee would hold upon the same conditions on which the State held it and no other.

Cedar Rapids & M. R. R. L. Co. v. Court-right, 88 U. S. 21 Wall. 810, 22 L. ed. 582; *Vansickle v. Haines*, 7 Nev. 249.

The Pocasset deed conveys all ponds, waters, etc., in explicit terms. It is not a case of doubtful construction where the construction is to be in favor of the public.

See *Holyoke W. P. Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133.

It is to be construed as any private grant would be construed.

Boston v. Richardson, 18 Allen, 156, 157.

The grant is absolute and unlimited on its face. Unless controlled by some statute of the Colony limiting and restricting its operation, the riparian owners of the "mill lot" cannot be deprived of the natural flow of the stream without compensation. No legislation subsequent to the grant can divest them of any part of it.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Holden v. James*, 11 Mass. 396; *Cooley*, Const. Lim. 360; *King v. Dedham Bank*, 15 Mass. 454; *Jones v. Jones*, 6 Cent. Rep. 391, 104 N. Y. 234; *Cedar Rapids & M. R. R. L. Co. v. Courtright*, *supra*; *New Orleans Gas L. Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Morawetz*, Priv. Corp. § 419; *Brown v. Grant*, 116 U. S. 207, 29 L. ed. 598; *Warren v. Charlestown*, 2 Gray, 84.

When a State sells a water privilege it cannot prevent the proper and reasonable use of it, nor derogate from the beneficial use of its grant.

Union Mill & Min. Co. v. Ferris, 2 Sawy. 176; *Union Mill & Min. Co. v. Dangberg*, Id. 450.

A legislative grant conveys with it all the fruits and effects of it.

Tymannus v. Williams, 7 Humph. 80; *Shep. Touch*, 89; *Rood v. New York & E. R. Co.* 18 Barb. 80.

Until 1692 the Ordinance of 1641-47 had no force in Plymouth Colony.

Litchfield v. Scituate, 186 Mass. 46; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 556.

A grant in Massachusetts Colony, prior to 1641, of a pond by a town, would have been valid.

Berry v. Raddin, 11 Allen, 580.

A grant of land by a State is a contract governed by the laws in force when it is made, and is protected by the Constitution from impeachment by a subsequent law.

Walker v. Whitehead, 88 U. S. 16 Wall. 814, 21 L. ed. 357; *Jackson v. Lamphire*, 28 U. S. 8 Pet. 280, 7 L. ed. 879.

The fact that in the deed rivers, waters, etc., are not specifically named, makes no difference to the deed's legal effect in conveying all the water rights and privileges which by law ap-
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pertained to the land bordering upon the stream.

Whitney v. Wheeler Cotton Mills, 7 L. R. A. 618, 151 Mass. 396.

If the State owned a part of one of these ponds it would have no right to divert the waters or do anything to or with them that would impair or interfere with the rights of other parties in the waters of the pond.

Atty-Gen. v. Revere Copper Co. 9 L. R. A. 510, 152 Mass. 444.

The Ordinance of 1641-47 applied solely to ponds lying in common, which means ponds not previously conveyed or appropriated in whole or in part to any particular person or persons.

Tudor v. Cambridge Water Works, 1 Allen, 164.

Messrs. James F. Jackson and Edward Higginson, for appellee:

The Commonwealth is the absolute owner of great ponds, holding them as trustee for the public uses and enjoyment, by a title similar to that which it has in navigable rivers and tide waters, and no private rights of property exist in such ponds.

West Roxbury v. Stoddard, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Hittinger v. Eames*, 121 Mass. 539; *Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 548.

The reasoning is similar to that governing the consideration of public and private fishery rights.

Cole v. Eastham, 133 Mass. 65.

The principle already applied to owners on the shore is applied to owners upon the outlet stream.

Fernald v. Knox Wool. Co. 7 L. R. A. 459, 82 Me. 42; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Potter v. Howe*, 2 New Eng. Rep. 187, 141 Mass. 357.

The Ordinance of 1647 is not only in force throughout the whole territory of this State, but its rule was established as the law of the Plymouth Colony.

Barker v. Bates, 18 Pick. 255; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 548, 556.

The principle of the Ordinance of 1647 was an active rule of law, applicable to the Watuppa Pond, in the years (1680, 1686) when the grants now relied upon by plaintiffs were made; and to avail plaintiffs it must be found that the grants "conveyed to them the title to the ponds or the waters thereof."

Ibid.

The grants must be construed with reference to the rules of law existing at the time they were given, including the rule found in the Ordinance of 1647.

Bishop, Cont. §§ 456, 480; *Damman v. Commissioners of S. & U. Lands*, 4 Wis. 414.

The terms of these grants are to be taken most strongly against the grantees and in favor of the grantor; and the grants will not be held to include the Watuppa Pond "unless it is included in its terms by express words or necessary implication."

Watuppa Reservoir Co. v. Fall River, *supra*;

Com. v. Roxbury, 9 Gray, 451, 492, 498; *Cleveland v. Norton*, 6 Cush. 880; *Treat v. Lord*, 42 Me. 552; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997.

The Pocasset grant mentions "ponds" in the habendum clause; "and yet if the thing granted be only in the habendum and not in the premises of the deed, the deed will not pass it."

Shep. Touch, 75; 2 Greenl. Cruise, title 82, chap. 21, §§ 68, 73, 75; *Sumner v. Williams*, 8 Mass. 162, 175; *Pyncheon v. Stearns*, 11 Met. 312, 316; *Goodtitle v. Gibbs*, 5 Barn. & C. 709, 717.

Even if the word "ponds" were expressly mentioned in the granting clause, it should not be held to include great ponds held in trust for the public by the grantor.

Reg. v. Northumberland, Plowd. 310.

If the terms of the grants are ambiguous as to the great ponds, evidence of contemporaneous and long-continued usage is admissible to ascertain the intent.

Rogers v. Goodwin, 2 Mass. 477; *Chad v. Tiled*, 2 Brod. & Bing. 403; *Duke of Beaufort v. Swansea*, 3 Exch. 425; *Jackson v. Wood*, 13 Johns. 346.

If any title in the pond passed to the Proprietors of Freetown or of Pocasset, it was the legal title only, the beneficial right remaining in the public. The Proprietors never attempted to convey to a private person. If they had so attempted it would have been "in violation of law and of no effect."

Atty-Gen. v. Revere Copper Co. 9 L. R. A. 510, 152 Mass. 444.

The grants must be construed with reference to the situation of the parties, the state of the country and of the thing granted.

Adams v. Frothingham, 3 Mass. 352; *Com. v. Roxbury*, 9 Gray, 451, 498.

Bodies of proprietors bore a semi-political character, and although for certain purposes they have been held to possess some of the rights of ordinary tenants in common, yet, whether under the name of "proprietors," "freemen," or "townsmen," their organization largely partook of a public nature.

Com. v. Roxbury, *supra*; *Angell & A. Corp.* chap. 6; *Order of Gen. Ct. of Plym. Rep.* 12.

The Pocasset proprietors acted in the manner common to such bodies in both colonies, as to their meetings, orders, etc. Both Pocasset and the Freemen's purchase were incorporated as towns soon after the settlement. The former became Tiverton (1694) and the latter Freetown (1683). When the boundary disputes with Freetown (Rep. 10) were settled in 1700 the agreement was made between "the proprietors of Freetown" and "the proprietors of Tiverton." The line they agreed upon continued to be the division line between the two towns.

Fowler's Hist. Fall River, pp. 21, 62.

Holmes, J., delivered the opinion of the court:

These are the same cases which are reported in 147 Mass. 548. Since that decision other facts have been added to the agreed statement and the cases have been reargued with reference not only to the facts now first appearing but also to the old ones, and we have been asked to reconsider our former judgment. We intend, however, to express no opinion 18 L. R. A.

on the questions passed on then, because apart from the questions upon which our opinions were divided we are agreed that the plaintiffs now make a case calling for the interposition of this court.

The plaintiffs are successors in title to grantees of Plymouth Colony, to whom the land under and on both sides of the outlet of the pond, the Fall River, to a point below the plaintiff's dam, was conveyed as part of a large tract. This conveyance was made on March 5, 1680, to Church, Gray and others, and is known as the Pocasset grant or purchase. The territory described in the granting clause of the deed included the whole of the South Watuppa Pond and a large part, but less than half, of the North Watuppa Pond. The habendum is "all the above mentioned and bounded lands with all and singular the woods, waters, coves, creeks, ponds, brooks, benefits, profits, privileges, and hereditaments whatsoever in before arising, accruing, belonging or thereto anyways appertaining, or to any part or parcel thereof." The plaintiffs also own other land on the Fall River as successors in title to other grantees of Plymouth Colony, to whom another large tract was conveyed in 1656, including all of the North Watuppa Pond not embraced in the Pocasset grant. This is known as the Freemen's purchase.

The new questions concern the effect of these deeds and more especially of the Pocasset grant. Leaving the Ordinance of 1647 on one side for the moment, we are of opinion that that grant purported to convey the ponds and waterpower embraced within its boundaries to the grantees as private owners. It is argued that great ponds not being mentioned in the granting clause they must be taken to be excepted, and that the habendum cannot increase the gift. But no such technical argument can be allowed to prevail against the plain meaning of one of our early deeds, if it ever would have prevailed in a case like this anywhere. In the conveyances made early after the settlement of the country, artificial rules yield to the intention to be gathered from the four corners of the instrument, *propter inopiam consilii*. *Ipswich Grammar School v. Andrews*, 8 Met. 584, 592; *Berry v. Raddin*, 11 Allen, 577, 581.

It is argued also that the title of the grantees is to be dealt with on the same footing as the title of a town, and therefore as subject to the Ordinance of 1647 when that became the law. If so, then if the land at the outlet of the pond was held undivided by the original proprietors until after the Province Charter (1692), it might follow that the former decision in this case was still applicable. The Town of Tiverton was incorporated in 1694, with boundaries, it is said, nearly coincident with those of the Pocasset grant. Moreover we presume that there is no doubt that "in the early settlements in the country, proprietors, commoners and towns were often confounded." 2 Dane, Abr. 698. If we had before us a case where after a grant of land and a great pond to proprietors the same grantees or their successors were incorporated as a town and thereafter the town had assumed to act as the proprietor of

the land and pond, and in that state of things the Ordinance of 1647 came into operation, we might hesitate to say that the pond was not within the scope of the ordinance. *West Roxbury v. Stoddard*, 7 Allen, 158, 171. But the elements of the case supposed or of any equivalent to it are wanting. The original conveyance, the Pocasset grant, is not a grant to or the incorporation of a town. It is a sale of land as private property to private individuals for a substantial sum of money. As we have said this sale embraced the water right now claimed. So far as appears, or as we have any reason to suspect, the whole land and water rights conveyed have been dealt with as private property from that day to this. There is no ground for saying that when the Ordinance of 1647 became law in the Plymouth Colony or at any later moment it found the Watuppa ponds the property of the Colony or of a town or in a like position for the purposes of the ordinance. We may add that the Town of Tiverton was not in existence until two years after the date of the Province Charter which it seems is to be taken as the date when the Ordinance of 1647 was extended to Plymouth. *Litchfield v. Scituate*, 136 Mass. 39, 46, 47.

There is no doubt, of course, that if the pond and the rights claimed by the plaintiffs had been appropriated to private persons before the ordinance went into effect those rights remained unaffected afterwards. *Berry v. Radcliff*, 11 Allen, 577. Again we do not understand it to be disputed that if the original Pocasset grantees got a private right to the waterpower now used by the plaintiffs, and did not lose it at the date of the Province Charter, the plaintiffs now have it. It seems to be plain that whatever mill or water rights the Pocasset grantees had at the mouth of the pond they conveyed to the plaintiff's predecessors in title. Finally, if the whole of the Watuppa ponds was the subject of private ownership or if the colony retained a part of one subject to its conveyance of the rest to the Pocasset grantees, the other owner, whether the grantees of the Freeman's purchase or the colony, in its capacity of owner and apart from the exercise of sovereign powers, could not draw off the water to the detriment of the Pocasset grantees. See *Tudor v. Cambridge Water Works*, 1 Allen, 164; *Smith v. Moodus Water P. Co.* 38 Conn. 460.

The only question which remains is whether the Ordinance of 1647 modifies the conclusion to which we have come apart from it. This may be answered in a few words. In *Litchfield v. Scituate*, 136 Mass. 39, 46, it is said that there is no sufficient evidence that the ordinance was the law of Plymouth Colony before its union with Massachusetts under the Province Charter, and on the next page the time when the Province Charter passed the seals is indicated as the moment when we are to take it that the ordinance became applicable to that part of the State. It is true that when it did become applicable it became so as part of the common law and that the fiction generally applied in respect to the common law is that it is only declared by the courts and has existed im-

morally. But when the Ordinance of 1647 is said to be part of the common law of Plymouth all that is meant is that, as we said in *Litchfield v. Scituate*, it has been extended to that territory by usage and by judicial decision. Such an extension does not necessitate a fiction that the law has been so always, which would be as unreasonable as a change of private rights in the guise of a declaratory statute. It is fiction enough if we assume that the common law of Plymouth conformed to the ordinance from the date of the Province Charter, a date too late to affect the plaintiffs in this case. An illustration may be suggested from our common law as to prescription. This has conformed to the Statute of Limitations as they have been altered from time to time. *Melvin v. Whiting*, 10 Pick. 295, 297; *Edson v. Munsell*, 10 Allen, 557, 565; *Coolidge v. Learned*, 8 Pick. 504. But we do not suppose that it would be argued that when the Statute was changed the common law was changed for past time, retrospectively, so that, for instance, the use of a way for twenty years while the Statute of 1786, chap. 18, was in force should now be held to have gained a right, although at the time it was insufficient to do so.

There is no question made as to the remedy, if the plaintiff's rights are established. *Tudor v. Cambridge Water Works*, 1 Allen, 164.

We regard what we have said as sufficient to establish the rights of the Troy Cotton & Woolen Manufactory. It owns the land at the outlet of the pond. This being so, probably it is not regarded as material whether an injunction shall be issued in the case of the Watuppa Company also. That is a corporation made up of the representatives of the several mills owning waterpower on Fall River, but seems not itself to be an owner of land or water rights. We gather, however, from the facts admitted that it has built and is in possession of a dam at the outlet of the pond and controls the whole waterpower in the interest of the owners for their benefit. We are disposed to think that it shows a sufficient possession under the title of the owners to warrant the issuing of an injunction in its behalf.

Decree for plaintiffs.

Wilbur H. POWERS

v.

Jerome F. MANNING.
(2 Cases.)

(...Mass....)

1. A note 'payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so-called class two cases" became due when a dividend had

NOTE.—Judges of Court of Commissioners of Alabama Claims.

The judges of the Court of Commissioners of Alabama Claims hold their offices while the court continues to exist, unless they are lawfully re-

been paid upon such portion of the judgments as to substantially exhaust the fund applicable to them. Full payment was not necessary.

2. **Each separate item of an account** upon which suit is brought may be composed of several elements if all taken together constitute but a single item of charge upon the same subject matter.
3. **The fees of commissioners appointed to take testimony** by the Court of Commissioners of Alabama Claims are not regulated by U. S. Rev. Stat., § 847, but such commissioners may make any contract in regard to compensation which may be agreed upon.
4. **In considering exceptions to rulings of the trial court** in an action to recover compensation for acting as commissioners to take testimony under appointment by the Court of Commissioners of Alabama Claims, the Supreme Court will not receive a copy of the instructions issued by that court to its commissioners; if material it should have been put in evidence at the trial.
5. **An attorney's withdrawal from a case before it is finished**, even without the consent of his client or the court, will not deprive him of the right to compensation for services already rendered, if it was for good cause upon reasonable notice and the client was not prejudiced thereby.

(September 5, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of two actions brought to recover the amount alleged to be due on certain promissory notes, and also to recover for services alleged to have been rendered by plaintiff to defendant, in which the court found for plaintiff. *Overruled.*

The facts are stated in the opinion.

Mr. Jerome F. Manning, defendant, *in propria persona.*

Mr. H. L. Boutwell for plaintiff.

Lathrop, J., delivered the opinion of the court:

These are two actions of contract tried in the superior court, without a jury. In each case the presiding justice found for the plaintiff; and the case comes before us on the defendant's exceptions.

The first count in the first case is on a promissory note, dated July 11, 1884, by the terms of which the defendant promised to pay the plaintiff the sum of \$685, "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so-called class two cases."

The defendant asked the court to rule that this note did not become due and payable until the United States had paid all such judgments in full, and that this action, as to said note, had been prematurely brought.

The court refused so to rule, as it appeared at the trial that the United States had substantially paid all judgments of the first class in full, and had paid 85.22 per cent of the greater part of the judgments of the second class, and substantially exhausted the fund.

The Court of Commissioners of Alabama Claims was constituted by the United States Statute of June 23, 1874, for the purpose of receiving and examining all claims, admissible under the Act, resulting from damage caused by the Alabama and other designated confederate cruisers. The claims allowed by this tribunal did not equal the amount of the award of the arbitrators appointed in pursuance of the Treaty of Washington between the United States and Great Britain, and which had been paid to the United States.

The Court of Commissioners of Alabama Claims having ceased to exist, Congress, by the Act of June 5, 1882, re-established it for the term of two years. By § 4 it was authorized to receive and examine the claims mentioned in § 5, and to enter judgments for the amounts allowed therefor in two classes. Section 5 defines the claims of the two classes. Section 7 provides that the judgments rendered by the court under the Act shall be paid by the secretary of the treasury out of the sum of money paid to the United States under the Treaty of Washington, and not appropriated to claims proved under preceding legislation. Section 8 provides that "judgments entered in the first class shall be paid before judgments of the second class are paid. If the sum of money so appropriated shall be insufficient to pay the judgments of the first class, they shall be paid according to the proportions which they severally bear to the whole amount of such unappropriated sum. If such sum shall be sufficient to pay the judgments of the first class and not sufficient to pay the judgments of the second class, the latter judgments shall be paid according to the proportions which they severally bear to the residue of such unappropriated sum after the judgments entered in the first class are paid." 22 U. S. Stat. at Large, 98.

Construing the condition contained in the note in suit and the finding of the court in connection with the terms of this Statute, we are of opinion that the ruling requested was rightly refused.

The award of the arbitrators was to the United States as a nation; and the fund was "to be distributed by Congress as it saw fit. No individual claimant had, as matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams v. Heard*, 140 U. S. 529, 587, 588,

moved therefrom; and on continuance of the court for a further term they continue in office without the necessity of a reappointment. *Manning v. French*, 4 L. R. A. 339, 149 Mass. 391.

Jurisdiction, practice and procedure of the Court of Commissioners of Alabama Claims. See *notes to Kingsbury v. Mattocks (Me.)* 3 L. R. A. 463.

The payment of the expenses of the Geneva Arbitration has not been charged by Congress upon 13 L. R. A.

the fund received under the award. *United States v. Weld*, 127 U. S. 51, 32 L. ed. 62.

The prohibition in the Act of 1874 concerning compensation for collecting such claims is limited to liens, sales or assignments creating a right of property in the claim itself, and not to personal agreements as to compensation. *Bachman v. Lawson*, 109 U. S. 659, 27 L. ed. 1067. See *note to Kingsbury v. Mattocks (Me.)* 3 L. R. A. 462.

35 L. ed. 550, 553, 554. When, therefore, the note in suit was made payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so-called class two cases," the parties to the note had reference to claims which could be enforced only under the terms of the Statute, which were to be paid out of a specific fund, in subordination to cases of the first class, and which were in a certain contingency to be paid proportionally.

The remaining exception in the first case may be briefly disposed of. The second count is on an account annexed, which contained over twenty items. The defendant objected to several of these items on the ground that the plaintiff sought in each of them to recover for services in several different matters, and the defendant asked the court to rule that the plaintiff could recover for but one matter of charge under each of said items, and also asked the court to rule that there could be no recovery on any of said items. The court found upon the evidence, as a fact, that the different matters mentioned in each of said items constituted one item of charge upon the same subject matter; and refused to give the rulings requested. One of these items is as follows: "1885, Dec. 8. To letter to Payson and Speer, and two page letter to Brigham, \$3."

If these letters related to the same subject matter, we are unable to see why one charge might not be made, and why, being so charged, they could not be inserted in one item. The other items are similar and fall within the same rule.

The case of *Jones v. Holey*, 1 Allen, 273, on which the defendant relies, is clearly distinguishable. The defendant in that case filed a declaration in set-off, one item of which was as follows: "To goods sold, materials found, and work done, \$100."

At the hearing before an auditor, the defendant introduced evidence of several distinct matters of charge under said item. At the trial this item was disallowed. In delivering the opinion of the court, Chapman, J., said: "The item in the account in set-off, 'To goods sold, materials found, and work done, \$100,' should not have been entirely rejected. In many cases all these particulars may enter into a single item of charge. And any single thing of which that item gives reasonable notice might have been proved. But it appears that the auditor allowed the defendant to prove several particulars, with the various prices of the same, under this single item. This was erroneous. Under a single item of his bill, the defendant should have been limited to the proof of a single article."

In the second case, one of the counts was on an account annexed in which the plaintiff sought to recover on an oral agreement made between himself and the defendant, by which the defendant promised to pay him at the rate of \$20 a day for every business day in which he was engaged in taking depositions, as a commissioner appointed by the Court of Alabama Claims, for the defendant. Other counts were upon promissory notes, the con-

sideration of which was services rendered as such commissioner and as an attorney.

The charges for such services are found by the court not to conform either in form or amount, to the provisions of U. S. Rev. Stat., § 847. The defendant asked the court to rule "that the plaintiff, as commissioner of the Court of Commissioners of Alabama Claims, was a public officer; that the fees to which he was entitled for services as such commissioner were regulated by the Revised Statutes of the United States, § 847; and that he can recover no more fees than those prescribed in the said section, even though the defendant expressly agreed to pay him more; and also that, having made a special contract in reference to his fees which is opposed to public policy, the plaintiff cannot recover on a *quantum meruit*. The court refused so to rule, and found for the plaintiff.

Section 847, U. S. Rev. Stat., is entitled "Commissioners' Fees," and prescribes what are the legal fees of such persons. Section 823 of the same chapter provides that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, . . . except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The commissioners mentioned in the above sections are undoubtedly the commissioners authorized by section 627 of the United States Revised Statutes, to be appointed by each circuit court. This was expressly so decided by Judge Choate in *Sedgwick v. Grinnell*, 10 Ben. 6, and is apparent from a consideration of all the provisions of the chapter. Thus, by § 846, the accounts of "commissioners of circuit courts" are required to be examined and certified by the district judge of the district for which they are appointed. The fees which are allowed them by § 847, are for services imposed upon commissioners of the circuit court by other sections of the Revised Statutes.

We are of opinion, therefore, that the fees of the plaintiff, as commissioner are not regulated by U. S. Rev. Stat., § 847. It is accordingly unnecessary to determine whether the words in section 823, "the following and no other compensation shall be taxed and allowed to . . . commissioners," refer to anything more than the costs which may be taxed for their services, or to their claims against the government of the United States, when acting in a judicial or ministerial capacity, and prevent them from making a contract for services on such terms as may be agreed upon.

At the argument in this court, the defendant produced a certified copy of certain instructions, which on June 5, 1883, the Court

of Commissioners of Alabama Claims directed its clerk to issue "to commissioners appointed and authorized to take testimony to be used in the trial of causes pending before it." We declined to receive this copy, being of the opinion that if the instructions had any bearing upon the question of the power of the parties to make the alleged contract for fees, they should have been put in evidence at the trial of the case. We see no reason to change our views.

The plaintiff also seeks to recover, on an account annexed, for services rendered to the defendant, as an attorney and counsellor at law, in the courts of this Commonwealth, and in the Circuit Court of the United States for the District of Massachusetts.

The plaintiff testified that he withdrew from the defendant's service, as attorney and counsellor-at-law, on February 2, 1886, and on that day gave the defendant and all his opponents notice in writing of his withdrawal; that the case of Amy against Manning was then upon the trial list; that Charles Cowley, Esq., also appeared for the defendant, and that such withdrawal was without the consent of the court or of his defendant. The defendant asked the court to rule that the plaintiff was not entitled to recover in this action for any services performed by him in defending the action of Amy against Manning in this court, because he withdrew therefrom, before the trial thereof, without the consent of the defendant or of the court. Also that the same rule of law applied to all actions pending where the defendant was a party and the plaintiff was his counsel, when the plaintiff withdrew therefrom. The judge found from the evidence that the conduct of said Manning was such that the plaintiff was fully justified in withdrawing from said suits, and that said Manning had other counsel, and suffered no damage on account of said withdrawals and declined to give the rulings requested.

The defendant relies, in support of his proposition that an attorney cannot withdraw his appearance for a party without leave of court, upon the case of *United States v. Curry*, 47 U. S. 6 How. 106, 12 L. ed. 868, where language to this effect is used by Chief Justice Taney. The point decided in that case was that the citation or notice of an appeal might be served upon the attorney of record of the appellees, while his name remained upon the docket of the court below, although he had in fact been discharged by his clients. The remark of the chief justice is not to be taken as the statement of a general principle, apart from the question before the court. That it was not so intended is shown by the context. The entire quotation is as follows: "So, too, as to the service of the citation on the attorney. It is undoubtedly good, and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And, while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself." See also *De la* 13 L. R. A.

Pole v. Dick, L. R. 29 Ch. Div. 351, 3d Common Law Rule of this court; 23d Equity Rule.

No case has been called to our attention which holds that, as between an attorney and his client, leave of court is required before a contract between them can be ended.

It is stated in 1 Tidd, Pr. 9th ed. 86, that "when an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money,"—citing 1 Sid. 31. This, however, is not the law of England or of this country to-day.

The question was thoroughly considered in England in the case of *Vansandau v. Browne*, 9 Bing. 402, and it was held that an attorney might for reasonable cause and upon reasonable notice, abandon the conduct of a case, and recover his fees. In regard to the case in Siderfin, Tindal, Ch. J., said: "Now in the report in Siderfin no facts are stated to explain the decision of the court. It may be, probably was, the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance; if so, the decision of the court was proper." See also *Rousson v. Earle*, M. & M. 538; *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Whitehead v. Lord*, 7 Exch. 691; *Harris v. Osbourn*, 2 Crompt. & M. 629.

In *Elliot v. Lawton*, 7 Allen, 274, it was held, in accordance with the English decisions, that the contract of an attorney with his client was an entire and continuous contract; and that the Statute of Limitations did not begin to run until the final service was performed. In answer to the objection that by holding the service to be entire the attorney would be precluded from enforcing any claim for services until the final termination of the suit, Mr. Justice Dewey, in delivering the opinion of the court, said: "To this it has been answered that such would be the effect, if nothing has occurred to change the relation of the parties and their duties to each other; but from the nature of this contract it may be terminated previous to the termination of the suit, for a good and sufficient cause, and upon reasonable notice. Hence it has been holden that failure to supply reasonable funds, or any other substantial cause for not further proceeding in the case, would justify the attorney in withdrawing from it, and in such a case a present right to enforce his claim for past services would arise, and of course also from that period the Statute of Limitations would commence running."

In *Ruah v. Cavanaugh*, 2 Pa. 187, which was an action for slander, the plaintiff, an attorney, collected a sum of money for the defendant, and retained it for his fees. The defendant thereupon called him a thief, robber, and cheat. One question raised was whether the plaintiff, who had been employed by the defendant to prosecute a person criminally, was entitled to any fees, having abandoned the prosecution. It was held that

if he were satisfied of the innocence of the accused, he was entitled to abandon the prosecution, and recover compensation; and that he was not, to quote the language of Gibson, *Ch. J.*, "bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness."

In *Tenney v. Berger*, 98 N. Y. 524, it was held that the employment by the client, without the consent of his attorney, of counsel against whom the attorney had personal and professional objections, and with whom he was unwilling to be associated, was a justifiable cause for his withdrawal from a case; and that, upon reasonable notice of such withdrawal, he was entitled to recover for services rendered.

In the case at bar, we are of opinion that, on the facts found, the presiding judge rightly refused to rule as requested by the defendant.

The only remaining exception relates to a promissory note payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims." This is disposed of by the conclusion we have reached on a similar question in the first case.

The result is that in each case the order must be—

Exceptions overruled.

Nathaniel F. BENSON, *Appl.*,

v.

Charles A. GRAY.

(...Mass....)

1. **A contract for the transportation of live-stock**, which provides that it shall be at owner's risk during transportation, loading and unloading; that it must be taken away within twenty-four hours after being unladen from the cars; that the carrier's liability shall cease "after their arrival at their place of destination and unloading," and that if not taken away it will be stored at owner's risk,—places the duty of unloading on the carrier.
2. **A rule of a carrier, known to the shipper**, requiring the latter to unload live-stock from the cars, will not override an express contract placing that duty on the carrier.

(September 18, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Bristol County in favor of defendant in an action brought to recover possession of two horses shipped by plaintiff over the Old Colony Railroad from Boston to New Bedford. *Judgment for plaintiff.*

NOTE.—*Shipment of live-stock; contract construed.*

The ways and means of loading the car being in proper condition, and the burden of loading being upon the shipper, it is his duty to have the car loaded that the train may not be unreasonably delayed. *Louisville, N. A. & C. R. Co. v. Godman*, 2 West. Rep. 325, 104 Ind. 490. See *Frazier v. Kansas C. St. J. & C. B. R. Co.* 48 Iowa, 571.

In case of special contract whereby the owner
18 L. R. A.

The facts are stated in the opinion.

Messrs. Lem Le B. Holmes and Elliot D. Stetson for appellant.

Mr. W. H. Cobb for appellee.

Allen, J., delivered the opinion of the court:

The transportation of the plaintiff's horses was under an express contract. This contract was prepared by the railroad company, and called "Live Stock Receipt." In it the company acknowledged the receipt of the two horses marked for the plaintiff at New Bedford, Mass., "which the company promises to forward by its railroad, and deliver to or order at its depot in . . . He or they first paying freight for the same." "N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner." Then followed the rates for transporting different kinds of animals; after which were certain rules and regulations in regard to freight. Among these rules were the following: "Nor will they [the company] hold themselves liable as common carriers for such articles after their arrival at their place of destination and unloading in the company's warehouses or depots." "Machinery . . . and live animals will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed to the contrary." "All articles of freight arriving at their place of destination must be taken away within twenty-four hours after being unladen from the cars."

The plaintiff paid for the transportation of the horses on their arrival at New Bedford, and took a receipt which contained the same rules and regulations copied above, and applied for his horses; and the agent of the railroad company refused to unload the horses, and required the plaintiff to unload them.

In the opinion of a majority of the court the railroad company must be held under this contract to have undertaken to unload the horses, though at the owner's risk. This contract was made out with express reference to the carriage of live animals. The railroad company promised to deliver them, and this implies unloading them. The company would also store them, unless called for, and this also implies unloading them. There are three several stipulations as to unloading goods, one of which in express terms includes live animals, and each of which implies that the company will unload them. It must therefore be held that the company undertook to unload them.

This being so, a usage of the company's agent at New Bedford to require the owner or consignee to unload live animals is of no

agrees to and does take charge of the stock, the burden of proving negligence is on him. *McBeath v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 190, 20 Mo. App. 445; *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440; *Buddy v. Wabash, St. L. & P. R. Co.* 2 West. Rep. 535, 20 Mo. App. 206.

Carriers of live-stock; responsibilities of. See *notes to International & G. N. R. Co. v. Tisdale (Tex.)* 4 L. R. A. 545; *Missouri Pac. R. Co. v. Fagan (Tex.)* 2 L. R. A. 75.

consequence. The usage cannot override the contract. *Dickinson v. Gay*, 7 Allen, 29; *Seccomb v. Provincial Ins. Co.* 10 Allen, 805, 810; *Dodd v. Farlow*, 11 Allen, 426, 429; *Boardman v. Spooner*, 18 Allen, 853, 859; *Osborne v. New Eng. Mut. M. Ins. Co.* 101 Mass. 551; *Snelling v. Hall*, 107 Mass. 184; *Haskins v. Warren*, 115 Mass. 514, 535, 536; *Hedden v. Roberts*, 184 Mass. 88; *Emery v. Boston Marine Ins. Co.* 138 Mass. 398; *Coltender v. Dinsmore*, 55 N. Y. 200.

A rule and regulation of the company can have no greater effect. The company's rule requiring consignees to unload livestock was not otherwise known to the plaintiff than this; he knew that the company's agent at New Bedford had been accustomed to require consignees to unload their horses. But if well known, it must still give way to the contract. It was a matter of contract between the plaintiff and the railroad company that the company should unload the plaintiff's horses. This being so, neither a usage nor a rule to the contrary will avail to excuse the company from the performance of its undertaking. In this respect, the case differs from *Miller v. Mansfield*, 112 Mass. 260, and other cases, where there was no such contract.

Judgment for the plaintiff.

Bertha BADENFELD, Admx., etc., of
Charles Badenfeld, Deceased,
v.

MASSACHUSETTS MUTUAL ACCI-
DENT ASSOCIATION.

(...Mass....)

1. Arbitration is not a condition precedent to an action on a policy promising to

NOTE.—*Accident insurance; warranty in application for insurance.*

A warranty, in an application against "bodily or mental infirmity," is not broken by the fact that the applicant was near-sighted and defective in his vision, especially if he at that time wore eyeglasses and this was known to the insurance agent. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 508.

A warranty that he never had "any bodily or mental infirmity" is not broken by the fact that he was subject to erysipelas. *Bernays v. United States Mut. Acc. Asso.* 45 Fed. Rep. 455.

Interpretation of contract.

A contract of insurance must have a reasonable interpretation, such as probably was in the contemplation of the parties when it was made. *Grandin v. Rochester German Ins. Co.* 107 Pa. 26.

Where the terms of a policy are susceptible, without violence, of two interpretations, that construction which is most favorable to the insured, in order to indemnify him against loss sustained should be adopted. *Teutonia F. Ins. Co. v. Mund*, 102 Pa. 80; *Burkhard v. Travelers Ins. Co. of Hartford, Id.* 202; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405.

The words "total and permanent loss of the sight of both eyes" mean the loss of eyesight when used in a policy insuring a person who has already lost an eye. *Humphreys v. National Ben. Asso.* 11 L. R. A. 564, 139 Pa. 264.

13 L. R. A.

pay a sum certain in case of death, although it provides that no suit shall be brought thereon unless the matter "has been first referred" to arbitration.

2. The burden of proving voluntary exposure to unnecessary danger as a defense to an action for accident insurance is on the insurer.

3. Voluntary exposure to unnecessary danger, which will prevent recovery of accident insurance, is not shown by the fact that the insured while waiting for a train was thrown or fell upon the track from a platform not intended for use in getting upon his train or in fact for use by passengers at all, though they sometimes used it, but for train hands, and which was only about two and a half feet wide in places where girders extended out from the wall.

4. Leaving a car while in motion is not necessarily "a voluntary exposure to unnecessary danger" which will defeat a recovery on a policy which by its terms is avoided by such exposure.

(June 10, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover the amount alleged to be due on an accident insurance policy, which resulted in a verdict in favor of plaintiff. *Overruled.*

The facts sufficiently appear in the opinion.

Messrs. Gaston & Whitney, for defendant:

The effect of the first condition of the policy is to prevent a recovery, if it appears affirmatively that the negligence of the deceased was a contributing cause of his death.

Freeman v. Travelers Ins. Co. 4 New Eng. Rep. 621, 144 Mass. 572.

The conduct of the deceased, as disclosed by the facts admitted and proved by the plaintiff, was such as to require the court to rule affirmatively that, as a matter of law, the negligence

The knowledge of the general agent of the company is the knowledge of the company in such a case. *Ibid.*; *People's Ins. Co. v. Spencer*, 53 Pa. 363.

Certificate.

A mere indorsement upon the back of a certificate giving general relief does not make it cover partial disablement where no provision therefor is contained in the body of the certificate. *Hollobaugh v. People's Mut. Acc. Ins. Asso.* 128 Pa. 566.

Conditions in policy; burden of proof of breach.

The burden of proving the breach of a condition in the policy "that insured shall use all due diligence for his personal safety and protection," is on the company. *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572; *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 423; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 572; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Hodsdon v. Guardian L. Ins. Co.* 97 Mass. 144; *Cluff v. Mutual Benefit L. Ins. Co.* 18 Allen, 306, 99 Mass. 317; *Jones Mfg. Co. v. Manufacturers Mut. F. Ins. Co.* 8 Cush. 82; *Orrell v. Hampden F. Ins. Co.* 18 Gray, 431; *Redman v. Aetna Ins. Co.* 49 Wis. 481; *Grangers Life Ins. Co. v. Brown*, 57 Miss. 308; *Germain v. Brooklyn Life Ins. Co.* 80 Hun, 536; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 508.

The company must allege and prove the want of

of the insured contributed to his death, and that his death occurred in consequence of voluntary exposure to unnecessary danger.

Butterfield v. Western R. Corp. 10 Allen, 532; *Burns v. Boston & L. R. Co.* 101 Mass. 50; *Harvey v. Eastern R. Co.* 116 Mass. 269; *Wills v. Lynn & B. R. Co.* 129 Mass. 35; *Torrey v. Boston & A. R. Co.* 147 Mass. 412.

In a proper case it is both within the power of the court and also its duty to rule affirmatively, that the facts establish negligence as a matter of law, or that the deceased voluntarily exposed himself to unnecessary danger.

Holmes, *Theory of the Common Law*, pp. 120-124; *Tuttle v. Travelers Ins. Co.* 134 Mass. 175; *Freeman v. Travelers Ins. Co. supra*; *Lorell v. Accident Ins. Co.* 3 Ins. L. J. 887, 5 Ins. L. J. 559; *Neill v. Travelers Ins. Co.* 17 Can. L. J. 44.

It is clear, as a matter of law, that the death of the insured was due to his own negligence or voluntary exposure to unnecessary danger, upon any theory which the jury would have been authorized to adopt, upon the evidence, as to the precise manner in which he came to be under the wheels of the train.

Hickey v. Boston & L. R. Co. 14 Allen, 429.

The fact that circumstances or excuses might be imagined, which would justify the deceased in being where he was, does not alter the question.

Gahagan v. Boston & L. R. Co. 1 Allen, 187; *Burns v. Boston & L. R. Co. supra*.

compliance with any particular proviso or condition on which it relies. *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610.

Until self infliction of the injury or the negligence procuring it is proved, the presumption of accident will prevail. *Cronkhite v. Travelers Ins. Co.* 75 Wis. 116. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685.

Temporary engagement in hazardous employment; classification of hazards.

The word "occupation" in the by-laws of the association has reference to the vocation, profession, or trade in which the assured is engaged for hire or profit, and does not preclude him from engaging in mere acts of exercise, diversion, or recreation, such as hunting. *Union Mut. Acc. Assn. v. Frohard*, 10 L. R. A. 388, and note, 38 Ill. App. 178.

Where the classification of hazards made in the by-laws is predicated only upon occupations and not in respect to acts, the case is no different than it would be if the word "act" were not found in the contract. *Ibid.* See note to *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685.

The classifications of risks on the back of the policy cannot control the express stipulations in the policy. *Ford v. United States Mut. Acc. Rel. Co.* 1 L. R. A. 700, 148 Mass. 153.

Exterior and visible marks and signs.

The clause that the insurance shall not cover any bodily injury of which there are no external or visible signs on the body of the insured, does not apply to fatal injuries. *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 251; *Tucker v. Mutual Ben. Life Co.* 60 Hun. 50; *Eggenberger v. Guarantee Mut. Acc. Assn.* 41 Fed. Rep. 172. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 687.

The dead body is external and visible sign enough 13 L. R. A.

The court should have, as requested by the defendant, nonsuited the plaintiff, on the ground of there not having been any arbitration or request for arbitration.

Scott v. Avery, 5 H. L. Cas. 811, 851; *Tredwin v. Holman*, 1 Hurlst. & C. 72; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 783; *Edwards v. Aberayron Mut. L. Ins. Soc. L. R.* 1 Q. B. Div. 563.

Messrs. A. A. Ranney and John Woodbury, for plaintiff:

Circumstantial evidence is sufficient to establish accidental death.

Wright v. Sun Mutual L. Ins. Co. 29 U. C. C. P. 221; *Travelers Ins. Co. of Hartford v. McConkey*, 127 U. S. 661, 32 L. ed. 308; *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 839; *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60; *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572.

The burden of proving non-compliance with the condition requiring due diligence for personal safety and protection was upon the defendant.

Freeman v. Travelers Ins. Co. supra.

The question was rightly left to the jury whether the defendant had established this defense.

Stone v. United States Casualty Co. 34 N. J. L. 371; *Wright v. Sun Mut. L. Ins. Co. supra*; *Providences L. Ins. & I. Co. v. Martin*, 82 Md. 810.

that an injury was received. *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 45 Hun. 317.

External, violent, and accidental means.

Sunstroke or heat prostration is not a bodily injury "sustained through external, violent, and accidental means," within the meaning of an insurance policy covering such injuries, but expressly excluding liability for "any disease or bodily infirmity." *Dozier v. Fidelity & C. Co.* 46 Fed. Rep. 446; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & Bl. 478. See *Boos v. World Mut. L. Ins. Co.* 6 Thomp. & C. 364.

So death from the effects of a blow struck by a person after an attempt to blackmail is the result of accidental means. *Richards v. Travelers Ins. Co.* 86 Cal. 170.

Falling from a window while in a state of somnambulism, if death ensues, is produced by external and accidental means. *Travelers Ins. Co. v. Harvey*, 82 Va. 948.

Where a driver of a wagon died within an hour after narrowly escaping a collision, from fright or internal strain in controlling his horse, which took fright and ran away, death ensued from bodily injuries effected through external, violent, and accidental means. *McGlinchey v. Fidelity & C. Ins. Co.* 6 New Eng. Rep. 450, 80 Me. 251. See *McDonald v. Snelling*, 14 Allen, 280.

So where a man with an axe chased a boy, who in his fright ran against a barrel of wine and broke it, the man was held responsible for the loss of the wine. *Vandenburgh v. Truax*, 4 Denio, 467. See *Beach v. Hancock*, 27 N. H. 223.

Where a woman, frightened by an express wagon carelessly driven, jumped against a wall and injured her face, the express company was held liable. *Coulter v. American M. Union Exp. Co.* 56 N. Y. 686. See Page v. Bucksport, 64 Me. 51.

So accidentally inhaling coal gas, causing death, entitles insured to a recovery upon an accident

The only cases in which the court has taken this question from the jury are those in which there was direct evidence of a gross act of carelessness on the part of the assured.

Tuttle v. Travelers Ins. Co. 134 Mass. 175.

It is voluntary exposure to a known danger that constitutes carelessness.

Burkhard v. Travelers Ins. Co. 102 Pa. 262.

The jury were entitled to consider whether or not the circumstances of the accident were such as would have justified the assured in going upon this platform, even though inspection might have shown it dangerous.

Marz v. Travelers Ins. Co. 18 Ins. L. J. 727.

A collateral agreement to refer an existing right of action to arbitration is void.

Roue v. Williams, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Vass v. Wales*, 129 Mass. 33; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572; *Horton v. Sayer*, 4 Hurlst. & N. 643; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257.

The true construction of the policy shows the clause to be a collateral agreement, and not a condition precedent.

Freeman v. Travelers Ins. Co. supra; *Coburn v. Travelers Ins. Co.* 5 New Eng. Rep. 182, 145 Mass. 226.

If the language of this clause were such as to make arbitration a condition precedent, the condition would in this case either be inapplicable or else void.

Hood v. Hartshorn, 100 Mass. 117.

Such a condition precedent is void as "an

attempt to oust the courts of justice of all jurisdiction over the whole controversy."

White v. Middlesex R. Co. 135 Mass. 216; *Horton v. Sayer*, 4 Hurlst. & N. 643, 651; *Lee v. Page*, 30 L. J. Ch. 857, 859; *Edwards v. Aberayron Mut. S. Ins. Soc.* L. R. 1 Q. B. Div. 563, 588.

W. Allen, J., delivered the opinion of the court:

The promise of the defendant was to pay a certain sum in the event of the death of the plaintiff's intestate occasioned by "bodily injuries effected through external, violent and accidental means."

There are nine provisos in the certificate, the last of which is that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men." It was admitted that there had been no reference to arbitration of the plaintiff's claim, and that the plaintiff never requested such arbitration. The first exception is to the refusal of the court to rule that, for that reason, the action could not be maintained. The promise is, not to pay the award, but to pay the sum named, and the proviso does not make the award a condition precedent to the promise to pay, but a mode of enforcing that promise. It is well settled that such an agreement is no bar to an action on the promise. *Reed v.*

policy. *United States Mut. Acc. Asso. v. Newman*, 84 Va. 52; *Paul v. Travelers Ins. Co. supra*.

So death from accidental drinking of poison is within the terms of the policy. *Healey v. Mutual Acc. Asso.* 9 L. R. A. 371, 133 Ill. 556.

Death from blood-poisoning produced by virus communicated by a fly comes within the terms of such a policy. *Bacon v. United States Mut. Acc. Asso.* 44 Hun. 593.

Death from accidental drowning is within such policy. *Trew v. Railway Pass. Assur. Co.* 3 Hurlst. & N. 845; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42.

An insane man who takes his own life dies from an injury produced by external, accidental, and violent means. *Accident Ins. Co. of N. A. v. Crandal*, 120 U. S. 527, 30 L. ed. 740.

If the injury be accidental, and the result is death, what matters it whether the injury is caused by a blow from a pitchfork or a strain in handling it? *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43. See note to *Healey v. Mutual Acc. Asso.* (Ill.) 9 L. R. A. 371.

Intentional injuries.

The exception as to "intentional injuries inflicted by the insured or any other person," includes intentional injury inflicted by another person. *Travelers Ins. Co. v. McCarthy*, 11 L. R. A. 297, 15 Colo. 361; *Travelers Ins. Co. of Hartford v. McConkey*, 127 U. S. 661, 32 L. ed. 808; *Hutchcraft v. Travelers Ins. Co.* 37 Ky. 301; *De Graw v. National Acc. Soc.* 51 Hun. 142.

An injury not anticipated and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of an accident policy. *Accident Ins. Co. v. Bennett* (Tenn.) June 6, 1891.

Where the insured was shot and killed by a third person, though without provocation, and while peaceably engaged in his ordinary business, no recovery can be had. *Fischer v. Travelers Ins. Co.* 77 Cal. 246.

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So where one willfully assaulted insured with a knife, no recovery can be had. *Scherck v. Travelers Ins. Co.* 33 Alb. L. J. 466. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 445; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 686.

Voluntary exposure to unnecessary risks.

A case is within this exception in the policy where insured met his death while attempting in broad daylight to cross a main line of railway in front of an approaching train. *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453.

So boarding a train while in motion is a voluntary exposure. *Miller v. Travelers Ins. Co.* 30 Minn. 548.

A clause excepting railroad employees from the provision against entering a moving train includes a transfer agent employed by a baggage transfer company. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 506.

Where one lowered himself from the window by a piece of bed ticking, it was a voluntary exposure which will defeat a recovery where death ensues. *Shaffer v. Travelers Ins. Co.* (Ill.) Oct. 31, 1890.

Passing over a trestle on a dark night, other ways of travel being open to one, is a voluntary exposure to danger. *Travelers Ins. Co. v. Jones*, 80 Ga. 541.

Passing from one car to another while the train is in motion avoids the insurance. *Sautelle v. Railway Pass. Ins. Co.* 18 Ins. L. J. 892.

But going out on the platform while the train is in motion, while suffering from nausea caused by heat of the car, is not a voluntary exposure such as will defeat a recovery. *Marx v. Travelers Ins. Co.* 39 Fed. Rep. 321.

Running towards an approaching train to get the mail, stumbling and falling down a bank against the engine is not a voluntary exposure to unnecessary danger. *Equitable Acc. Ins. Co. v. Osborn*. 90 Ala. 201, post, 297.

"Lifting and over exertion" must be a voluntary and unnecessary act, and not an act put forth to

Washington F. & M. Ins. Co. 188 Mass. 872, and cases cited.

The certificate also contains the proviso that "members are required to use all due diligence for personal safety and protection; and that "no claim shall be made under this certificate where death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger." These provisos constitute matter of defense and the burden of proving them is upon the defendant. *Freeman v. Travelers Ins. Co.* 144 Mass. 572, 4 New Eng. Rep. 621. The other exceptions are to the refusals of the court to rule upon the undisputed evidence in the case, and upon the hypothetical findings of the jury upon the evidence, that the defense of want of due diligence or of voluntary exposure to unnecessary danger by the deceased was made out, and to instruct the jury to find a verdict for the defendant.

After the ten o'clock train left, the dead body of the plaintiff's intestate was found on the track where the train had stood in such a situation and condition as showed that he had been run over by the train and instantly killed. Track No. 8 was the easterly track and was near the easterly wall of the train house. A platform extended from the wall toward the track so far that a car upon the track would overhang the platform about six inches. The distance from the wall to the edge of the platform was about five and one half feet, but there were girders extend-

ing inward from the wall about three feet so that the distance from the face of the girders to the edge of the platform was about two and a half feet.

"There was evidence tending to prove that the plaintiff, before ten o'clock in the forenoon was waiting in the train house of a railroad station in Boston to take a train that left at a quarter after 10 on track No. 7, and that he knew that a train left on track No. 8 at 10 o'clock."

The defendant contended, and there was evidence to prove, that the platform east of the tracks was intended for the use of the train hands and not for passengers, though it was sometimes used by them, and that the place intended for and generally used by passengers for taking and leaving cars on track No. 8 was the platform on the westerly side of that track between it and track No. 7.

The supposition that the deceased fell in attempting to get on or off any platform of the cars while they were in motion seems inconsistent with the evidence. The only theory of accidental injury consistent with the evidence seems to be that the deceased was thrown or fell from the platform east of the cars, upon the rail between the front and rear trucks of the forward car about the time the cars started and before they had moved twenty feet. There was no evidence of the cause of his fall, and it cannot be contended that the mere fact that he fell under the car

save one's self from being crushed by a descending weight. *Reynolds v. Equitable Acc. Assn.* 59 Hun, 18.

Whether insured was guilty of voluntary exposure to danger is a question for the jury. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 508. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 444; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 687.

Payment of premium.

A cash payment by an accident insurance company to the assured on account of an injury received, to which he was not entitled unless the installments of premium had been paid, did not raise a conclusive presumption that all such installments had in fact been paid. *Melin v. North American Acc. Ins. Co.* 70 Wis. 579.

Where an agent solicits an ignorant negro porter of a railroad company to take insurance, and offers to take an order on the company for the premium, and the policy is delivered to the porter before the company can forfeit the policy for nonpayment of premium, in case it cannot realize on the order, it must give the insured notice of its nonpayment. *Eury v. Standard Life & Acc. Ins. Co.* 10 L. R. A. 584, and note, 89 Tenn. 427.

Limitation of right to sue.

In an accident policy limiting the right to sue thereon to one year from the time of the alleged injury, the limitation begins to run when the proofs are accepted and the claim is in a condition to be sued. *Cooper v. United States Mut. Acc. Assn.* 57 Hun, 407.

The stipulation in an accident insurance policy, that action thereon must be commenced within 13 L. R. A.

one year from the time the right of action accrues, is reasonable and valid. *Suggs v. Travelers Ins. Co.* 71 Tex. 579.

The provision that the action should be brought "within one year from the time of the alleged accidental injury," means a year from the time the right of action was complete. *Cooper v. United States Mut. Acc. Assn.* 32 N. Y. S. R. 725.

The limitation of a year runs during the minority of the beneficiary where there is no exception in their favor. *Suggs v. Travelers Ins. Co.* 71 Tex. 579.

Notice of accident.

The requirement of an immediate written notice of an accident, means that notice must be given within a reasonable time. *People's Mut. Acc. Assn. v. Smith*, 126 Pa. 317.

Contributory negligence not a defense.

Contributory negligence on the part of the insured is not a defense, and by the use of the word "accidental," injuries to which the negligence of the insured contributed are not excluded from the protection of the policy. *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28; *Trew v. Railway Pass. Assur. Co.* 6 Hurst. & N. 839; *Providence L. Ins. & I. Co. v. Martin*, 32 Md. 310; *Stone v. United States Casualty Co.* 34 N. J. L. 371.

Proof of nature, cause, or manner of death.

The requirement, in an accident insurance policy, of direct and positive proof of the nature, cause, or manner of death, does not make it necessary to establish the fact by persons actually present at the death. *Accident Ins. Co. of N. A. v. Bennett* (Tenn.) June 6, 1891.

is a defense. The real contention of the defendant, expressed in different forms in its prayers for instructions, is, that the mere fact that the deceased was in a dangerous place (on the platform east of the track), or, as stated in one prayer for instructions, doing a dangerous act (leaving a car while it was in motion), is, as matter of law, conclusive proof that he did not use all due diligence for personal safety and protection, and that he voluntarily exposed himself to unnecessary danger.

This is not an action against the railroad company in which the mutual rights and duties of a person injured and the company are involved.

As regards the defendant, the deceased had a right to go upon the platform, and to examine the wall of the building, and the girders and the platform and the cars standing upon the track and to enter and leave them. None of these acts would of itself be evidence of want of due diligence for personal safety or of voluntary exposure to unnecessary danger. Any of them might be done carefully or carelessly. The manner and circumstances of the act would give character to it.

The facts that the deceased was upon the platform, and that he was injured in the manner shown, clearly do not constitute negligence in law or afford conclusive evidence of negligence.

The defendant asked for instructions upon

the hypothesis that deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but if it could be inferred it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presumption that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it was in motion under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent. It may be said, in general, in regard to each of the defendant's prayers for rulings and instructions, that there is no evidence of the act of the deceased proximate to his injury and of course no evidence of the circumstances which characterize the act as negligent or otherwise. If the jury infer an act they are not, without evidence, at liberty to infer the circumstances which made the act negligent. The jury could not properly find their verdict upon particular facts found without evidence. The real question was whether the facts directly proved by the evidence and those inferred from them sustained the burden of proof which was upon the defendant, and this was clearly a question for the jury and not for the court, unless the court could rule that there was not sufficient evidence. The instructions gave were sufficiently favorable to the defendant.

Exceptions overruled.

ALABAMA SUPREME COURT.

EQUITABLE ACCIDENT INSURANCE CO., *Appt.*, v.

Laura OSBORN, Admx., etc., of John Osborn, Deceased.

(90 Ala. 201.)

1. **A general denial** which puts in issue the execution of an insurance policy should be verified under the Alabama Code.
2. **A plea which states only legal conclusions** instead of facts is demurrable.
3. **A variance is created** by proof of a poli-

cy which specifies no time for its continuance under a complaint which describes it as running for one year from a certain date.

4. **A man is not guilty of voluntary exposure** to unnecessary danger within the meaning of a policy because he runs toward an approaching train, which does not stop there, to get the mail and stumbles and falls down a bank against the engine.

(November Term, 1890.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover the

NOTE.—Scope, nature and effect of verification.

The Codes of all States which have adopted the reformed system of procedure contain provisions in regard to verification of pleadings. In all cases of a verification of pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from cause are unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. When a corporation is a party, the verification may be made by an officer thereof. See 1 Estee, Pl. § 273.

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The object of the verification is to secure good faith in the averments of the party. Patterson v. Ely, 19 Cal. 28.

An answer may be verified though the complaint is not. In such case a reply must be verified. Levi v. Jakeways, 4 How. Pr. 126, 2 Code Rep. 66; Lin v. Jaquays, 2 Code Rep. 29.

Courts lean against objections on the ground of insufficient verification. Wilkin v. Gilman, 18 How. Pr. 225.

The verification constitutes no part of a pleading, but when any pleading is verified every subsequent pleading, except a demurrer, or the general answer of an infant by his guardian *ad litem*, must also be verified. See N. Y. Code Civ. Proc. § 523; Reynolds v. Smathers, 87 N. C. 24; Alford v. McCormac, 90 N. C. 151; Crompton v. Crow, 2 Utah, 245; Boone, Code Pl. § 84.

Verification is only required to be adopted to the mode of statement in the pleading. If the mode of

amount alleged to be due on a policy of accident insurance. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. G. R. Harsh and Bowman & Harsh for appellant.

Mr. E. T. Taliaferro for appellee.

Somerville, J., delivered the opinion of court:

1. The first plea of the defendant, being a general denial of all the allegations of the complaint, necessarily put in issue the execution of the written policy of insurance which was the foundation of the suit, as well as the plaintiff's ownership of the policy, as the beneficiary under it. The plea should therefore have been supported by affidavit, and for want of such verification it was subject to the demurrer which was interposed to it, and was properly sustained by the trial court. *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 423; Code 1886, §§ 2676, 2770; *Manning v. Maroney*, 87 Ala. 568.

2. The third plea was too vague and uncertain in its averments, and therefore necessarily ambiguous in meaning. It, moreover, states legal conclusions instead of facts, and was subject to demurrer on these and other grounds sustained by the court. *Carmelich v. Mims*, 88 Ala. 335.

3. The fourth plea was subject to like objections, as stated in the demurrer to it.

4. The court erred in not sustaining the plaintiff's motion to exclude the policy of insurance on the ground of variance. The complaint describes the policy as running for the term of one year from date, which was February 18, 1888. We discover nothing in the terms of the policy, or in the other evidence, which indicates how long the risk was to run. This may be an inadvertent omission; but, as

the bill of exceptions purports to contain all the evidence, the objection to the admission of the policy should have been sustained. In addition to this, we may observe that the evidence shows that the accident which produced the death of the insured happened on May 30, 1889, or more than a year after the issue of the policy, and the risk was not, therefore, covered by the time for which the policy described in the complaint was to remain in force. This, of itself, is fatal to any recovery, as the facts of the case now stand.

5. The policy insures against death and certain other injuries, effected through "external, violent, and accidental means." That the death of the insured resulted from precisely such a cause, the evidence leaves no doubt. The insured came speedily to his death by stumbling and falling, as he ran towards the railroad track upon the approach of a passenger train, coming in sudden contact with the steam-chest on the side of a railway engine. The injury, therefore, comes within the general terms of the policy, unless taken out by some one of the exceptions.

6. One of the exceptions, not covered by the policy, is "voluntary exposure to unnecessary danger." It is contended that the facts of the present case bring it within the terms of this exception. The phrase, "voluntary exposure to unnecessary danger" involves the idea of "intentionally doing some act which reasonable and ordinary prudence would pronounce dangerous." As said in an analogous case, where the same phrase was construed: "The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action.

statement is absolute, then the verification should be absolute, but if the mode of statement is qualified, then the verification should be qualified. *Orvis v. Goldschmidt*, 64 How. Pr. 71, 2 N. Y. Civ. Proc. 314.

A defect in the verification of a complaint or petition may be waived, and will be deemed waived where no objection is made until after the rendition of the judgment. *Dorrington v. Meyer*, 8 Neb. 214; 2 Boone, Code Pl. 5.

Mode of verification.

As a general rule, every pleading should be verified by the party pleading; but for convenience and from necessity, many exceptions to the rule are allowed. Thus, when an artificial person, as a private corporation, is a party, the pleading may be verified by any of its officers; and when the State is a party, the verification may be made by anyone acquainted with the facts. N. Y. Code, § 157.

So, where a party cannot verify a pleading by reason of absence at the time such verification becomes necessary, his attorney may verify the pleading for him. *Stannard v. Mattice*, 7 How. Pr. 4; *People v. Allen*, 14 How. Pr. 384; *Roscoe v. Mason*, 7 How. Pr. 121; *Treadwell v. Fassett*, 10 How. Pr. 184; *Lefevre v. Latson*, 5 Sandf. 660, 10 N. Y. Legal Obs. 246; *Boston Locomotive Works v. Wright*, 15 How. Pr. 263; 2 Wait, Pr. 688.

Verification by agent or attorney.

A verification to a pleading, made by an agent, which states that "all the material allegations . . . 13 L. R. A.

are with his personal knowledge," is sufficient without assigning any reason why the verification is not made by the party. *Betts v. Krindell*, 13 N. Y. Civ. Proc. 157.

Verification by defendant's agent, stating after the usual form that the reason why it was not made by defendant was, that the allegations were within the agent's personal knowledge and not within that of the defendant, was held good. It was also held that the exception as to those matters stated on information, etc., might have been omitted. *Ross v. Longmuir*, 15 Abb. Pr. 326, 24 How. Pr. 49.

A pleading verified by an attorney, stating, as the ground for his verification, that he could not find the party in the city, and that it was his last day to reply, is not good as it states no legal reason why the verification is not made by the party. It may be treated as a nullity. *Lyons v. Murat*, 54 How. Pr. 23.

Where verification of an answer, made by the defendant's agent or attorney, contains an allegation inconsistent with an allegation in the answer, defendant may be required to verify in person. *Jailard v. Tomes*, 3 Abb. N. C. 24.

It seems that under Code Civ. Proc., § 2533, which provides that "the surrogate may require the petition or answer to be verified," he has authority to compel the verifications of objections to an account filed with him. *Thompson v. Mott*, 2 Dem. 154.

Verification by corporation.

When the verification is by an officer of a corporation, it is in fact the verification of the corporation, and the form is that of a party to the action,

The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." *Burkhard v. Travelers Ins. Co. of Hartford*, 102 Pa. 262. Death by accident has been defined to be "death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things" (*North American L. Ins. Co. v. Burroughs*, 69 Pa. 43), and again, as "any event which takes place without foresight or expectation of the person acted upon or affected by the event." May, Ins. 2d ed. § 520. So it is said in 1 Am. & Eng. Encyclop. Law, p. 87: "An accident, in its application to insurance policies, has been defined as an injury which happens by reason of some violence, casualty, or *vis major* to the assured, without his design or consent or voluntary co-operation." See also *Schneider v. Provident L. Ins. Co.* 24 Wis. 28; *Tuttle v. Travelers & Acc. Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316-319, note.

The evidence in the record fails to satisfy us that the insured was guilty of voluntarily exposing himself to unnecessary danger, and any degree of negligence short of this will not operate to defeat a recovery. May, Ins. 2d ed. § 530. He was approaching the arriving railway train, for the purpose of getting the mail for the postmaster. True, he was moving rapidly; but he made an effort to check his speed as he reached the sloping bank which led down to the side track of the railroad; and in doing this he stumbled, and came in collision with the engine. But for the accident of stumbling, the inference is fair that he would not have been injured. The efficient and proximate cause of the death, therefore, was the accident, as much as if the collision had been with a huge stone,

instead of with the steam-chest on the side of the engine. The injury received was clearly not "intentional" within the meaning of one of the exceptions of the policy. Nor, in our opinion, can it be properly construed to be a "walking or being on a railroad bridge or road-bed," within the meaning of another excepted class of cases contained in the policy, as is contended for by the appellant. Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind so as to make the exceptions unfairly devour the whole policy. Accordingly, in *Wright v. Sun Mut. L. Ins. Co.* 29 U. C. C. P. 221 (1878), a well-considered case of insurance against accidents, it was held that using a railroad track merely to cross a street, through which it ran, was not a "walking on the track" within the meaning of a prohibition of the policy, for accidents resulting from which no liability was to be incurred. A fair and reasonable construction of the phrase in question is: Voluntarily and intentionally being or walking on the railway road-bed, not being there by force of accident, and involuntarily, for a mere comparative moment of time. *Burkhard v. Travelers Ins. Co.* 102 Pa. 262; *Scheiderer v. Travelers Ins. Co.* 58 Wis. 13; 1 Am. & Eng. Encyclop. Law, 92.

These principles will be sufficient, without more, to enable the court below upon another trial to reach a proper conclusion.

Reversed and remanded.

and need not state the grounds of belief. *Glaubenslee v. Hamburg & A. P. Co.* 9 Abb. Pr. 104.

The managing agent of a foreign corporation having charge of all its business, and on whom the process in the action was served, may verify its answer as an officer of the corporation, and without stating the grounds of his belief. *Ibid.*

The verification of a pleading made by the secretary of a corporation may be in the usual form of a verification by a party, and need not set forth the grounds of the officer's belief as to all matters stated on his knowledge, and the reason why the verification is not made by the party. The verification is the verification by the corporation, and therefore a verification by a party. *American Insulator Co. v. Bankers and M. Teleg. Co.* 7 N. Y. Civ. Proc. 443.

Miscellaneous considerations.

In all cases when the verification may be omitted, the criterion is whether, if called as a witness, the party would be excused from answering. If there is more than one party, and anyone would be privileged, verification may be omitted; so, if any part of the pleadings would excuse a party from testifying. *Clapper v. Fitzpatrick*, 3 How. Pr. 314, 1 Code Rep. 66; *Blaisdell v. Raymond*, 5 Abb. Pr. 144, affirmed, 6 Abb. Pr. 148; *Henry v. Bank of Salina*, 1 N. Y. 83.

The code provisions allowing an omission of the verification apply only where the accusatory matter is contained in the pleading to be answered. *Fredericks v. Taylor*, 52 N. Y. 596, 14 Abb. Pr. N. S. 77.

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Long retention of an unverified bill of particulars, which have been verified, waives the irregularity. *Paine v. Smith*, 32 Wis. 335.

A garnishee's omission to verify his answer, or to serve it in time, cannot be objected to after joining issue thereon and going to trial. *Kirby v. Corning*, 54 Wis. 599.

A verification by attorney, setting forth a sufficient statutory ground of belief, is not vitiated by the statement of other real or supposed grounds of belief. *Market Nat. Bank v. Hagan*, 21 Wis. 317.

A verification is sufficient which states that the party "has read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge and belief." The words "and belief" may be treated as surplusage. *Seattle Coal & T. Co. v. Thomas*, 57 Cal. 197.

Party may serve with pleading an affidavit, excusing verification. *Blaisdell v. Raymond*, 5 Abb. Pr. 144 affirmed, 6 Abb. Pr. 148.

Where the affidavit of a defendant to his answer states that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and as to those matters that he believes them to be true, it is a sufficient verification; it is not necessary that the defendant should state in the affidavit that he has heard the answer read, and knows the contents thereof. *Fleming v. Wells*, 65 Cal. 336.

The omission to verify is an irregularity which may be waived, and the right to take advantage of it is lost by long delay. *Wilson v. Bennett*, 2 N. Y. Civ. Proc. 34.

MINNESOTA SUPREME COURT.

J. W. STEVENS, *Reapt.*,

v.

John LUDLUM, *Appt.*

(....Minn.....)

*1. To constitute an estoppel in pais, an actual fraudulent intent in making the representation is not necessary. It is enough that the person making it knows, or ought to know, the truth; that he intends, or might reasonably anticipate, that the person to whom it is made, or to whom it is to be communicated, will rely and act on it as true; and that the latter has relied and acted on it, so that to permit the former to deny its truth will operate as a fraud.

— *Head notes by GILFILLAN, *Ch. J.*

NOTE.—“*Equitable estoppel*” defined.

Equitable estoppel is the effect of voluntary conduct of a party, whereby he is precluded, both at law and in equity, from asserting the rights which might perhaps have otherwise existed as against another, who has, in good faith, relied thereon, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy. *Edwards v. Dickson*, 66 Tex. 618.

The conduct must be something which amounts either to a representation, or to a concealment of the present or past existence of a fact. *Ibid.* See *Bigelow, Estoppel*, 486; *Jackson v. Allen*, 120 Mass. 64; *Langdon v. Doud*, 10 Allen, 488; *White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 31 Ill. 422.

One who makes representations cannot withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud. *Babcock v. People's Sav. Bank*, 118 Ind. 212; *Anderson v. Hubble*, 98 Ind. 570; *Ward v. Berkshire L. Ins. Co.* 6 West. Rep. 504, 106 Ind. 301.

Constructive fraud lies at the foundation of the doctrine of equitable estoppel. *Brinkerhoff v. Lansing*, 4 Johns. Ch. 65, 1 L. ed. 765.

So the acts and declarations of the holder of a mortgage may be so instrumental in altering the position of a party as to make it inequitable for one to enforce the mortgage against the other. *Burke v. Grant*, 2 West. Rep. 384, 116 Ill. 124.

Examples of prior mortgagees losing his priority, by denying his own security, to an intended mortgagee who makes inquiry and states that he is about to lend money on the same property. 2 Pom. Eq. Jur. 189; *Ibbottson v. Rhodes*, 2 Vern. 554; *Berisford v. Milward*, 2 Atk. 49; *Stronge v. Hawkes*, 4 De G. M. & G. 186, 4 De G. & J. 632; *Beckett v. Cordley*, 1 Bro. Ch. 353; *Pearson v. Morgan*, 2 Bro. Ch. 386; *Evans v. Bicknell*, 6 Ves. Jr. 174; *Lee v. Munroe*, 11 U. S. 7 Cranch, 366, 3 L. ed. 373.

If one obtain money, or aid in obtaining it, by falsely representing that another has title to the land, when he knows to the contrary,—when in fact he has the title,—he will be estopped from setting up his title as against the lender. *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 113; *Lee v. Porter*, 5 Johns. Ch. 272, 1 L. ed. 1080; *Fonbl. Eq.* 163.

Where one, without objection, suffers another to do acts upon his authority, or by his conduct adopts and sanctions such acts, he will be bound thereby, as if the requisite power had been given in the most formal manner. *Townsend v. Chappell* (“*Bronson v. Chappell*”) 79 U. S. 12 Wall. 661, 20 L. ed. 436.

If he has justified the belief of a third party that the person assuming to be his agent was authorized 18 L. R. A.

2. One making representations, relating to his business, to a commercial agency, may be estopped as to its patrons to whom it communicates such representations; as where defendant so represented that he was the owner of a business concern known as the “New York Pie Company,” and that representation was communicated by the agency to plaintiff, one of its patrons.

(May 11, 1891.)

A PPEAL by defendant from an order of the Municipal Court of the City of Minneapolis denying his motion for new trial of an action brought to hold defendant liable upon a bill of exchange drawn upon the New York Pie Company and accepted by its manager, in

to do what was done, he is estopped to deny it. *Ibid.* See notes to *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 755; *Galbraith v. Lunsford* (Tenn.) 1 L. R. A. 522.

Equitable estoppel, when arises.

An equitable estoppel arises when one party by his faulty conduct has induced his adversary to omit some act which, but for said fault and negligence, he would have performed, and which, if done, might have prevented the loss. *Wilson Sewing-Mach. Co. v. Southern Exp. Co.* 43 La. Ann. 593. See *Leather Mfrs. Bank v. Morgan*, 117 U. S. 108, 29 L. ed. 816.

Positive fraud is not required to work an equitable estoppel, where silence or conduct has created a belief of the existence of a state of facts which it would be unconscionable to deny. *Alexander v. Woodford Spring Lake Fish Co.* (Ky.) 12 Ky. L. Rep. 107.

So one who represents himself as the owner of a bull which inflicted an injury, for the purpose of misleading the party injured, so as to deprive him of his right of action against the real owner, is estopped to deny that he is the owner. *Baird v. Vaughn* (Tenn.) Dec. 13, 1890.

A party may by his declarations and conduct, and even by his silence or negative omission to act, estop himself from claiming his rights, where such claim would operate to the injury of another. *Trenton Bkg. Co. v. Duncane*, 38 N. Y. 223; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 1 L. ed. 165.

It is the dictate of natural justice that he, who, having a right or interest, by his conduct influences another to act on the faith of its non-existence, or implies that it will not be asserted, shall not be allowed afterward to maintain it to that other's prejudice. *McGovern v. Knox*, 21 Ohio St. 547.

The doctrine has been applied to estates in land, trust funds, things in action, and other forms of interest, in some defensively, in others as the ground of affirmative relief. See 2 Pom. Eq. 239.

A fraudulent intent is necessary to create an estoppel affecting the legal title to land. *Storrs v. Barker*, 6 Johns. Ch. 103, 2 L. ed. 88.

It is an act of fraud for a party, conscious of his own right, to suffer another, ignorant of that right, to go on, purchase property, and make improvements thereon. *Ibid.*; *Miller v. Platt*, 5 Duer, 238; *Durham v. Alden*, 20 Me. 223, 37 Am. Dec. 49; *Hatch v. Kimball*, 16 Me. 146.

Doctrine of estoppel in pais.

The doctrine of estoppel in pais is applicable to one who has induced another to occupy a position he would not have occupied but for the acts of the

which judgment had been directed in plaintiff's favor. *Affirmed.*

At the trial the court found that defendant had stated to representatives of various commercial agencies, who called upon him in their official capacity, that he was sole proprietor of the New York Pie Company; that this information was communicated by the agencies to plaintiff, one of their subscribers, who in good faith acted thereon in extending credit to the company.

Messrs. Gilger & Harrison, for appellant:

Combs v. Cooper, 5 Minn. 254 (Gil. 200), expressly holds that there must have been an express design that the act or statement should influence the conduct of another in estoppels

by representations, and the court clearly distinguishes between such cases as *Pence v. Arbuckle*, 22 Minn. 417, and the class of cases to which the case at bar belongs.

Messrs. Hubachek & Daly, for respondent:

If a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it.

Manufacturers & T. Bank v. Hazard, 80 N. Y. 226; *Blair v. Watt*, 69 N. Y. 118; *McCravey v. Remson*, 19 Ala. 480; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Brown v. Grant*, 39 Minn. 404.

Negligence when naturally tending to indi-

former and his declarations. *Burke v. Grant*, 2 West. Rep. 864, 116 Ill. 124; *Hefner v. Vandolah*, 57 Ill. 520; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Faxton v. Faxton*, 28 Mich. 159; *Tucker v. Conwell*, 67 Ill. 552.

To constitute an estoppel *in pais*, (1) there must have been a false representation or a concealment of material facts; (2) the party to whom the representation was made, or from whom the material facts were concealed, must have been ignorant of the existence of the facts concealed or of the falsity of the representation. *Steed v. Petty*, 65 Tex. 490.

It is not created unless the declaration is plainly inconsistent with the rights which are alleged to be barred, and made with full knowledge of the existence of the inconsistent right. *Fletcher v. McGill*, 8 West. Rep. 532, 110 Ind. 395; *Lee v. Templeton*, 73 Ind. 515.

No estoppel *in pais* can arise unless to permit the party sought to be estopped to show the truth will operate as a fraud upon the other party. *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514.

Neither married women nor infants are estopped *in pais* unless their conduct has been intentional and fraudulent. *Sneed v. Petty*, *supra*.

But a husband who holds himself out as a partner with his wife, and induces others to trust the partnership, is estopped to deny its existence. *Schlapback v. Long*, 90 Ala. 125. See note to *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 755.

False representations.

If the declarations or conduct were intended to deceive generally, or occurred under circumstances likely to deceive, it is sufficient. *Horn v. Cole*, 51 N. H. 297, 12 Am. Rep. 124. See *Adams v. Brown*, 16 Ohio St. 78; *Dezell v. Odell*, 3 Hill. 221; *Quirk v. Thomas*, 6 Mich. 78; *Mitchell v. Reed*, 9 Cal. 204.

The representation must generally be the statement of a fact; when not resolvable into a statement of fact as distinguished from a statement of law, the party making it is not bound. *Mason v. Harper's Ferry Bridge Co.* 28 W. Va. 639.

If the element of fraud is wanting, there is no estoppel; as, where both parties are equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely on his own judgment. *Northwestern Mut. L. Ins. Co. v. Amerman*, 7 West. Rep. 715, 119 Ill. 329; *Davidson v. Young*, 38 Ill. 152.

There is no estoppel where parties have the same knowledge of the material facts. *Wolf v. Zimmerman*, 27 Ind. 488. See *Dodge v. Pope*, 93 Ind. 488; *Krug v. Davis*, 101 Ind. 75.

A representation, in order to estop, must be as to facts, either present or past; and a promise to do

something in future may constitute a valid contract, but not an estoppel. *Jones v. Parker*, 67 Tex. 78; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674; *Mason v. Harper's Ferry Bridge Co.* *supra*; *Edwards v. Dickson*, 66 Tex. 618.

The only case in which a representation as to the future can operate as an estoppel is when it is in relation to an intended abandonment of an existing right, and is made to influence others, and they have been induced by it to act. *Union Mut. L. Ins. Co. v. Mowry*, *supra*. See *Faxton v. Faxton*, 28 Mich. 159; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618.

Representations set up as an estoppel must have been made to the party asserting the estoppel, or have been of such a character and made under such circumstances that the party making them must be taken to have contemplated that they would be communicated to and acted on by him. *Hodge v. Ludlum*, 45 Minn. 280.

It is essential to an estoppel by conduct that there must have been a false representation or concealment of material facts; and a mistake of law made by the party asserting the estoppel, for which the other party was not responsible, is not sufficient. *St. Louis v. Schulenburg-Boeckler Lumber Co.* 95 Mo. 613.

No one can base an estoppel upon an act of the opposite party induced by his own fraud. *McMartin v. Continental Ins. Co.* 41 Minn. 198.

Representation must have been acted upon.

A representation, to create an estoppel, must have been acted upon. *Hope Lumber Co. v. Foster & L. Hardware Co.* 53 Ark. 198; *Stuart v. Lowry*, 42 Minn. 473.

No representations will authorize or constitute an estoppel, where the party to whom they were made did not act upon them, even if all the other elements which constitute an estoppel exist. *Huntington First Nat. Bank v. Williams*, 126 Ind. 423.

To work an estoppel the person estopped must have known the facts, or been guilty of negligence in not knowing them, and the persons in whose behalf the doctrine is invoked must have relied on and acted on the faith of what the former said or did or omitted. *Welsh v. Cooley*, 44 Minn. 446.

Parties who made false representations under the assumption that they were true are estopped to say that they were uninformed as to their truthfulness. *Ross v. Hobson* (Ind.) Feb. 5, 1891.

An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Henry v. Sneed*, 99 Mo. 407; *Mueller v. Kaessmann*, 84 Mo. 318.

cate intention, will have the same effect in creating an estoppel as actual intention.

Pence v. Arbuckle, 22 Minn. 417.

Representations made to mercantile agencies may be taken advantage of and work as an estoppel in favor of any subscriber to whom the representations are carried.

Ibid.; Bigelow, Estoppel, 5th ed. p. 597, note 3; *Swift v. Winterbotham*, L. R. 8 Q. B. 244.

Gillilan, Ch. J., delivered the opinion of the court:

The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pic Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows, or ought to know, the truth, and they are intentionally made under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth. *Coleman v. Pearce*, 26 Minn. 123; *Beebe v. Wilkinson*, 30 Minn. 548.

Nor need the representations be made directly to the party acting on them. It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one

of a particular class, or it may be made to A, to be communicated to B. Anyone so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage." Bigelow, *Frauds*, 445.

If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him, if he had occasion to act on it, is furnished by *Pence v. Arbuckle*, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Anyone making representations to such an agency, relating to his business or the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agent to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel. The findings of fact in the case are fully sustained by the evidence.

Order affirmed.

Petition for rehearing overruled June 25, 1891.

TEXAS SUPREME COURT.

A. HEILIGMANN, *Appt.*,
v.

William ROSE et al.

(....Tex.....)

1. Criminal acts need not be proved,
in a civil action, by any greater or more certain

degree of proof than is required in civil actions generally.

2. An instruction which fails to present separately the elements of actual and exemplary damages, but limits the amount of recovery, is not prejudicial in the absence of special requests, if the verdict is for less than the jury could properly find.

NOTE.—Nature and scope of the judge's charge.

No instructions should be given, which are not relevant to facts which there is evidence tending to prove. In many cases, the giving of instructions has been held error. *Glat v. Loring*, 60 Mo. 487; *Huffman v. Ackley*, 34 Mo. 277; *Lillis v. St. Louis, K. C. & N. R. Co.* 64 Mo. 464; *Krech v. Pacific Railroad*, 64 Mo. 172; *Weiland v. Weyland*, 64 Mo. 168.

It should be borne in mind in this connection that an appellate court will never reverse a decision on the sole ground that the trial court refused to instruct the jury upon an issue of fact which was not raised by the pleadings and in support of which no evidence has been elicited. *State v. Harris*, 59 Mo. 550; *Barr v. Armstrong*, 56 Mo. 577; *Winters v. Hannibal & S. J. R. Co.* 39 Mo. 468; *Hamilton v. Russell*, 5 U. S. 1 Cranch, 309, 2 L. ed. 118; *Chirac v. Reinecker*, 27 U. S. 2 Pet. 612, 626, 7 L. ed. 538, 542; 13 L. R. A.

Clarke v. Kownslar, 36 U. S. 10 Pet. 657, 9 L. ed. 571; *Rhett v. Poe*, 43 U. S. 2 How. 458, 11 L. ed. 838; *Harper v. Smith*, 1 Cranch, C. C. 495; *Chicago & A. R. Co. v. Utley*, 38 Ill. 410; *State v. Rash*, 12 Ired. L. 362; *State v. Strouderman*, 6 La. Ann. 286; *Thompson v. Shannon*, 9 Tex. 536; *Hibler v. McCartney*, 31 Ala. 501; *Breese v. State*, 12 Ohio St. 146; *State Bank v. Williams*, 6 Ark. 156; *Paschal v. Davis*, 3 Ga. 256; *American Transp. Co. v. Moore*, 5 Mich. 368; *Snyder v. Wilt*, 15 Pa. 56; *Croft v. State*, 6 Humph. 817; *Storrey v. Brennan*, 15 N. Y. 524; *Rouse v. Lewis*, 4 Abb. App. Dec. 181; *State v. Arthur*, 23 Iowa, 420; *Cowles v. Bacon*, 21 Conn. 451; *People v. Roberts*, 6 Cal. 214; *Whitner v. Hamlin*, 12 Fla. 18; *Henry v. Jones*, 1 Idaho, 48; *Packer v. Cookayne*, 3 G. Greene, 111; *Rice v. Rice*, 6 Ind. 100; *State v. McCurry*, 63 N. C. 38; *Harvey v. Skipwith*, 16 Gratt. 405; *Dwyer v. Dunbar*, 75 U. S. 5 Wall. 318, 18 L. ed. 489; *Etting v. Bank of United States*, 24 U. S. 11 Wheat. 59, 6 L. ed. 419;

3. A verdict need not specify whether it is for actual or exemplary damages where the issues of actual and exemplary damages are not separately submitted to the jury.

4. Evidence of the market value of dogs is not necessary to sustain a judgment for damages for poisoning them, where there is proof of their usefulness and services from which the jury can infer value.

(May 23, 1891.)

A PPEAL by defendant from a judgment of the District Court for Bexar County in favor of plaintiffs in an action brought to recover damages for the loss of plaintiffs dogs, which were alleged to have been poisoned by defendant. *Affirmed.*

The facts sufficiently appear in the commissioner's opinion.

Conner v. State, 4 Yerg. 137; Allen v. Wanamaker, 81 N. J. L. 370; New York v. Price, 5 Sandf. 542; Rice, Ev. 793-797.

In the absence of statute to the contrary, the judge has power to instruct the jury *sua sponte*; but it is in his discretion whether to do so or not, if either party request it. Pennock v. Dialogue, 27 U. S. 2 Pet. 1. 15. 7 L. ed. 327, 332, affirming 4 Wash. C. C. 538; Haupt v. Pohlmann, 16 Abb. Fr. 301, 307.

State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which he will permit to go to them in their retirement, or requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the courts of the United States. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Nudd v. Burrows, 91 U. S. 423, 23 L. ed. 236; United States v. Train, 12 Fed. Rep. 352. For these regulations the local statutes should be consulted.

In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except. Smith v. Crichton, 33 Md. 103, 108.

Instructions based upon a hypothetical state of facts.

A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and have the instruction of the court given to the jury thereon; and it is error to refuse to listen to a timely request so to do. Chapman v. McCormick, 86 N. Y. 479.

In order to justify him in giving an instruction predicated upon a supposed state of facts, it is not necessary that he should be entirely satisfied of the existence of such facts, but if there is any evidence from which the jury may infer them to be true, it is his duty to declare the law thereon. Flournoy v. Andrews, 5 Mo. 513; Bradford v. Pearson, 12 Mo. 71.

And it is not error for him to do so, even where the evidence is very slight. Camp v. Phillips, 42 Ga. 239.

He ought not, however, to give instructions upon trifling and indifferent statements irrelevant to the issue (Dickerson v. Johnson, 24 Ark. 251); nor leave a fact to the jury based upon evidence which goes no further than to raise a mere guess, possibility or conjecture as to the truth of what is claimed. Cobb v. Fogelman, 1 Ired. L. 440; Sutton v. Madre, 2 Jones, L. 320.

The judge opens any hypothetical statement with the formal words, "If the jury believe from the evidence." To use only the words, "If the jury believe," without conveying to their minds

13 L. R. A.

Mr. Oscar Bergstrom, for appellant:

It is error for the court to suggest the amount or limit of damages which the jury might find.

Newman v. Dodson, 61 Tex. 91.

Damages are intended as compensation for the pecuniary injury sustained by the party injured, and in order to entitle a party to damages he must show that he has suffered some personal injury or pecuniary loss.

Brown v. Hoburger, 52 Barb. 15; *Brill v. Flagler*, 23 Wend. 354; *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385; *Sutherland, Dam.* p. 802.

In the absence of testimony, authorizing the finding of actual damages, it is error to submit to the jury a charge authorizing them to find both actual and exemplary damages, without requiring them to find actual and exemplary damages separately, so as to ascertain whether

that they are to found their belief on the evidence, is an objectionable way of giving an instruction. *Matthews v. Hamilton*, 23 Ill. 470; *Toledo, W. & W. R. Co. v. Ingraham*, 77 Ill. 309.

But, as juries are supposed to have some small trace of sense, there is a presumption that they know that they are to find from the evidence, and accordingly it is not necessary to repeat this expression at every turn in the charge. *Toledo, W. & W. R. Co. v. Ingraham, supra*; *Miller v. Balthaser*, 73 Ill. 302. See *Thompson, Charging the Jury*, § 62.

A hypothetical instruction which announces a correct legal proposition, and is based on the evidence before the jury, is not liable to the objection that it assumes a fact in dispute. *Bushnell v. Crooke Min. & S. Co.* 12 Colo. 247.

When counsel should request the court to charge.

The usual course upon a trial is to hand up the requests to the judge before the charge is made, and, at most, prior to the time when the jury are ready to retire in charge of an officer. A proper degree of vigilance would certainly require that the right to present requests should be exercised before the latter contingency, and a delay beyond this ordinarily would leave it for the judge to say whether he would keep or call the jury back and pass upon the requests. *Chapman v. McCormick*, 86 N. Y. 479.

But notwithstanding such a limit of time, counsel acting in good faith have a right, after the judge has instructed the jury, and before they have retired, to request him to correct an error or supply a deficiency. *Crippen v. Hope*, 38 Mich. 344; *Chapman v. McCormick, supra*.

Good practice requires that counsel desiring to request instructions should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge. If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read, or he may, in his discretion, require them to be submitted to the adverse counsel, and then charge those that are consented to, and determine whether or not to charge those that are not consented to. *Abb. Tr. Pr.* 145.

Where, after a cause has been submitted to the jury, they desire further instructions, the court may give them such instructions publicly and in open court, notwithstanding counsel for one of the parties is not present. *Cornish v. Graft*, 7 N. Y. Civ. Proc. 204; *Rice, Colo. Code Proc.* § 187, and cases cited.

the verdict found by the jury is for actual or exemplary damages.

Galveston, H. & S. A. R. Co. v. Dunlavy, 56 Tex. 256; *Wallace v. Finberg*, 46 Tex. 85; *Galveston, H. & S. A. R. Co. v. LeGierse*, 51 Tex. 208.

Mr. J. M. Copeland for appellees.

Fisher, J., filed the following opinion:

This case originated in the justice court, and was tried on appeal in the District Court of Bexar County at its February Term, 1889, when judgment was rendered in appellees' favor against appellant for the sum of \$75 and costs of suit. No written pleadings are in court, except a statement of appellees' demand, wherein they charge that appellant wickedly and maliciously poisoned five dogs, for which they ask a recovery of damages against appellant in the sum of \$25 for each of said dogs as actual damages, and \$75 exemplary damages. Appellant assigns as error the refusal of the court to instruct the jury upon his request: "You are further instructed that the claim of plaintiffs is based upon acts which, if true, would constitute a criminal offense; and, before you can find for the plaintiffs, you must find from the evidence, beyond a reasonable doubt, that defendant poisoned the dogs sued for; and, if there is any reasonable hypothesis upon which this poisoning can be explained, except that the defendant did it or that some other person than defendant might have poisoned them, then you will find for defendant." We know of no decision, and none is cited, that would justify the court in giving this charge. There is no force in the position that, because the facts of this case may involve a criminal act, there should be a greater or more certain degree of proof than is required in other civil actions. A party holding the affirmative of an issue is only required to adduce a preponderance of evidence as will satisfy the minds of the jury of the truth of the facts in issue. As said by the court in the case of *Sparks v. Dawson*, 47 Tex. 145: "To require the facts to be established by evidence with that absolute certainty which fixes in the mind of the jury a conviction that excludes all reasonable doubts of their existence is a rule not applicable to this or any other civil case." The court did not err in refusing to give the charge.

The second assignment presented by appellant affirms that the court erred in the third subdivision of its charge, because the jury was authorized to find a verdict against defendant for exemplary damages, and suggests to them that the court believes the sum of \$75 is a proper amount therefor. The charge complained of reads: "If you find from the evidence that defendant intentionally and willfully poisoned the dogs of plaintiffs as charged, or any one of said dogs, you will find a verdict in favor of the plaintiffs for the actual market value of the dog or dogs so poisoned, and you will, in addition, find a verdict for such exemplary damages as you may deem adequate, not exceeding seventy-five dollars. If, however, you find the charge of plaintiffs not proven, you will find for the defendant." In this connection,

the court, at the request of appellant, gave the following in charge first: "In order for the plaintiffs to recover, you must find from the testimony that the defendant poisoned the dogs, and that they were the property of plaintiffs; that the dogs were of some pecuniary value,—either that they had some market value at which they would sell, or that the services or use of the dogs were of some pecuniary value. The simple opinion of a witness, not based upon any facts, as to market value or use of the dogs, is not sufficient." The court does not present the two elements of damages separately, but submits them in one general charge, and restricts the jury in their finding not exceeding a certain amount. In both particulars, our courts have repeatedly deprecated this practice; but, while this is true, the decisions uniformly hold, in the absence of a special charge correcting the error, that it alone is not sufficient cause for reversal. *Newman v. Dodson*, 61 Tex. 98; *Bruno v. White*, 70 Tex. 512; *East Line & R. Co. v. Lee*, 71 Tex. 541; *Brooke v. Clark*, 57 Tex. 109; *Belo v. Wren*, 63 Tex. 727; *Moehring v. Hall*, 66 Tex. 241. If the verdict of the jury is for a less amount than they could properly find, under the evidence and pleadings, an instruction that informs them that they cannot exceed a certain amount could result in no injury, and is harmless error. *East Line & R. Co. v. Lee*, 71 Tex. 541. The assignment is not well taken.

Appellant insists by his fourth assignment of error that the verdict of the jury is insufficient to support the judgment, because it does not specify whether they find actual or exemplary damages, or both, or how much of either. If the rule that the court is not required to submit the issues of actual and exemplary damages separately is correct, unless requested so to do, it would be inconsistent to require the jury to make separate findings upon issues not submitted. This assignment is governed by the rule discussed under the one preceding.

The appellant's third assignment questions the sufficiency of the evidence to support the verdict of the jury, on the ground that the dogs poisoned were of no market or pecuniary value, or that their service or use was of value to the owners. Considering the evidence under this assignment, we find that appellees lost these valuable dogs by poison, such dogs at the time their property. The evidence that connects the appellant with the killing of the dogs is partially circumstantial, but we think sufficient to show his guilty agency, and that the trespass was intentional and malicious. The dogs were of fine breed, and well trained, and one of the Newfoundland dogs was trained to signal the arrival of any person at appellee's, who could tell from his look if the person was man, woman, or child. The dogs, so testifies appellee, are worth \$25 each, and she would not take double that sum. Her husband paid \$5 for one when young, and one was given in pay for professional services rendered by appellee; and she could have sold the dogs for \$5 each, but would not take \$50 each for them. Great pains were taken in raising them, and they were well trained.

The authorities well settle that dogs are property, and that an owner has his action and remedy against a trespasser for the damages resulting from injuries inflicted upon them. Some authorities hold that dogs have no market value. This may be relatively true, but it is not a rule that will govern in all cases. It may be difficult, in the majority of cases, to ascertain the market value of a dog, but such a result may, in some cases, be accomplished. The special charge asked by appellant, and given by the court, substantially presents the true rule in determining the value of dogs. It may be either a market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog. *Ramsey v. Hurley*, 72 Tex. 200; *Brunsvig v. White*, 70 Tex. 504; *Uhlein v. Cromack*, 109 Mass. 273; *Brent v. Kimball*, 60 Ill. 213; *Perry v. Phipps*, 10 Ired. L. 261; *Parker v. Mize*, 27 Ala. 483; *Harrington v. Miles*, 11 Kan. 483; *Canling v. Hannibal & St. J. R. Co.* 54 Mo. 386; *Spray v. Ammerman*, 66 Ill. 813; *Stickney v. Allen*, 10 Gray, 355.

The law recognizes a property in dogs, and for a trespass and infraction of this right the

law gives the owner his remedy. The wrong-doer cannot escape the consequences of his acts by saying, "You have suffered no damages," for the law implies that some damages result from every illegal trespass or invasion of another's rights. *Parker v. Mize and Brent v. Kimball*, *supra*; *Champion v. Vincent*, 20 Tex. 816.

There is no evidence in this case that the dogs had a market value, but the evidence is ample showing the usefulness and services of the dogs, and that they were of special value to the owner. If the jury from the evidence should be satisfied that the dogs were serviceable and useful to the owner, they could infer their value when the owner, by evidence, fixes some amount upon which they could form a basis. We cannot say that the verdict in this case is not based upon actual damages, and when the evidence, as it does in this case, justifies a verdict for either actual or exemplary damages, or both, we will not presume that the finding of the jury was based on grounds not proper.

We find no error in the record, and report the case for affirmance.

Adopted by Supreme Court, May 26, 1891.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James Seth ADAMS
v.
Anne T. ADAMS *et al.*

(....Mass.....)

1. A statute providing that a child born before wedlock shall be made legiti-

mate by the subsequent marriage of its parents will not legitimate a child whose father had not at the time of the marriage obtained a valid divorce from his former wife.

2. The status given a man by the laws of his domicile will not be recognized in other jurisdictions when it is constructed on principles contrary to those generally recognized

NOTE.—Effect of subsequent marriage of the parents on antenuptial issue.

The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the State or country where the marriage takes place, and the parents are domiciled, such legitimacy follows the child wherever it may go. *Miller v. Miller*, 91 N. Y. 315.

Each State has the right to determine the status of its own citizens; the domicile decides which State has the right. *Strader v. Graham*, 51 U. S. 10 How. 93, 13 L. ed. 342; *Story*, Conf. L. 141, § 106.

Foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin. *Story*, Conf. L. § 93.

It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of the offspring, as to legitimacy or illegitimacy, ought to depend on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property. *Story*, Conf. L. § 93.

Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the State affecting all these personal qualities of its subjects travel with them wherever they go and attach to 13 L. R. A.

them in whatever country they may be resident. *Wheaton*, Law of Nations, 172.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State or country where such marriage took place, and the parents were domiciled, it is therefore legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller*, *supra*.

In cases of intestacy personal property is distributed according to the law of the place of the domicile of the intestate. *Parsons v. Lyman*, 20 N. Y. 103, 112; *Moultrie v. Hunt*, 23 N. Y. 394; *Story*, Conf. L. § 380.

But real estate in such cases descends according to the law of the place where it is situated. *White v. Howard*, 46 N. Y. 144-159; *Story*, Conf. L. § 424.

In this case it was held that an antenuptial child born in Scotland, of persons domiciled there, could not inherit lands in England, though by the law of Scotland the child had been legitimated by the subsequent intermarriage of the parents. The rule laid down in this case has been uniformly followed in England. *Don's Estate*, 4 Drew. 197; *Re Wright*, 2 Kay & J. 595; *Re Wilson's Trusts*, L. R. 1 Eq. Cas. 247; *Shaw v. Gould*, L. R. 3 H. L. 55.

An antenuptial child was born in South Carolina, in which State the parents intermarried, but at that time their intermarriage did not legitimate the child. Subsequently, the three became citizens of Mississippi, where antenuptial children were legitimated by the subsequent intermarriage of the

or to those which can be admitted by the laws of the forum.

3. That a marriage has taken place on the faith of a previous divorce does not preclude an inquiry by the courts of another State into the capacity of the divorced party and thus into the validity of the divorce, and the marriage may be declared invalid if the divorce is one which would be decreed void if directly in issue.
4. A decree of divorce will be regarded as void in other jurisdictions if granted by a court which was without authority because plaintiff had not resided within its jurisdiction the length of time fixed by statute as a condition precedent to his right to sue; and it may be impeached collaterally in such other jurisdictions by strangers to it notwithstanding the divorce record shows that the necessary residence was found as a fact by the court.
5. A divorce decree which would be regarded as invalid outside of the jurisdiction in which it was passed should not be regarded as beyond impeachment in that jurisdiction.
6. A child whose parents were married after its birth and after its father had obtained a divorce from his former wife, which was void as against his children by her because of lack of power in the court to grant it, cannot compete with the latter for an interest under a Massachusetts will giving a benefit to "all the children" of its father.
7. Statutes providing that the issue of marriages null in law shall be legitimate, and that when a marriage is annulled on the ground that a former husband or wife was living, children begotten before the judgment are legitimate, apply only to children born after the void ceremony was performed.

parents. The father died intestate. It was held that the status of the child was fixed by the domicile of its origin; where it was illegitimate, it so remained, and could not inherit. *Smith v. Kelley*, 23 Miss. 167.

A child born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage, either at the time of the birth or afterwards), though legitimate by the law of Scotland, cannot take, as heir, lands of his father in England. *Birtwhistle v. Vardill*, 7 Clark & F. 886.

The English judges, in *Doe v. Vardill*, 5 Barn. & C. 438, did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous born issue, and that, being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, that a person who inherits land in England must not only be legitimate, but must have been actually born in wedlock. *Ross v. Ross*, 129 Mass. 252-254; *Miller v. Miller*, 91 N. Y. 321, 322.

In addition to the cases cited in *Ross v. Ross* and *Miller v. Miller*, *supra*, and in the notes to *Stewart v. Stewart*, 81 N. J. Eq. 407, and to *Bussom v. Forsyth*, 32 N. J. Eq. 285, a few recent cases are appended; *Atkinson v. Anderson*, L. R. 21 Ch. Div. 100; *Re Grove*, L. R. 40 Ch. Div. 216; *Keegan v. Geraghty*, 101 Ill. 28; *Stoltz v. Doering*, 112 Ill. 234; *Sunderland's Estate*, 60 Iowa, 732; *Scott v. Key*, 11 La. Ann. 232; *Caballero's Succession*, 24 La. Ann. 573; *Stack v. Stack*, 6 Dem. 280; *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603, *note*.

The question involved was elaborately discussed in England, in *Doe v. Vardill*, 5 Barn. & C. 438, *sub nom.* *Birtwhistle v. Vardill*, 2 Clark & F. 571, 7 Clark & F. 886; in New York, in *Miller v. Miller*, 13 L. R. A.

(September 2, 1891.)

REPORT from the Supreme Judicial Court for Suffolk for the consideration of the full court of a suit brought to establish an alleged right to share in the fund left by the will of Seth Adams, deceased. *Bill dismissed*.

The facts are stated in the opinion.

Messrs. M. F. Dickenson, Jr., and Hollis R. Bailey, for plaintiff:

The status of an infant (born before wedlock) as to legitimacy is determined by the law of the domicile of his father at the date of the act of legitimation, or possibly by the law of the father's domicile at the date of birth and legitimation.

If legitimate according to that law, he will be considered as legitimate in Massachusetts, and will be entitled to take under a Massachusetts will.

Ross v. Ross, 129 Mass. 246, 247, 256; *Re Andros*, L. R. 24 Ch. Div. 637; *Re Grove*, L. R. 40 Ch. Div. 216; *Re Goodman's Trust*, L. R. 17 Ch. Div. 266; *Nelson*, Private International Law, pp. 17, 18; Article on Legitimation, 88 L. T. 42; *Miller v. Miller*, 91 N. Y. 315; *Stack v. Stack*, 6 Dem. 281; *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603; *Caballero's Succession*, 24 La. Ann. 573.

According to the law of California, a child born before wedlock becomes legitimate by the subsequent marriage of its parents.

2 Cal. Civ. Code, § 215.

The language of the statute is mandatory and unqualified, and applies to all children born before wedlock without regard to the question whether or not the parents at the time

supra; and in Massachusetts, in *Ross v. Ross*, *supra*. In the latter case *Chief Justice Gray* cites and comments upon every case up to that date (1880), and, after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding, in *Doe v. Vardill*, that an heir to land in England must be actually born in wedlock, do not apply in this country, and that a person declared to be a legitimate child of another, by the law of the State of the domicile, must be held to have all the rights of a legitimate child wherever he goes.

An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the Statute, so-called, of Merton, 20 Hen. III. chap. 9, which, it was claimed, negatively enacted that the English heir must be born in lawful wedlock. *Lord Brougham*, in 2 Clark & F. 582, and again, in 7 Clark & F. 914, combats this position with arguments that the courts of New York and Massachusetts seemed to think unanswerable. *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

The relation of husband and wife being a status based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous, is governed by the law of the place of the contract; this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile; and therefore any such marriage, valid by the law of the place where it is contracted, is valid everywhere to all intents and effects, civil or criminal, including the settlement of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate. *Parsons, Ch. J.*, in *Greenwood v. Curtis*, 6 Mass. 358, 377-379; *Medway v. Needham*, 16

of the conception or birth of the children were competent to marry.

See *Sutphin v. Cor*, 1 Western Law Monthly (Ohio) 846.

The competency of a party to marry is to be determined by the law of the State where the marriage takes place.

Ross v. Ross, *supra*; *Com. v. Lane*, 118 Mass. 462, 463; *Moore v. Hegeman*, 92 N. Y. 524; *Thorp v. Thorp*, 90 N. Y. 602; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Pearson v. Pearson*, 51 Cal. 120; *State v. Ross*, 76 N. C. 242.

A marriage good where it is celebrated is good everywhere, except it be incestuous or polygamous, or where the parties, being residents of a State, have gone out of the State with intent to evade its laws.

Greenwood v. Curtis, 6 Mass. 373; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Sutton v. Warren*, 10 Met. 451; *Com. v. Hunt*, 4 Cush. 50; *Com. v. Lane*, *supra*; *Milliken v. Pratt*, 125 Mass. 380; *Ross v. Ross*, *supra*.

A suit for divorce, so far as it deals with the status of the libellant, is a proceeding *in rem* or *quasi in rem*, and a decree of divorce, so far as it determines that status, is binding on all the world, at least within the State or jurisdiction where the decree is granted.

Hood v. Hood, 110 Mass. 463, 465; *Burien v. Shannon*, 115 Mass. 488, 449; *Brigham v. Fayerweather*, 1 New Eng. Rep. 736, 140 Mass. 413; *McClurg v. Terry*, 21 N. J. Eq. 238.

A divorce may be valid in the State where it is granted, even though it is not recognized as valid in other States.

Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Com. v. Lane*, 118 Mass. 463; *Bullock v. Bullock*, 122 Mass. 3; *Milliken v. Pratt*, 125 Mass. 380, 381.

Under the provisions of the celebrated "Code Napoleon," enacted in 1804, and substantially adopted in many of the American States, humane regulations as to legitimacy will be found established. No. 331 is in the following language:

Children born out of wedlock, other than such as are the fruit of an incestuous or adulterous intercourse, may be legitimated by the subsequent marriage of their father and mother, whenever the latter shall have legally acknowledged them before their marriage, or shall have recognized them in the act itself of celebration. The germ of this enactment dates back to the Roman law.

A natural son born of a free woman, with whom marriage is not prohibited, will become subject to the power of the father as soon as the marriage instruments are drawn as the Constitution directs; which allows the same benefit to those who are born before marriage as to those who are born subsequent thereto. *Cooper, Justin. De Legitimatione*, lib. 1, title 10, § 13.

A charge of illegitimacy must be supported by direct and irrefutable evidence. It must be conclusively proved. *Caujolle v. Ferrie*, 23 N. Y. 90.

As to a marriage at common law, and the evidence tending to prove it, see *Hebblethwaite v. Hepworth*, 38 Ill. 132; *Port v. Port*, 70 Ill. 436; *Caujolle v. Ferrie*, 23 N. Y. 107; 2 Greenl. Ev. § 462; 1 Bishop, Mar. & Div. §§ 13, 457, note, 1521; *Stoltz v. Doering*, 112 Ill. 234.

The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, *eo nomine*, is therefore a legitimate 13 L. R. A.

Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572; *People v. Baker*, 76 N. Y. 84; *Flower v. Flower*, 42 N. J. Eq. 152; *Doughty v. Doughty*, 28 N. J. Eq. 584; *Cook v. Cook*, 56 Wis. 218; *Wright v. Wright*, 24 Mich. 180; *Trevino v. Trevino*, 54 Tex. 262; *Colvin v. Reed*, 55 Pa. 376.

A decree of divorce is valid and effectual within the State where it is granted, until it has been there directly attacked and vacated. It cannot thus be attacked collaterally.

Edson v. Edson, 108 Mass. 590, 597; *Keith v. McCaffrey*, 4 New Eng. Rep. 645, 145 Mass. 19; *Williams v. Haynes*, 77 Tex. 283; *People v. Harrison*, 84 Cal. 607; *Ex parte Starnes*, 77 Cal. 162.

The word "children" in a will includes a child made legitimate by a subsequent marriage.

Monson v. Palmer, 8 Allen, 551.

By the law of California and of Texas where a marriage is annulled or is deemed null, children begotten before the judgment are legitimate, whether born before or after wedlock. If entered into in good faith by either of the parties, the marriage, so far as children are concerned, has all the effects of a valid marriage.

2 Cal. Civ. Code, §§ 84, 1387; *Graham v. Bennett*, 2 Cal. 508; *Tex. Rev. Stat. § 1656*; *Carroll v. Carroll*, 20 Tex. 731, 745; *Nichols v. Stewart*, 15 Tex. 233; *Smith v. Smith*, 1 Tex. 627; *Hartwell v. Jackson*, 7 Tex. 580; *Lee v. Smith*, 18 Tex. 145; *Dyer v. Brannock*, 66 Mo. 418; *Wright v. Lore*, 12 Ohio St. 619; *Watts v. Owens*, 62 Wis. 518; *Buissiere's Succession*, 41 La. Ann. 217; *Workman v. Harold* (Ky.) Jan. 20, 1887; *Harris v. Harris*, 85 Ky. 49; *Stones v. Keeling*, 5 Cal. 143; *Coutts v. Greenhow*, 2

chld. *Fielder v. Fielder*, 2 Hagg. Consist. 197, 4 Eng. Ecol. 527; *Wilkinson v. Adam*, 1 Ves. & B. 422.

In *Vowles v. Young*, 13 Ves. Jr. 145, *Lord Chancellor Erskine* said, in reference to proof of an actual marriage, that the evidence, especially in the case of obscure families, must be very slight. As sustaining the same rule, may also be cited *Starr v. Peck*, 1 Hill, 270; and the qualification of that case, as made in *Cheney v. Arnold*, 15 N. Y. 345, does not weaken its authority on the question of the duty of a court to presume matrimony, when the parties have cohabited, and there are circumstances from which a contract may be inferred. *Caujolle v. Ferrie*, 23 N. Y. 90.

At common law a bastard has no right of inheritance. In the eyes of the law, bastards are not regarded as children for civil purposes. 1 Bl. Com. p. 458, in discussing the rights of bastards, says: "The rights are very few, being only such as he can acquire, for he can inherit nothing, being the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. In *Blacklaws v. Milne*, 32 Ill. 505, it was held that the common-law rule which excluded illegitimate children from inheriting was in force in that State.

Words and terms having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended. The word "illegitimate," when used in this connection, has, by the common law, and the law of this State, a well-defined meaning, which is, begotten and born out of wedlock. 1 Rev. Stat. 641, § 1; 2 Kent, Com. 208, 209; 1 Bl. Com. 454, 455.

The so-called "Statute of Merton."

The Statute of Merton was enacted at the priory of Merton, in Surrey, in the year 1236. It is worthy

Munf. 372; *Glass v. Glass*, 114 Mass. 563; *Hiram v. Pierce*, 45 Me. 367; 1 Bishop, Mar. & Div. 6th ed. § 801; Stimpson, Am. Stat. Law, § 6116, p. 670.

Messrs. Robert M. Morse, Jr., and James Fox, for defendants:

The length of residence is purely a matter of jurisdiction. It has nothing to do with the merits of the cause, but solely with the right of the particular court to try it.

Brett v. Brett, 5 Met. 233; *Schrou v. Schrou*, 103 Mass. 575; *Eaton v. Eaton*, 122 Mass. 376; *Bennett v. Bennett*, 28 Cal. 599.

As a question of jurisdiction it is open to inquiry, and the recitals of the records are not conclusive.

Graham v. Spencer, 14 Fed. Rep. 603, 605; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 397; *Knowles v. Gas Light & C. Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Sewall v. Sewall*, 122 Mass. 161; *Cummington v. Belchertown*, 4 L. R. A. 131, 149 Mass. 225; *People v. Davelle*, 25 Mich. 247; *Reed v. Reed*, 52 Mich. 121, 122; *Gregory v. Gregory*, 1 New Eng. Rep. 796, 78 Me. 187; *Van Fossen v. State*, 87 Ohio St. 317; *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 30; *Neff v. Beauchamp*, 74 Iowa, 92; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298.

A decree of divorce rendered by a court having jurisdiction over one only of the parties will not be treated as conclusive, but is open to inquiry.

Watkins v. Watkins, 135 Mass. 84; *Cummington v. Belchertown*, *supra*.

In much the larger part of adjudged cases a decree of divorce rendered in another State against a nonresident, who does not appear and who is not served with process, is treated as wholly void.

Prosser v. Warner, 47 Vt. 667. See *People v. Baker*, 76 N. Y. 78; *Thorn v. Salmonson*, 37 Kan. 441; *Cook v. Cook*, 56 Wis. 195; *Irby v.*

Wilson, 1 Dev. & B. Eq. 568; *Colvin v. Reed* 55 Pa. 375; *Platt's App.* 80 Pa. 501; *Philadelphia v. Wetherby*, 15 Phila. 408. See also *Reed v. Reed*, 52 Mich. 117; *Doughty v. Doughty*, 27 N. J. Eq. 315, 28 N. J. Eq. 581.

Judgments of divorce have frequently been annulled, even by the court which granted them, upon proof that knowledge of the suit was fraudulently kept from the libellee.

Edson v. Edson, 108 Mass. 590; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Britton v. Britton*, 45 N. J. Eq. 88; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 888; *Everett v. Everett*, 60 Wis. 200.

A decree which stands unreversed and in full force may be called in question or impeached in collateral proceedings under some circumstances.

Gilman v. Gilman, 126 Mass. 27; *Needham v. Thayer*, 147 Mass. 536; *Cummington v. Belchertown*, *supra*.

The effect, if any, of the decree and of the marriage immediately following was to deprive these children and the wife of their vested rights of property. The rights of these defendants are protected by the 14th Amendment of the United States Constitution and the courts of California would be bound to respect and enforce them, and they cannot be taken away by any recitals of the record falsely asserting the jurisdiction of the court.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 585; *Needham v. Thayer*, *supra*; *Belcher v. Chambers*, 53 Cal. 635; *Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629.

As to the defendants other than Mrs. Adams, the rule that a judgment cannot be impeached collaterally has no application.

Downs v. Fuller, 2 Met. 135; *Chase v. Chase*, 6 Gray, 157; *Inman v. Mead*, 97 Mass. 310; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; *Hargrave's Tracts*, 451, 11 *Hargrave's St. Tr.* 262; *Harrison v. Southampton*, 17 Eng. L. & Eq. 364.

of remark, that the famous Statute of Merton, 20 Hen. III. chap. 9, is, in fact, not a statute, but a mere entry on the minutes of Parliament of a refusal by the English lords to assimilate the laws of England to that of other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate. *Dayton v. Adkisson*, 4 L. R. A. 483, 45 N. J. Eq. 608.

Before and during the reign of Henry III., if it was alleged that the person claiming as heir was illegitimate, a writ was issued to the archbishop, or bishop, commanding that inquiry and return upon this issue be made to the king or his justices. (1 Reeves, Hist. chap. 3, 168.) By the canons of the church, the rule of the Roman law, the subsequent intermarriage of parents legitimated antenuptial children, and the ecclesiastics were inclined to return according to the canons of their church, and contrary to the common law.

At the Parliament of Merton the ecclesiastics endeavored to enact the rule of their church, but "all the earls and barons, with one voice, answered that they would not change the laws of England which had hitherto been used and approved." (1 Bl. Com. 19, 456; 2 Kent, Com. 209.) No change whatever was made at Merton; and, thereafter, the ecclesiastics were required to return the facts, whether the claimant was begotten and born out of wedlock, and judgment was rendered by the courts accord-

ing to the common law. 1 Reeves, Hist. chap. 3, 169.

Bracton, an ecclesiastic, as well as lawyer, who wrote, it is supposed, in the time of Henry III., in discussing the effect of the legitimation of antenuptial children by the subsequent intermarriage of their parents, said: "It follows to consider how the illegitimate are legitimated, and it is to be known, that if anyone has natural children by any woman, and afterwards contracts marriage with her, the children already born are legitimated by the subsequent marriage, and are reckoned fit for all lawful acts, nevertheless only for those which regard the sacred ministry, but they are not legitimated for those which regard the realm, nor are they adjudged to be heirs who can succeed to their relatives, on account of a custom of the realm, which is of a contrary import." Chap. 29, f. 63, b. or vol. 1, p. 503, of the Lords Commissioners' Edition.

It may be safely asserted that the decisions of the English courts rest on the common law. *Fenton v. Livingstone*, 5 Jur. N. S. pt. 1, p. 1183, holds that the Statute of Merton is only declaratory of the common law.

But it is not very material whether they rest on the common law or the early statutes, because the English statutes enacted before the settlement of this country are a part of its common law. *Bogardus v. Trinity Church*, 4 Paige, 198, 3 L. ed. 402; 1 Kent, Com. 473.

The question whether Charles W. Adams, when he undertook to marry Hannah Phillips, was married or single, is a question not of law but of fact. That question must be settled by this court, because the case is here, and the question what the California court would do with this question of fact if the case were there, is quite beside the point. The validity of the marriage depends wholly upon the question what view this court shall take concerning the validity of the divorce.

Re Wilson's Trusts, L. R. 1 Eq. 247; *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Atty-Gen.*, L. R. 2 Prob. & Div. 156; *Beazley v. Beazley*, 8 Hagg. Eccl. 639; *Briggs v. Briggs*, 5 Prob. Div. 163; *Smith v. Smith*, 13 Gray, 210.

Cal. Civ. Code, § 84, does not cover the case of a child born before marriage. It refers clearly to the children of the marriage.

Estate of Wardell, 57 Cal. 491; *Watts v. Owens*, 62 Wis. 517.

Under the statute by which a child born before wedlock becomes legitimate by the subsequent marriage of its parents, the marriage must be a valid marriage.

Pub. Stat. chap. 125, § 5; *Loring v. Thorndike*, 5 Allen, 257; *Greenhow v. James*, 80 Va. 636.

In *Boyes v. Bedale*, 1 Hem. & M. 798, it was held that a child legitimated by subsequent marriage under the law of France, where the father acquired a domicile after the death of the testator, was not a child within the meaning of the testator's will.

In no case in this State has the law of legitimation of another State different from our own been applied to the construction of a domestic will.

See *Cotman v. Krell*, 152 Mass. 214; *Lincoln v. Perry*, 4 L. R. A. 215, 149 Mass. 368.

Even if the California law permitted a man to legitimate a child already born by going through the form of marriage with his mistress,

this court would not recognize such legitimation any more than it would recognize the child of a polygamous marriage.

Bethell v. Hildyard, L. R. 88 Ch. Div. 220; *Hyde v. Hyde*, L. R. 1 Prob. & Div. 180.

Holmes, J., delivered the opinion of the court:

This is a bill in equity by which the plaintiff seeks to establish his right to a share in a fund left by the will of Seth Adams of Newton, Massachusetts, to the "present wife" of his brother, Charles W. Adams, "for the benefit of herself and all the children of said Charles in equal proportions." The question is whether the plaintiff is one of the children within the meaning of the will. The wife referred to is admitted to be the defendant, Anne T. Adams, who was married to Charles in Maine, in 1854, he then being a resident of New York. The plaintiff is the child of Charles W. Adams and Hannah Phillips, was born in California on August 28, 1881, and was then illegitimate. At that time Charles Adams' domicile was in Texas. In October, 1881, Charles Adams changed his domicile to California, and on December 3, 1881, he began an action there for divorce against the above-mentioned Anne, and got a decree on April 13, 1882. It is found that he had not been a resident of the State for six months next preceding the commencement of the action, as required by the California Civil Code, § 128, and that for this reason the court had no jurisdiction of the action, but that the court was imposed upon by Adams. We may also mention that it is found that Adams' wife was then residing in Massachusetts, and had no actual notice of the action, and that it might be a question, if material, whether her domicile followed that of her husband. Cal. Civ. Code, § 129;

The principles supposed to be incorporated in the so-called Statute of Merton are fully recognized by special legislation in the following States as summarized by Snyder in his *Geography of Marriage*, as follows:

In Arizona, the children of a man and woman living together as man and wife, or of persons living together, who subsequently marry, are legitimate.

In Florida, Iowa, Minnesota, Montana, Nevada, Oregon, Pennsylvania and Washington, children born out of wedlock become legitimate by the subsequent marriage of their parents.

In Connecticut, where the parents of children born out of wedlock subsequently marry, and recognize such children as theirs, they shall be deemed legitimate. Stat. 1876.

In Virginia and West Virginia children born out of wedlock, whose parents subsequently marry, if recognized by the father before or after marriage, shall be deemed legitimate.

In New Hampshire, where the parents afterwards marry and recognize them, they shall inherit as if they were legitimate.

In Illinois, Indiana, Massachusetts, Ohio, Vermont, Wisconsin and Wyoming a child born out of wedlock, whose parents shall subsequently marry, and whose father acknowledges such child, shall be deemed legitimate.

In New Mexico, children legitimated by a subsequent marriage of their parents are as direct heirs 18 L. R. A.

as legitimate children, with the exception of the right of primogeniture.

In North Carolina, children born out of wedlock can become legitimate only upon petition of the father, which must be presented to the superior court of the county where he resides, and if it appear that he is father of the child, the court may make a decree to that effect which shall be recorded by the clerk, and such child may then inherit from his father only.

In Michigan, children born out of wedlock become legitimate by the subsequent marriage of their parents, or, if they do not marry, the father can make the child "legitimate in law" by so acknowledging in writing, executed like a deed of land.

In Nebraska, children born out of wedlock become legitimate if the parents afterwards marry and have been adopted in the family with other children born in wedlock, or shall have been acknowledged by the father in writing, signed in the presence of one witness.

In Louisiana, children born out of wedlock, except those born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, when legally acknowledged before marriage, by an act passed before a notary and two witnesses, or by their contract of marriage itself. They are then known as natural children.

Burlen v. Shannon, 115 Mass. 438, 447, 448. On April 20, 1882, Charles Adams married Hannah Phillips in California, then having his domicile there, and after the marriage recognized the plaintiff as his son. By the law of California a child born before wedlock becomes legitimate by the subsequent marriage of his parents. Civil Code, § 215. The law of Texas is similar if the child is recognized by the father. Rev. Stat. § 1656 (1879).

The word "children," in a Massachusetts will means legitimate children. *Kent v. Barker*, 2 Gray, 535, 536. Probably the meaning would be the same even if the parents referred to, and the child, were domiciled in a State where illegitimate children were recognized as children for some purposes. *Lincoln v. Perry*, 149 Mass. 368, 373, 374, 4 L. R. A. 215. But we do not need to consider this at length, as it does not appear that the law of California or of Texas would recognize the plaintiff as the child of Charles Adams for the present purposes unless he were legitimated, and Charles Adams in any case was only domiciled in California for a short time, long after the testator's death, and after the birth of his child, and died domiciled in Massachusetts. The plaintiff's case is put wholly upon his having been legitimated. We assume for the purposes of our decision that if he has been legitimated he is entitled to a share under the will. *Loring v. Thorndike*, 5 Allen, 257; *Sleigh v. Strider*, 5 Call, 439; *Re Andros*, L. R. 24 Ch. Div. 637.

We may as well add here that if the Texas domicile of Charles Adams at the time of the birth of his son was material (*Ross v. Ross*, 129 Mass. 248, 256; *Re Grove*, L. R. 40 Ch. Div. 216), no difference based on that fact and favorable to the plaintiff has been called to our attention. We shall speak only of the law of California in dealing with this part of the case. We shall not consider whether, if it were necessary to satisfy the requirements of the Texas statute, a marriage in California would do so.

It may be assumed that the California statute to which we have referred (Civil Code, § 215) requires a valid marriage to legitimate an earlier born child. *Loring v. Thorndike*, 5 Allen, 257, 263, 269; *Greenhow v. James*, 80 Va. 636, 641. For Charles Adams' marriage to be valid it was necessary that he should have obtained a valid divorce. But if we should assume that the decree of divorce was valid in California so that Charles Adams had a capacity to marry there, and that his marriage conferred the status of a legitimate child upon his son by the law of that State, we should encounter doubts like those expressed by Lord Colonsay in *Shaw v. Gould*, L. R. 3 H. L. 55, 97, whether at any distance of time we were to reopen the inquiry into the circumstances of Charles Adams' resort to the California court. The California record shows that the court there found that Charles Adams had been a resident of the State for the necessary time. There is color in the California decisions put in evidence for the argument that this finding could not be impeached collaterally in Cali-

fornia, and thus that the case supposed is the case before us.

Taking the case this way for a moment, we still are unable to decide it in favor of the plaintiff. The rule that the status of the domicile is the status everywhere must yield when the status is constructed on principles which are contrary to those which are generally recognized or which can be admitted by the law of the forum resorted to. See *Ross v. Ross*, 129 Mass. 248. We should agree with the English decisions so far as this, that the fact that a marriage has taken place on the faith of a previous divorce does not preclude an inquiry by the courts of another State into the capacity of the divorced party and thus into the validity of the divorce, or a denial of the validity of the marriage if the divorce is one which would be decreed void if it were directly in issue. A purely voluntary contract of marriage cannot be allowed to impart a conclusive character to a decree which before could have been examined. *Smith v. Smith*, 13 Gray, 209, 210; *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Atty-Gen.* L. R. 2 Prob. & Div. 156; *Briggs v. Briggs*, 5 Prob. Div. 163.

The present case offers remarkably little ground for hesitation in going into this inquiry. Marriage in California is, or may be, a pure matter of private contract entered into without intervention of the State except for purposes of registration. Civil Code, §§ 55, 75, 78; *Graham v. Bennet*, 2 Cal. 508. The mother's rights are not in question, and if they were, she did not stand at all in the position of a purchaser for value without notice. She is found to have known all the facts, and her belief in Charles Adams' capacity to contract marriage was simply an opinion about California law. (We are not now considering the conditions of a putative marriage, as to which different views have been expressed). *Glass v. Glass*, 114 Mass. 563, 566; *Shaw v. Gould*, L. R. 3 H. L. 55, 97; *Buisson's Succession*, 41 La. Ann. 217, 220, 221; *Harris v. Harris*, 85 Ky. 49. The plaintiff is claiming a purely gratuitous benefit as an incidental result of the proceedings in California, at the expense of other children who were not parties to any of those proceedings, or entitled to be heard at any stage of them, but who nevertheless are to be precluded from denying their validity.

If the validity of the divorce were immediately in issue it could be impeached here, for want of jurisdiction, notwithstanding the recitals in the record, and those recitals could be contradicted by parol evidence. *Sewall v. Sewall*, 122 Mass. 156, 161; *Cumington v. Belchertown*, 149 Mass. 223, 225, 4 L. R. A. 131; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897. See *Bowler v. Huston*, 30 Gratt. 266; *Mitchell v. Ferris*, 5 Houst. (Del.) 34; *Eager v. Storer*, 59 Mo. 87. For instance, if Charles Adams had married Hannah Phillips in this State and had been indicted for polygamy (*People v. Davell*, 25 Mich. 247; *Van Fossen v. State*, 37 Ohio St. 317, 320. See *People v. Baker*, 76 N. Y. 78); or even in a proceeding between the parties to the divorce, if the

one raising the objection had not appeared in that cause, and was not domiciled in the State where it was granted. *Reed v. Reed*, 52 Mich. 117, 121; *Cross v. Cross*, 108 N. Y. 628. See *Chaney v. Bryan*, 15 Lea, 589; *Leith v. Leith*, 39 N. H. 20, 41. So a *fortiori* where the question is raised, as here, by third persons whose rights are concerned, and who were not parties to or entitled to be heard in the divorce suit. See *Gregory v. Gregory*, 78 Me. 187, 190, 1 New Eng. Rep. 796; *Neff v. Beauchamp*, 74 Iowa, 92, 94; *O'Dea v. O'Dea*, 101 N. Y. 23, 1 Cent. Rep. 785; *Cummington v. Belchertown*, 149 Mass. 223, 4 L. R. A. 131; *Shaw v. Gould*, L. R. 3 H. L. 55.

In *Hood v. Hood*, 11 Allen, 196, the fact of domicile was tried between the original parties for the purpose of determining the jurisdiction of an Illinois divorce, and in *Hood v. Hood*, 110 Mass. 463, it was the Massachusetts, not the Illinois, decree, which was held conclusive on third persons, they offering evidence only to impeach the Illinois decree. See also *Burten v. Shannon*, 115 Mass. 438, 445, 449; Pub. Stat. chap. 146, § 41.

There is no doubt that the requirement of six months residence goes to the jurisdiction of the court. The finding of the judge on this point is confirmed, not only by the plain effect of the California statute, but by the express statement of the Supreme Court of that State and by its intimation that a divorce granted without that prerequisite would not be binding in any other State. *Bennett v. Bennett*, 28 Cal. 599, 601; *People v. Dawell*, 25 Mich. 247, 263, 264.

But although we have made the assumption for a moment, we by no means are prepared to concede that if the present case arose in California under a California will it would be decided differently there. The universal effect of a judgment *in rem* in establishing or changing a status or title, whether given to it by statute or by the tradition of the courts, rests on the practical necessity of the case, because the effect is of a nature to concern strangers to the proceedings. It would be inconvenient for parties to be divorced as between themselves and yet married towards the world. The same convenience makes it desirable that the effect should be the same wherever the question arises, whether within the jurisdiction or without it, and therefore in the case of a decree which would be void outside the jurisdiction, that it should not be held conclusive within it. The decree, if binding in California, would be binding everywhere. *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604. It is desirable, at least, that the converse rule should be applied, and that a decree void elsewhere should not be held binding there. We are aware that some of the cases which we have cited and others which we have not cited contemplate the possibility of a divorce which shall be valid only as to the plaintiff within the jurisdiction. But especially in this country where changes of residence from State to State are frequent, every court must strive so far as possible to bring the local view of a citizen's

status into accord with that which would prevail generally elsewhere.

We have tried to show that the decree before us would be regarded as void outside the jurisdiction, and void on the ground that the condition precedent attached by a California statute to the right of the court to take jurisdiction had not been complied with. The question is whether the statute has a less effect within the State. No conclusive evidence of the law of California upon this point has been called to our attention. If the plaintiff had been rightly in court and the objection had been that the defendant had not been duly served, it may be that if the record showed a proper publication it could not be contradicted. *Re Newman*, 75 Cal. 213, 220. But perhaps even this is doubtful in view of some of the decisions earlier cited, and however it may be, a distinction has been suggested between a total want of jurisdiction and a failure to get jurisdiction of the person of the defendant in a case which is rightly in court. *People v. Dawell*, 25 Mich. 247, 256. See *Henderson v. Staniford*, 108 Mass. 504, 506; *Whitwell v. Barbier*, 7 Cal. 54, 63, 64. We feel at liberty to assume the law of California to be in accordance with that generally received elsewhere, and to consider the question on principle. The argument for the conclusiveness of the decree in California would seem to be that the parties to a domestic judgment showing jurisdiction on the face of the record cannot impeach it collaterally. *Hendrick v. Whittemore*, 105 Mass. 23; *McCormick v. Fiske*, 138 Mass. 379; *Freeman, Judgm.* §§ 181, 184. And that if a judgment *in rem* is operative as between the parties while it stands, it must be effectual to determine their status as to third persons, although not parties, for reasons already given. *Re Newman*, 75 Cal. 213, 220; *Hood v. Hood*, 110 Mass. 463, 465; *Brigham v. Fayerweather*, 140 Mass. 411, 413, 1 New Eng. Rep. 736.

But if the judgment is thus binding to all intents and purposes in California, it would be binding elsewhere, which as has been shown is not the law. In New York this consideration has been adduced as a reason for the rule prevailing there that a domestic record may be impeached collaterally for want of jurisdiction, even by a party. *Ferguson v. Crawford*, 70 N. Y. 253, 261, 262. Whether the rule as to parties be regarded as an anomaly established on the principle *communis error facit jus*, or as a mere rule of procedure, that those who have it in their power to reverse a judgment must do so if they do not want to be bound by it, as possibly may be inferred from some of the cases (*Hendrick v. Whittemore*, 105 Mass. 23, 28), the conclusion cannot be admitted that those who have not that power are also bound, if the judgment is *in rem*, to admit the change of status which it purports to effect. Consider what would be the result. In a great majority of divorces neither party wishes to disturb the decree. If their acquiescence should be allowed to have the effect supposed, third persons may be affected in their property and in their most sacred personal

rights by the interested action of others without ever having had a chance to be heard. The cases are few, and we are aware of no binding authority. But in *Perry v. Meddowcroft*, 10 Beav. 122, 137, an infant was allowed to impeach a domestic sentence of nullity collaterally for collusion, although the sentence operated *in rem*, and bastardized him if it stood. *Harrison v. Southampton*, 22 L. J. N. S. Ch. 372; *Meddowcroft v. Huguenin*, 4 Moore, P. C. 886, 898. We cannot doubt that if the fraud on the court had concerned its jurisdiction rather than the merits, *Lord Langdale* would have been at least equally ready to hear the evidence. *Cavanaugh v. Smith*, 84 Ind. 380. Yet the parties to the collusive decree were bound by it. *Greene v. Greene*, 2 Gray, 361, 362; *Nichols v. Nichols*, 25 N. J. Eq. 60, 65. We have confined our citations mainly to cases of divorce and judgments *in rem*. But where there has been an execution sale under a judgment *in personam* there is a difficulty not unlike that which arises with regard to judgments *in rem* in allowing the validity of the judgment to be disputed by third persons for the purpose of destroying the purchaser's title. Yet it has been held that this may be done. *Safford v. Weare*, 142 Mass. 281, 2 New Eng. Rep. 586.

We shall not consider further whether this judgment was not absolutely void on the facts reported, and whether, if so, the record could be contradicted by the parties to it on what has been declared in California to be a "fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it." *McMinn v. Whelan*, 27 Cal. 300, 314.

We are of opinion, for the reasons which we have given, that the validity of the divorce granted Charles W. Adams is open to contradiction in this suit, that the divorce was void and ineffectual as against his legitimate children, that therefore his marriage with the plaintiff's mother was void, and did not legitimate the plaintiff in such a sense as to entitle him to set up a claim in competition with the legitimate children under a Massachusetts will.

Another and distinct argument has been drawn from another California statute which provides that when a marriage is annulled on the ground that a former husband or wife was living, children begotten before the

judgment are legitimate. Cal. Civ. Code, § 84. The California and Texas statutes also provide that the issue of marriages null in law shall be legitimate. Cal. Civ. Code, § 1387; Tex. Rev. Stat. § 1656.

The Texas statute may be laid on one side. For even if we should hold that the Texas law imparted to the plaintiff his capacity for legitimation, which under the facts of this case we do not intimate, still, subject to the qualifications heretofore stated, the effects of his parents' marriage upon him must be determined by the law of California where it took place and where they and he then were domiciled. We lay on one side, therefore, without further remark, a dictum in a decision by the Supreme Court of Texas, that children born before the parents entered into a void marriage would be legitimated so as to take as children under a Texas will. *Carroll v. Carroll*, 20 Tex. 731, 745, 746.

We see no ground for construing the California Acts as applying to any children except those born after the void ceremony has been gone through with. They alone can be described as issue of the marriage, according to the express words of section 1387. *Greenhow v. James*, 80 Va. 636, 638. They alone fall within the obvious reasons for the Statute and the earlier Spanish law from which it would seem that the Statute may have been derived, according to the exposition in another Texas case. *Smith v. Smith*, 1 Tex. 621, 629. If we assume that section 84 applies where there has been no judgment annulling the marriage, the general words "children begotten before the judgment" must be confined to children born after the marriage in view of section 1387. Neither section 84, nor section 1387, nor both together, can be taken to enlarge the meaning of section 215, discussed at the beginning of this opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the Supreme Court of California so far as they have expressed an opinion. *Estate of Wardell*, 57 Cal. 484, 491. See also *Watts v. Owens*, 62 Wis. 512, 517; Fraser, Parent & Child, 2d ed. 28. We have found no case favoring a different construction except the few words in *Carroll v. Carroll*, 20 Tex. 746.

Bill dismissed.

KANSAS SUPREME COURT.

Martha A. BUFFINGTON, *Plff. in Err.*,
v.
William S. GROSVENOR.

SAME, *Plff. in Err.*,

v.
John G. SEARS.

(... Kan.)

*1. The word "citizens," as used in section

*Head notes by JOHNSTON, J.

17 of the Bill of Rights prior to the Amendment of 1888, meant citizens of Kansas; and the word "aliens," as there used, meant persons born out of the United States and not naturalized.

2. The statute which provides that the widow shall not be entitled to an interest in lands conveyed by the husband when the wife, at the time of the conveyance, was a non-resident of the State, is not repugnant to section 2 of article 4 of the Fourteenth Amendment to the Constitution of the United States.

NOTE.—*Laws regulating the descent of real property.*

The descent or transfer of real property is governed by the law of the place where the land is 13 L. R. A.

situated, the *lex loci rei sitæ*. The law of the domicile, *lex domicilii*, does not apply to real property. And that law of descent governs which was in

(July 9, 1891.)

WRITS of error to the District Court for Kingman County to review judgments in favor of defendants in actions brought to recover possession of certain real estate. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Hallowell, Hume & Gordon* for plaintiff in error.

Messrs. John E. Lydecker and Douthitt, Jones & Mason, for William S. Grosvenor, defendant in error:

The State has a right to regulate by statute the manner any right, title or interest in and to real estate situated within the State of Kansas may be transferred; and whether the wife be an heir of the husband under the Statute, or not, when she survive him she cannot take any interest in real estate transferred to a purchaser in manner and form prescribed by the laws of the State; and provisions of the Statute prescribing certain modes of transfer, which will transfer the entire estate without the wife's joining therein, cannot properly be called provisions as to the descent of property; there is no descent.

Conner v. Elliot, 59 U. S. 18 How. 591, 15 L. ed. 497; *Magee v. Young*, 40 Miss. 164; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9, 14, 15.

The right of the wife to an interest in the real estate of the husband is contingent, and is not a vested or existing right, such that the Legislature may not at any time modify, change, or entirely abolish.

Conner v. Elliot, 59 U. S. 18 How. 591, 15 L. ed. 497; *Barbour v. Barbour*, 46 Me. 9; 1 Woerner, American Law of Administration, 225; *Ligare v. Semple*, 32 Mich. 498; *Bennett v. Harms*, 51 Wis. 251; *Wallace v. Reddick*, 6 West. Rep. 769, 119 Ill. 151; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Cooley*, Const. Lim. 360, 361.

It was claimed in *Head v. Daniels*, 38 Kan. 2, that section 192 of the Civil Code, which provides that "no undertaking for attachment shall be required where the parties defendant were all nonresidents or a foreign corporation," was unconstitutional on the same grounds urged in this case, but that Statute was decided valid by the court.

The validity of this Statute has been recognized and upheld by the decisions of this court.

Comstock v. Adams, 23 Kan. 513; *Koons v. Rittenhouse*, 28 Kan. 359; *Chambers v. Cox*, 23 Kan. 393; *Farlin v. Sook*, 26 Kan. 398; *Busenbark v. Busenbark*, 33 Kan. 576.

force at the decease of the ancestor. Story, Conf. L. § 484; *Potter v. Titcomb*, 22 Me. 300; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 10 Met. 303; *Marshall v. King*, 24 Miss. 85; *McGaughey v. Henry*, 15 B. Mon. 338; *Jones v. Marable*, 6 Humph. 116; *Price v. Tally*, 10 Ala. 946; *Eslava v. Farmer*, 7 Ala. 543; *Tiedeman*, Real Prop. § 664.

Lands are to descend according to the laws of the State in which they are situated, irrespective of the domicile of the person dying intestate, or of those claiming as heirs. *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Boone*, Real Prop. § 236.

It will also be borne in mind that the distribution of personal property of an intestate must be according to the law of the country or State of which he 18 L. R. A.

The Legislature has the undoubted right by statute to declare what interest a wife, during the life and after the death of her husband, shall have in his real estate situated within the State, and the mode and manner such real estate may be transferred, so as to divest the husband and wife of all estate or interest therein; and the proviso to section 8 is such a Statute, and nothing more, and does not violate any provisions of the Constitution of the United States.

1 Hare, Am. Const. Law, 518; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832.

Johnston, J., delivered the opinion of the court:

Martha A. Buffington brought two actions in the District Court of Kingman County, one against William S. Grosvenor and the other against John G. Sears, to recover from each one half of certain real property situate in Kingman County. She was unsuccessful in each case, and is here complaining of the judgments that were given. The material facts of the cases are alike, and, as they present but one question, they may be disposed of in a single opinion. Martha A. Buffington became the wife of Pierce Buffington in 1865, and continued in that relation until the time of his death, in 1884. He removed to Kansas five or six years before his death and, shortly after coming here, he acquired the absolute legal title to the property in controversy. Afterwards he conveyed the property by warranty deeds to certain grantees, and the defendants, by subsequent conveyances, have acquired all the title obtained by such grantees. Martha A. Buffington did not join her husband in conveying the property, and has never executed a conveyance of the same to anyone, but she was never a resident or citizen of Kansas, and was never in the State prior to the death of her husband. She now claims to be entitled to one-half interest in the real estate of her husband, of which she had made no conveyance; but the trial court held, under the proviso of section 8 of the Act concerning descents and distributions, that, as she had not been a resident of Kansas, she never had any interest in the land conveyed, and her signature or conveyance was unnecessary to a complete transfer of the land by her husband. The section referred to reads as follows: "One half in value of all the real estate in which the husband, at any time during the marriage, had a legal

was a domiciled inhabitant at the time of his death, without regard to the place of either the birth or death, or the situation of the property at the time; but that real estate descends according to the law of the place where it is situated. *Lingen v. Lingen*, 45 Ala. 410, 412; *Woerner*, American Law of Administration, § 64.

For the minor details of the law regulating the descent of real property, the practitioner should consult the statutory regulation of the various States. Mr. Washburn, in his well-known treatise on the Law of Real Property (pp. 21 *et seq.* vol. 3), has appropriately grouped the various rules of descent that at present obtain in the various jurisdictions of the United States.

or equitable interest which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him: provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this State. Continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right aforesaid." Gen. Stat. 1889, par. 2599. The plaintiff's contention is that the proviso of the section violates both the State and Federal Constitutions, in that it discriminates against the citizens of other States, and aliens. It is first contended that the proviso falls within the inhibition of section 17 of the Bill of Rights, which at the date of the conveyance of the land in controversy by Pierce Buffington read as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property." Does the proviso mentioned make "a distinction between citizens and aliens in reference to the purchase, enjoyment, or descent of property?" We are inclined to think that it is a regulation of the manner of transferring property within the State, instead of a restriction upon its descent. However, that question is immaterial in this case, so far as section 17 of the Bill of Rights is concerned. In no event can it be said that there is a distinction between citizens and aliens in the present case, for it does not appear that the plaintiff is an alien within the proper meaning of that term. It is alleged by plaintiff, and conceded on the other side, that she is a citizen of the United States. The wife of a citizen of Kansas, who resides in another State, cannot be regarded as an "alien." Webster defines the word as "one born out of the jurisdiction of the United States, and not naturalized," and Bouvier gives a like definition. Anderson's Dictionary of Law defines an "alien" to be "one born in a strange country, under obedience to a strange prince, or out of the ligeance of the king." The amendment to this constitutional provision, which was adopted in 1888, shows that that is the sense in which it is used in our Constitution. Section 17 of the Bill of Rights, as amended, reads as follows: "No distinction shall ever be made between citizens of the State of Kansas, and the citizens of other States and Territories of the United States, in reference to the purchase, enjoyment, or descent of property. The rights of aliens in reference to the purchase, enjoyment, or descent of property may be regulated by law." Before this amendment was adopted, citizens and aliens stood upon an equality with reference to the purchase, enjoyment, and descent of real property, but by the amendment the people ordained that the restriction upon the Legislature should be removed, and authorized such discriminating regulations against

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aliens in this respect as might be deemed wise. The use of the term "alien" in the amendment leaves no doubt of the sense in which the word is used, and furnishes an argument that it was used in the same sense in the original provision. We agree with counsel for plaintiff that the term "citizen," as used in the original provision, refers to citizens of the State of Kansas. Counsel, who filed a brief by the permission of the court as *amicus curiæ*, contend that the term includes all citizens of the United States, but we are not inclined to agree with that view. We conclude, then, that section 17 of the Bill of Rights had no application to this case.

It is next contended that the proviso is repugnant to that provision of the Federal Constitution which ordains that "the citizens of each State shall be entitled to all the privileges and immunities of the several States," and also violative of a like limitation in the 14th Amendment. We think the proviso is not in conflict with either of these provisions. It makes no discrimination against the citizens of other States in respect to any of the privileges or immunities of general citizenship. The proviso, in connection with other statutes, furnishes a rule regulating the manner of the transfer and transmission of real property. Where a person owns the absolute title to land in Kansas, and his wife is a resident of the State, she must join in the conveyance; but when she is not a resident of Kansas, and therefore not subject to its laws, her signature and conveyance are unnecessary, and the husband alone may convey a good title. It is competent for the Legislature of each State to declare the mode and manner by which real property situate within the State may be transferred by the husband, or by the husband and wife, or by judgment and process of court, so as to divest the husband, or husband and wife, of all estate or interest therein, and also to provide for the distribution of and the right of succession to the estates of deceased persons. "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *United States v. Fox*, 94 U. S. 815, 24 L. ed. 192.

It is urged by the plaintiff that the wife is an heir, and as such is entitled to inherit one half of her deceased husband's property, but that the proviso discriminates against widows who reside outside of the State, and deprives them of the right which is accorded to a resident widow. The wife, strictly speaking, is not an heir of the husband, although she is generally spoken of as such; but still, if she is regarded as an heir, the nonresident widow is not deprived of any "privilege or immunity." Under our Stat-

ute the property of the husband belongs exclusively to him, as the wife's property is exclusively her own. Neither has any vested interest or control over the property of the other by virtue of the marriage relation. The wife has no estate in the land of the husband. It is a mere possibility, depending upon the death of the husband, or whether he has divested himself of the title prior to his death. If he survives her, no interest is taken by nor transmitted to her heirs. If she survives him, but before his death he conveys the land, or it has been sold on execution or other judicial sale, nothing remains for her to take, and she has been deprived of no right. If there was an attempt to convey by the husband alone when his wife was a resident, the title would remain in her, because the manner of conveying land prescribed by statute had not been pursued; and if there was no judicial sale of the land, and it was not necessary for the payment of debts, a one-half interest would descend to her. In such a case, if she was a nonresident of the State, the conveyance by the husband alone would, under the rules prescribed for conveying, be sufficient to divest the title, and hence there would be nothing for her to inherit. It therefore appears that, if the conveyance is made in the manner prescribed by statute, there is nothing for either the resident or nonresident widow to inherit. There is really no discrimination between the resident and the nonresident widow, for each takes one half of all the real property which her husband owned at the time of his death. When the husband's land has been conveyed in accordance with law during his life, there is no descent to either, for there is nothing to descend. For reasons that were deemed sufficient, the Legislature made the signature and conveyance of the nonresident wife unnecessary. The fact that the wife did not accompany her husband to Kansas, or had abandoned him and gone to another State, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The Statute was enacted shortly after the admission of the State, and when it was rapidly increasing in population, through immigration from many of the eastern States, and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception in the transfer of real property. The "immunities" and "privileges" referred to in the Federal Constitution would not, in any event, include the claim made by the plaintiff. Those terms "mean that all citizens of the United States shall have the right to acquire property and hold it, and this property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected; that this property shall not be subject to any burdens or taxes not imposed on the property of citizens of the State." 3 Am. & Eng. Encyclop. Law, 253. See also 13 L. R. A.

the cases there cited, and *Corfield v. Coryell*, 4 Wash. C. C. 380; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

According to these authorities, many rights and privileges may be granted by a State, depending to some extent upon the residence of those to whom they are granted, without infringing upon this provision of the Constitution. The privilege of voting, of holding office, or of acting as an administrator of estates, may be withheld until after persons have resided within the State a reasonable period of time, without violating the Constitution; and it is not violated by allowing an attachment against the property of a nonresident debtor without an undertaking, although such process cannot be obtained against a resident without an undertaking. *Head v. Daniels*, 88 Kan. 1; *Cooley*, Const. Lim. 6th ed. 490.

These and many other distinctions do not fall within the privileges and immunities of general citizenship. In treating upon this question, *Judge Cooley* says: "Although the precise meaning of 'privileges' and 'immunities' is not very clearly settled as yet, it appears to be conceded that the Constitution secures in each State, to the citizens of all the other States, the right to remove to and carry on business therein; the right, by the usual modes, to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts, and the enforcement of other personal rights; and the right to be exempt in property and person from taxes or burdens which the property or persons of citizens of the same State are not subject to. To this extent, at least, discriminations could not be made by state laws against them. But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon actual residence, such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like." *Cooley*, Const. Lim. 6th ed. 490; also note on page 25.

There are several adjudicated cases in other States sustaining a provision of statute substantially similar to the proviso in question. In *Pratt v. Tefft*, 14 Mich. 191, it was decided that a woman residing out of the State at the time of her husband's death was not entitled to lands lying within the State owned by him, but which had been conveyed without her joining in the deed. Although the estate of dower has been abolished in Kansas, the contingent interest of the wife in the real property of the husband is similar to dower in its inchoate stage; at least, it is substantially similar, so far as the validity of such a provision as we are considering is concerned. In *Ligare v. Semple*, 32 Mich. 488, it was again decided that "a wife who is a nonresident of the State, at the time the husband makes an absolute conveyance of lands divesting himself entirely of his seisin and estate, has no right of dower, under the statutes of this State, in lands so conveyed." The Supreme Court of Nebraska held that, "where a husband conveys lands in this State while his wife is a nonresident thereof, she

has no dower interest in the land thus conveyed." *Atkins v. Atkins*, 18 Neb. 474.

In *Bennett v. Harms*, 51 Wis. 251, a like provision of the Statute was under consideration, and the point was directly made that it conflicted with the Constitution of the United States by discriminating against non-resident citizens, but the validity of the statute is sustained in an elaborate opinion. A like question has been decided by the Supreme Court of the United States under a law of Louisiana which discriminated in favor of women who contracted marriage within the State, or who contracted marriage out of the State, and afterwards went there to live, and it was claimed to be in conflict with the provision of the Federal Constitution that

"the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but it was ruled, Judge Curtis delivering the opinion, that such discrimination had no connection with that clause of the Constitution. *Conner v. Elliot*, 59 U. S. 18 How. 591, 15 L. ed. 497. Following these decisions, we conclude that the Statute is not repugnant to the Federal Constitution; and, if we are in error in this regard, the parties are entitled to have the decision reviewed in the Supreme Court of the United States.

We find no error in the record, and therefore the judgment of the District Court will be affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN
v.

Edward WAGNER *et al.*, *Appts.*

SAME

v.

Albert H. BARIE *et al.*, *Appts.*

SAME

v.

Frank WITTELSBERGER *et al.*, *Appts.*

(....Mich.....)

An ordinance establishing the weight of the loaves of bread that shall be offered for sale within the city, and fixing a penalty for offering for sale short-weight loaves, cannot be successfully attacked as not being within the police power, nor as taking property without compensation, or abridging, or unlawfully interfering with, the right to carry on business.

(July 23, 1891.)

CERTIORARI to the Recorder's Court of the City of Detroit to review three certain judgments convicting defendants of a violation of one of the ordinances of said city. *Writ dismissed.*

The facts are stated in the opinion.

Messrs. William Look and H. F. Chipman, for appellants:

By the terms of the ordinance, bread is required to be made of good, wholesome flour or meal, into loaves of one, two and four pounds, and no other, avoirdupois weight.

The undisputed testimony in the case shows that these provisions of the ordinance are impossible to be complied with.

A statute imposing impossible conditions is void.

NOTE.—*City ordinance regulating weights and measures.*

A city ordinance for the regulation of the standard of weights and measures, which provided that the sealer might inspect the weights and measures every six months, and "as much oftener as he thinks proper," and also provided that when the weights and measures were not in conformity with the standard they should be sent by the owners to 13 L. R. A.

Henderson v. Wickham, 92 U. S. 259, 275, 23 L. ed. 548, 550.

This by-law, in taking private property of respondents without compensation, is in contravention to the constitutional guaranties, that private property cannot be taken for public use until the necessity therefor and the amount of compensation therefor have been determined by a court and jury.

Powers' App. 29 Mich. 509.

If the respondents comply with this ordinance, they lose large quantities of valuable material every time a loaf is baked, and for which they receive no remuneration or return, and for which loss there is no redress.

See Mich. Const. art. 6, § 2; U. S. Const. 14th Amend.; *Parsons v. Russell*, 11 Mich. 121; *Ames v. Port Huron Log. D. & B. Co.* 11 Mich. 148.

Any law which imposes on any person any charge or burden greater than those which are imposed on all others, under like circumstances, is in conflict with the 14th Amendment of the United States Constitution, and is therefore void.

Monticello v. Banks, 48 Ark. 251; *St. Louis v. Spiegel*, 8 Mo. App. 478, 75 Mo. 145; *Highgate v. State*, 3 New Eng. Rep. 819, 59 Vt. 39; *Excelsior P. & Mfg. Co. v. Green*, 39 La. Ann. 455.

An Act which provided that every railroad company . . . which shall cause the death of any live-stock by running against it with an engine shall be liable for its value, takes property without due process of law.

Jensen v. Northern Pac. R. Co. (Utah) 4 L. R. A. 724, citing *Cooley*, Const. Lim. 5th ed. 480-486, and notes; *Cottrel v. Union Pac. R. Co.* (Idaho) March 18, 1889; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Bielenberg v. Montana U. R. Co.* 2 L. R. A. 813, 8 Mont. 271.

An Act which provides for assessment upon

a place designated by the sealer for correction, was not an unreasonable ordinance; and the common council had power under its charter to make such ordinance. *People v. Rochester*, 45 Hun, 102.

There is nothing in the Constitution of the State which invalidates a grant of power to a municipal corporation to regulate the weight and price of bread. *Mobile v. Yuille*, 3 Ala. 137; 1 Dillon, Mun. Corp. p. 392.

adjoining landowners of expense for providing for overflow of lands is unconstitutional, in authorizing property to be taken without due process of law.

Hutson v. Woodbridge Proc. Dist. 79 Cal. 90. See also *Chauvin v. Valison*, 8 L. R. A. 194, 8 Mont. 451; *Campbell v. Campbell*, 63 Ill. 462.

This Act is void in abridging the privileges and immunities of the respondents, viz.: the right to do as they please with their own property, and to manufacture a loaf of any wholesome ingredients they may see fit; and of such size and weight as they may deem most salable and marketable.

Hunter v. Hatch, 45 Ill. 178; *Parmelee v. Lawrence*, 44 Ill. 405; *Cooley, Const. Lim.* 372-375; *Kuhn v. Detroit Common Council*, 70 Mich. 534.

This by-law curtails and, in a measure destroys the business of the defendants, and places a limitation upon the capacity of the respondents to carry on a lawful calling or occupation, and to earn their living.

Re Jacobs, 98 N. Y. 98; *Butchers U. S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388-398.

This ordinance cannot be sustained upon the ground that it is within the police powers of the State.

Police regulations are confined to the protection of the lives, health and morality of citizens, and to the preservation of good order and public morals.

People v. Phippen, 70 Mich. 6; *Robison v. Miner*, 13 West. Rep. 471, 68 Mich. 549.

In Minnesota, it is within the police power to impose such regulations as may reasonably be deemed necessary to protect people from imposition and fraud in articles sold for consumption as food.

Butler v. Chambers, 36 Minn. 69.

The manufacturer may be required, as a proper police regulation, for the benefit of the people in general, to sell the commodity for what it actually is and upon its merits.

See *People v. Arensberg*, 7 Cent. Rep. 247, 105 N. Y. 123; *Palmer v. State*, 89 Ohio St. 286; *Powell v. Com.* 5 Cent. Rep. 890, 114 Pa. 268, affirmed, 127 U. S. 678, 32 L. ed. 253; *State v. Addington*, 77 Mo. 110-118; *Ex parte Kohler*, 74 Cal. 88; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 389, citing *Slaughter House Cases*, 83 U. S. 16 Wall. 36-106, 21 L. ed. 894-418; *Re Jacobs, supra*; *Bertholf v. O'Reilly*, 74 N. Y. 509, per Andrews, J.; *People v. Marx*, 99 N. Y. 377; *People v. West*, 8 Cent. Rep. 758, 106 N. Y. 298; *People v. Kübler*, 8 Cent. Rep. 761, 106 N. Y. 321; *People v. Ciperly*, 1 Cent. Rep. 804, 101 N. Y. 634; *Re Sam Ke*, 31 Fed. Rep. 680; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1; *Abeel v. Clark*, 84 Cal. 226; *Missouri Pac. R. Co. v. Harrelson*, 44 Kan. 253.

In Michigan, under the exercise of this power, the State may prohibit, under penalty, the exercise of any trade or employment which is bound to be hazardous or injurious to its citizens.

People v. Hawley, 8 Mich. 330; *People v. Gallagher*, 4 Mich. 244; *People v. Walling*, 53 Mich. 13 L. R. A.

268; *Robison v. Haug*, 14 West. Rep. 876, 71 Mich. 40, 41.

This ordinance is class legislation, and denies an equality of rights to the respondents, by placing upon their business an unusual or illegal burden, which amounts to a large special tax upon their trade and calling.

See *Bounsville v. State*, 4 L. R. A. 93, 118 Ind. 426; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 385; *Durkee v. Janesville*, 28 Wis. 464, 468; *Calder v. Bull*, 3 U. S. 3 Dall. 386, 389, 1 L. ed. 648, 649; *Schut v. Chicago & W. M. R. Co.* 14 West. Rep. 650, 70 Mich. 484; *Rinear v. Grand Rapids & I. R. Co.* 14 West. Rep. 908, 70 Mich. 620; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 85; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 111; *Janesville v. Carpenter*, 8 L. R. A. 308, 77 Wis. 288; *Re Frazee*, 6 West. Rep. 140, 63 Mich. 403; *People v. Armstrong*, 2 L. R. A. 721, 73 Mich. 288.

This ordinance prevents one class of citizens, and one class only, from carrying on a lawful and respectable calling or business, and from manufacturing and selling a wholesome and necessary commodity without first having a policeman enter and search the place of business of the citizen, without due process of law, and without the direction or authority of a court.

Hibbard v. People, 4 Mich. 125; *Robison v. Miner*, 13 West. Rep. 471, 68 Mich. 567.

This Act is void in imposing unusual conditions on private business.

Re Jacobs, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

This ordinance is unreasonable and oppressive to a degree that it forces the respondents to do business at an actual loss of a portion of their material and stock.

People v. Armstrong, 2 L. R. A. 721, 73 Mich. 295; *People v. Gilson*, 12 Cent. Rep. 616, 109 N. Y. 389; *Re Jacobs* and *Re Frazee, supra*; *Anderson v. Wellington*, 2 L. R. A. 110, 40 Kan. 173.

The by-law in question is void in assuming to regulate that which the Legislature has no power to regulate, and consequently has no power to give the City of Detroit authority to regulate (a private business).

1 Dillon, Mun. Corp. 3d ed. 115, citing many authorities; *State v. Belvidere*, 44 N. J. L. 351; *Anderson v. Wellington, supra*.

The defendants have committed no offense known to the laws of the land. They have been guilty of no criminal intent. There can be no crime without a criminal intent.

Pond v. People, 8 Mich. 150; *Faulks v. People*, 89 Mich. 200; *People v. Parks*, 49 Mich. 333; *People v. Roby*, 52 Mich. 579.

Mr. Charles W. Casgrain for appellee.

McGrath, J., delivered the opinion of the court:

This case comes from the Recorders' Court of the City of Detroit by writ of certiorari, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record. Defendants are bakers, and are charged with making for sale, selling, and offering for sale, bread that was deficient in weight under the ordinance.

The ordinance is entitled "An Ordinance Relative to the Manufacture and Selling of Bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker, without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows: "Sec. 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds (and no other) avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter: provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed, in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale; and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread. Sec. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stored, or deposited, or offered for sale, and to inspect and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weighing the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and, if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law. Sec. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this Act, either by refusing him or delaying his entrance or admission into any of the places above named, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance or any part of it, shall be impeded or obstructed. Sec. 7 Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed fifty dollars and the cost of prosecution; and the offender may be imprisoned in the Detroit house of correction until the payment thereof: provided, always, that the term of imprisonment shall not exceed the period of six months."

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The defendants insist (1) that matters contained within the body of the ordinance are not within its title; (2) that by the ordinance private property is taken without compensation; (3) that the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; (4) that it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; (5) that the ordinance is not within the police powers of the State.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the Legislature do not apply to ordinances enacted by a common council of a city. *People v. Hanrahan*, 75 Mich. 611-615, 4 L. R. A. 751. The ordinance does not provide for the taking, seizing, or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk. In *Wheeler v. Russell*, 7 Mass. 258, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Raton v. Kegan*, 114 Mass. 433, it was held that, in view of the Statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, "Water." But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining the moisture. And again, it may be too cold; in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was fifteen years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-

weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance. Again, it is claimed that a barrel of flour will make two hundred and fifty loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade. The State may institute any reasonable preventive remedy where the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. *Tiedeman, Pol. Powers, § 89, p. 208.* Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in

the sale of short-weight loaves, if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a State is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. *Tiedeman, Pol. Powers, p. 208, § 89.*

The charter of the City of Detroit empowers the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293, 2 L. R. A. 721, be subjected to the test of reasonableness.

The convictions are affirmed, and the writ dismissed.

The other Justices concurred.

KENTUCKY SUPREME COURT.

KINCAID *et al.*, *Appts.*,
v.

MCGOWAN *et al.*

(88 Ky. 91.)

1. A grantor of the fee of the surface of land may reserve an estate in fee in the

minerals and each estate will be subject to the Law of Descent, Devise and Conveyance.

2. The right to minerals, timber and a mill-site reserved to the grantor in conveyance of certain parcels of land within a larger tract will not pass by his subsequent conveyance of the whole tract expressly deducting therefrom the parcels of land previously conveyed.

NOTE.—Reservations in deeds; term defined.

Reservation has been defined as the creation of a right or interest, which had no prior existence as such, in a thing or part of a thing granted. *Kister v. Reeser*, 98 Pa. 5.

By a reservation in a deed a new right is created in the thing granted which did not previously exist, and is reserved to the grantor. An "exception" is always part of the thing granted, and the whole of the thing excepted. A reservation may be a right or interest in the particular part which it affects. The terms are often used in the same sense. Though apt words of reservation be

used, they will be continued as an exception, if such was the design of the parties. *Ibid.*; *Perkins v. Stockwell*, 131 Mass. 530; *Kimball v. Withington*, 141 Mass. 379. See also *Bowman v. Wathen*, 2 Mo. Lean. 322; *Sanger v. Sargent*, 8 Sawy. 99; *Bryan v. Bradley*, 16 Conn. 432; *Barnes v. Burt*, 38 Conn. 542; *Karmuller v. Krotz*, 18 Iowa, 358; *State v. Wilson*, 42 Me. 9; *Tarbox v. Eastern S. B. Co.* 50 Me. 340; *Hudson Iron Co. v. Stockbridge I. Co.* 107 Mass. 322, 323; *Ashcroft v. Eastern R. Co.* 126 Mass. 196; *Stockwell v. Couillard*, 129 Mass. 231; *Craig v. Wells*, 11 N. Y. 321; *Parcell v. Stryker*, 41 N. Y. 433; *Sloan v. Lawrence Furnace Co.* 29 Ohio St. 568; *Schofield v. Ferrers*, 47 Pa. 197; *Miller v. Lapham*, 44 Vt. 416;

3. The legal owners in the actual possession of land can maintain a suit to quiet title against adverse claims which becloud the title and injure the market value of the land in which all adverse claimants, whether by independent titles or not, may be joined as defendants.

(May 31, 1887.)

A PPEAL by complainants from a decree of the Circuit Court for Menafee County sustaining demurrers to a bill filed to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. William Lindsay, with Messrs. S. F. J. Trabue, E. F. Trabue and W. P. D. Bush, for appellants:

Plaintiffs having the legal title, and being in possession, it was proper to make as many persons parties to their bill as have adverse claims.

Armitage v. Wickliffe, 12 B. Mon. 494; *Blapham, Eq. § 575*; *Beard v. Smith*, 6 T. B. Mon. 505; *Hiatt v. Calloway*, 7 B. Mon. 180; *Dudley v. Frankfort*, 12 B. Mon. 612; *Cates v. Loftus*, 4 T. B. Mon. 442; *Landrum v. Farmer*, 7 Bush, 49.

The property in minerals and timber may be vested in other persons than the owner of the fee.

Collier, Mines, p. 15; *Cardigan v. Armitage*, 2 Barn. & C. 197, 3 Dow. & R. 414; *Bainbridge, Mines*, §§ 33, 34; *Armstrong v. Caldwell*, 53 Pa. 287; *Caldwell v. Copeland*, 37 Pa. 430.

The deed of June 9, 1843, passed all the rights and estates the grantor then had in the tract of land described, and therefore passed the timber, minerals, etc., which he had expressly reserved to himself by deed made prior to that date.

As to rules for construction of deeds, see 2 Bl. Com. pp. 16, 18; 8 Kent, Com. pp. 401,

Rich v. Zelledorff, 22 Wis. 547; *Anderson, Law Dict.* title, *Reservation*.

A distinction noted.

The distinction between a reservation and an exception is, that by an exception the grantor withdraws from the effect of the grant some part of the thing itself which exists in substance at the time of making the grant, and which is included in the granted premises; while a reservation is of some new right or other thing issuing or coming out of that which is granted, and not a part of the thing itself (*Shep. Touch. 80*; *Craig v. Wells*, 11 N. Y. 815; *Marshall v. Trumbull*, 28 Conn. 188; *State v. Wilson*, 42 Me. 9; *Ives v. Van Auken*, 34 Barb. 596; *Ashcroft v. Eastern R. Co.* 126 Mass. 196; *Whitaker v. Brown*, 46 Pa. 197; *Bridger v. Pierson*, 1 Lans. 481; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290; *Munn v. Worrall*, 53 N. Y. 44; *Moulton v. Trafton*, 64 Me. 218; or it may be of an existing easement or servitude, not capable of being severed from the grant. *Cudler v. Tufts*, 8 Pick. 272, 278; *Doe v. Lock*, 4 Nev. & M. 807; *Pettee v. Hawes*, 13 Pick. 323, 326; *Hurd v. Curtis*, 7 Met. 110.

And whether a restriction in a deed will be deemed a reservation or an exception depends less upon the words used than upon the nature of the right or thing reserved or excepted. *Barnes v. Burt*, 38 Conn. 541; *Martindale, Conv.* 2d ed. § 118.

What may be reserved.

A reservation cannot be made by parol (*Gibbon v. Dillingham*, 10 Ark. 9; *Wintermute v. Light*, 46 Barb. 278; *Turner v. Cool*, 23 Ind. 58. But see *Backenstoss v. Stahler*, 33 Pa. 251), and a reservation to a stranger is void. *Hornbeck v. Westbrook*, 9 Johns. 73.

It is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources. *Moulton v. Faught*, 41 Me. 298.

Generally, the same rules of construction apply to a reservation or implied grant as to an express grant. *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672; *French v. Carhart*, 1 N. Y. 98.

The words "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert," were held to vest an estate for life only (*Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672), so of the words, "reserving to the grantor the use and control, etc., during his natural life" (*Richardson v. York*, 14 Me. 216), and so of a reservation, "for the use of our mother." *Keeler v. Wood*, 30 Vt. 242; *Boone, Real Prop.* § 308.

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A reservation (in a deed) of, and an agreement for, all the marble from certain land, that the grantor might want to manufacture, is not a grant of an exclusive right. *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 19 L. ed. 955.

When a reservation is made in a deed, it is not necessary, in order to give it effect, that the grantor should, when he executes the deed, assert verbally his right to the property excepted from the conveyance; and evidence that he made no such assertion is inadmissible. *Hornbuckle v. Stafford*, 111 U. S. 339, 28 L. ed. 468.

Where a grantor conveys land, "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," the clause operates as an exception, and the grantor retains the entire and perpetual property in the coal. *Whitaker v. Brown*, 46 Pa. 197; 2 Devlin, Deeds, § 980.

A reservation of minerals and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had been first granted to him with a reservation of the surface. *Stoughton's App.* 88 Pa. 198, 201; *Duke v. Hague*, 107 Pa. 57, 66; *Broman v. Young*, 35 Hun. 178, 181; *First Nat. Bank of Richburg v. Dow*, 41 Hun. 13.

The nature of a transaction, as well as the language may be regarded in deciding whether language in a deed constitutes a reservation or a condition. *Foxcroft v. Mallett*, 45 U. S. 4 How. 358, 11 L. ed. 1008.

Reservation in mortgage.

In those States in which the common-law doctrine of mortgages prevails, the mortgagee is entitled to immediate possession of the mortgaged premises, unless the right to retain the possession until default is reserved to the mortgagor. *Martindale, Conv.* § 407, p. 348.

In such States, therefore, if it be the intention that the mortgagor shall retain the possession, a clause should be inserted to that effect (*Coffey v. Hunt*, 75 Ala. 236). In the absence of any provision of the kind, parol evidence cannot be received to prove that such was the intention of the parties at the time of making the mortgage. Though it has been held that the agreement need not be expressed in the mortgage, but may be implied from a note made by the mortgagor to the mortgagee at the same time with the mortgage (*Clay v. Wren*, 34 Me. 187), although the note was not referred to in the mortgage. *Martindale, Conv.* § 453.

403; 1 Washb. Real Prop. 4th ed. top page 8; Wms. Real Prop. pp. 18, 14; Bingham, Sale of Real Prop. pp. 190, 289, 258, 295, 298; *Caldwell v. Copeland*, 37 Pa. 427; 3 Washb. Real Prop. 4th ed. top pp. 397, 398, 408, 404, 481, 483; *Lexington & O. R. Co. v. Kidd*, 7 Dana, 279, 280; *Peisch v. Dickson*, 1 Mason, 11; *Crosby v. Montgomery*, 38 Vt. 238.

Messrs. **Peters & Tyler, Thomas Turner and H. C. Lilly & Son**, for appellees:

The court did right in requiring plaintiffs to elect. The relief sought against Gray is inconsistent with that sought against the other defendants.

United States L. Ins. & T. Co. v. Vattier, 1 Handy, 217; *Tompkins v. White*, 8 How. Pr. 520; Civil Code, §§ 83-85; *Sale v. Crutchfield*, 8 Bush, 646; *Dragoo v. Levi*, 2 Duvall, 520; *Hord v. Chandler*, 13 B. Mon. 408; *McKee v. Pope*, 18 B. Mon. 555; *Bonney v. Reardin*, 6 Bush, 38; *Caldwell v. Caldwell*, 2 Bush, 452; *Hancock v. Johnson*, 1 Met. (Ky.) 245.

The plaintiffs do not state facts sufficient to show their right to maintain an action to quiet title.

Scott v. Means, 80 Ky. 460; *Fraleigh v. Peters*, 12 Bush, 470; 2 Story, Eq. Jur. §§ 826, 859.

By his deed to Plummer and Kincaid, Duckham did not pass the timber, minerals, and mill-seat which he had reserved to himself in the deeds to the McGowans.

Bainbridge, Mines, p. 168.

Bennett, J., delivered the opinion of the court:

The appellants' petition contains three paragraphs: the first against William Gray, the second against the appellees, and the third against John M. Clayton. The allegations of the petition which are common to all the paragraphs are, that on the fourth day of January, 1786, the Commonwealth of Virginia granted to Dean Timmons twenty-two thousand acres of land, which lie in Menefee and Wolfe Counties, this State, and that Thomas Duckham, on the ninth day of June, 1843, he being the owner thereof, sold said survey of land to Edward Kincaid, the appellant's ancestor, and Samuel Plummer, except the tracts previously sold by Thomas Duckham to Powell Rose, James Cox and J. P. McGowan. That on the fourth day of October, 1846, Samuel Plummer sold his undivided interest in said land to Edward Kincaid, who thereby became the owner of the whole, and held and owned said land at the time of his death, except the tracts which he had previously sold to Dr. William Congleton, Spencer and John —, and George Centers. That the appellants, as the children and grandchildren of Edward Kincaid, he having died intestate, inherited said land from him, and that they own and are in the actual possession of the same, except said parcels sold by Edward Kincaid, and the tracts sold by Duckham to Powell Rose, James Cox and J. P. McGowan.

The first paragraph of the petition alleges that Wm. Gray holds a deed to five hundred acres of said land; that the deed purports on its face to have been executed by Thomas Duckham as the attorney in fact of Edward Kincaid, but that said Duckham had no authority from Edward Kincaid to make said con-

veyance, and that the said deed is void, but, nevertheless, cast a cloud upon their title, which the appellants ask the chancellor to remove by declaring said deed to be void, etc.

The second paragraph alleges that the appellees "are setting up some sort of claim to some part or interest in the said balance of said twenty-two thousand-acre tract," under some contract made with Thomas Duckham, the vendor of Edward Kincaid. Appellants also allege that they do not know the exact nature of the appellees' claim, but do know that they are giving out in speeches that they own and have the right to hold, possess and sell portions of said plaintiffs' lands, and also the minerals under and timber upon certain other parts of said survey of twenty-two thousand acres, which minerals and timber belong to these plaintiffs. It is also alleged that the claim of the appellees, although groundless, impairs the value of the appellants' land and casts a cloud upon their title. The chancellor is asked to compel appellees to exhibit any title they may have to said land, or to the minerals and timber under and upon any land lying within the said twenty-two thousand-acre survey; and that the appellants' title be quieted, etc. The third paragraph alleges that John M. Clayton "asserts that he holds title to some portion of the said balance of the twenty-two thousand-acre survey, as the remote vendee of Thomas Duckham, and gives out publicly that he can sell and pass a good title to purchasers, and that these plaintiffs have not a good title," whereby he greatly impairs the vendible value of their estate. They also allege that the claim of Clayton is groundless. They ask that he be required to exhibit his claim of title, and that their title be quieted, etc.

Upon motion of the appellees, the lower court required the appellants to elect to proceed on the first paragraph or second and third paragraphs. The appellants excepting to the ruling of the court, elected, under protest, to proceed on the second and third paragraphs.

Thereafter the appellants amended the second paragraph of their petition. The appellees then entered a general and special demurrer to the second paragraph of the appellants' petition as amended, both of which were sustained by the lower court, and the appellants electing to stand by their pleadings, the second paragraph was dismissed. They have appealed to this court. The amended petition sets out a more specific description of the land claimed by appellants. It also exhibits two deeds of conveyance from Thomas Duckham to James P. McGowan, the first dated the 2d day of February, 1842, and the second dated the 21st day of November, 1842. The first deed conveys a certain boundary within the twenty-two thousand-acre survey, but "reserves" to the grantor "all minerals and mines in the bowels of the boundary" conveyed, "and one half of the timber included in said boundary, and a mill-site on Glady Creek."

The second deed conveys a certain other boundary of land within said twenty-two thousand-acre survey, but reserves to the grantor "one half of all the mines and minerals in the bowels of the earth" within said boundary, and "one half of the timber thereon," except on the south side of the river. On

that side he reserves all of the timber, except that which is "on Swift Camp."

It is alleged in the appellants' amended petition that the minerals and timber claimed in their original petition are the minerals and timber reserved in these two deeds. The special demurrer raises the question of the appellants' right to these minerals and timber. We will dispose of that question first. The appellants' contention is that they are entitled to the minerals and timber reserved by Duckham in said conveyances, by virtue of his deed to Edward Kincaid and Samuel Plummer, dated the ninth of June, 1843, which conveyed to them all of the twenty-two thousand-acre survey of land, only deducting therefrom "what" Duckham had sold and made deeds to prior to that date. In other words, that Duckham's reservations in said deeds, being a landed estate of inheritance in himself, were included in his conveyance of the entire twenty-two thousand-acre survey, which conveyance, to Edward Kincaid and Samuel Plummer, only excepted the surface conveyances previously made by him.

An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are accepted in the conveyance, or "have before been served in ownership, and the right thereto vested in some other person." The surface and the metals and minerals may be a distinct property from each other by separate conveyances from individuals. Bingham, *Sales of Real Property*, p. 288.

Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are landowners. They own separate and distinct corporeal hereditaments. *Caldwell v. Fulton*, 31 Pa. 475.

The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them, in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance. *Adam v. Briggs Iron Co.* 7 Cush. 861.

Also, by the severance each estate is as distinct property in the respective owners as is the property in a two-story house, where the title to the lower story is in one person and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the surface to recover it; also, an action will lie in behalf of the owner of the mineral estate to recover it; also the right of either owner may be barred by the Statute of Limitations.

Now, then, Duckham sold to McGowan two parcels of land out of a larger boundary which he owned. These two parcels of land were each designated and set apart by metes and bounds, thereby becoming separate and distinct tracts of land, not only from each other, but from Duckham's remaining portion of the survey. The title to the surface or soil, however, was only conveyed to McGowan in each of these boundaries, together with such portions of the minerals and timber as above set forth.

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Duckham retained his title to the other minerals and timber, also a mill-site on one of the tracts. The interest that he retained was a separate and distinct interest in the two boundaries, which interest by the said conveyances, by metes and bounds, became separate and distinct from the remaining portion of the survey. Indeed, it not only became a distinct interest from the remaining portion of the survey, but a distinct and separate estate from the surface estate which was conveyed to McGowan. So Duckham owned, after these two conveyances, an absolute estate in all of the remaining portion of the twenty-two thousand-acre survey, and also owned a distinct estate in the other two parcels, consisting of minerals, timber and a mill-site. He sold to Edward Kincaid and Samuel Plummer the remaining survey, which he called, in the deed of conveyance, land. Of course this, by operation of law, passed title within that boundary to the vendees to the center of the earth, and included the minerals therein. In that deed he expressly deducted the parcels of land theretofore conveyed. In these parcels he owned a mineral and timber interest and a mill-site. These parcels were separate parcels from the portions sold to Kincaid and Plummer; also Duckham's interest therein was separate from said portion.

Now, it seems to us clear that the deed from Duckham to Kincaid and Plummer did not embrace the separate and distinct mineral and timber interest and mill-site that Duckham owned in these two tracts of land, which has been previously separated from the portion of the survey sold to Kincaid and Plummer.

Bainbridge, on the Law of Mines and Minerals, American ed., side page 129, says: "When mines form part of the general inheritance, they will, of course, be transferred along with the lands, without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a distinct title to them must also be established."

"In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made."

So it seems that the mineral and timber interest and mill-site reserved by Duckham in these two tracts of land, being a distinct interest from the surface right conveyed, and also being separated from the balance of the twenty-two thousand-acre survey by designated boundaries, it would require apt words to convey these separate interests. To illustrate, suppose the mill-site reserved had had upon it a fine flouring mill, or there had been a valuable stone quarry (which is a mineral interest) opened on the land, or a fine lead or silver seam on it, worth thousands of dollars, would it be contended that the conveyance of the adjoining portion of the survey—we say adjoining, because the two tracts had become separated from it by metes and bounds—would include these interests? Surely not. The unhesitating answer would be that these were distinct and separate interests, which could only be conveyed by apt words.

We think, therefore, that the lower court did right in sustaining the special demurrer to the second paragraph of the petition.

The next question is, Was the general demurrer rightfully sustained?

It is distinctly alleged in the petition that the appellants have the legal title to all the balance of the twenty-two thousand-acre survey, after deducting the parcels previously sold by Duckham and the parcels sold by Edward Kincaid after his purchase, and that they are in the actual possession of said balance, less about one thousand acres occupied by squatters. It is also alleged, in substance, in the first paragraph, that Gray claims title to five hundred acres of this balance under a deed which is void. It is alleged, in the second paragraph, that the appellees claim some of this balance by some kind of title derived from Thomas Duckham. It is also alleged that Clayton claims a part of said land by some kind of title derived from Duckham.

By an Act of the Legislature, approved March 9, 1854, it is provided "that hereafter it shall and may be lawful for any person, having both the legal title and possession of lands, to institute and prosecute suit by petition in equity, in the circuit court of the county where the lands, or some part thereof, may lie, against any other person setting up claim thereto; and if the plaintiff shall be able to establish, and does establish, his title to said land, the defendant shall be by the court ordered and decreed to release his claim thereto," etc. This Act was not repealed by the General Statutes, and is now in full force.

Pomeroy, in his work on Remedies and Remedial Rights, section 369, in treating of actions to quiet titles, says: "The very object of the proceeding assumes that there are other claimants, adverse to the plaintiff, setting up titles and interests in the land or other subject matter hostile to his. Of course, all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants." He further says, on the same page, that "this action has been greatly extended by statute, especially in the western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this condition, the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted against him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment."

So it is clear that by the Act of the Legislature of the ninth of March, 1854, any person having the legal title and possession of land may bring an action in equity in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land. But for this remedy, what remedy would the owner of the legal title and possessor of the land have? He cannot bring an action of ejectment, be-

cause he has the possession of the land. The adverse claim, however worthless it may be, clouds his title, and may be used injuriously to embarrass and belittle it, and to greatly depreciate its market value, for prudent persons would neither buy the property, at a fair value, while thus affected, nor loan money upon its security, although assured by the best lawyers that the adverse claim was worthless. The object of the statute was, therefore, to provide a certain remedy, notwithstanding the fact that equity, independently of the statute, affords substantially the same remedy.

The suit authorized by the Statute of the ninth of March, 1854, is the converse of the legal action of ejectment. See Pomeroy, *supra*. And this court, in *Woolfolk v. Ashby*, 2 Met. 289, having decided that an action of ejectment will lie against as many persons as hold an adverse possession of the land, although each one holds the possession of a distinct parcel from the other, and by a distinct claim of right, it follows that, under the Statute, *supra*, in an action to quiet the title to land, all persons setting up claim thereto, whether or not each claims a separate parcel of the land by distinct right, may be joined in the suit as defendants.

Also, it seems clear that in an equitable action to quiet the title to land, independently of the statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper, to make all adverse claimants defendants. See Pomeroy, *supra*.

In the case of *Scott v. Means*, 80 Ky. 460, the petition did not disclose that there was a controversy between the parties as to the location of the boundary. It simply alleged that the defendants had trespassed upon plaintiffs' lands, and slandered their title. For trespass upon land or the slander of title an action at law for compensatory damages is ordinarily an adequate remedy. Therefore, this court held, in that case, that an action in equity to quiet title and settle the question as to the alleged trespass would not lie. Also, that as the plaintiffs' right in the possession of the land in dispute could be settled by an action at law, such action at law should have preceded an action in the nature of a bill of peace. The other cases relied on by appellees involve the same principle. Those cases are unlike this. Here the appellants, as alleged by them, are the owners of the land, and have the actual possession of it. The appellees are not complained of as trespassers or slanderers of the title, but as adverse claimants of the title, which beclouds the appellants' title, and injures the market value of their land. For this wrong there is no redress, except by an action in equity to quiet title.

We think that the lower court erred in sustaining the general demurrer to the second paragraph of the petition and in ruling the appellants to elect.

For these reasons the judgment of the lower court is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

Holt, J., did not sit.

Petition for rehearing overruled.

NEW HAMPSHIRE SUPREME COURT.

LIME ROCK NATIONAL BANK

v.

W. G. R. MOWRY *et al.*

Charles A. SINCLAIR, Petitioner.

(.....N. H.....)

1. **The assignment as collateral for future advances of a mortgage** executed to secure an existing debt, is not prohibited by a statutory provision that no estate conveyed in mortgage shall be held by the mortgagee for any obligation or liability arising after the execution and delivery of the mortgage.
2. **The mortgagee's acquisition of the**

equity of redemption will not work a merger of the mortgage, if during all the time he owns such equity the mortgage is held by one to whom it had been assigned as collateral security for the mortgagee's debt.

(July 31, 1891.)

EXCEPTIONS by petitioner to rulings of the Trial Term of the Supreme Court for Grafton County (Smith, J.), refusing to vacate a decree foreclosing a mortgage. *Overruled.* The facts are stated in the opinion.

Messrs. Bingham & Mitchell, for petitioner:

This assignment, if treated as a mortgage, as

NOTE.—Absolute assignment, when a mortgage.

An absolute assignment of a mortgage, with an agreement to sell the same to the assignor on receiving the amount intended to be secured, by a certain day, is a mortgage. *Clark v. Henry*, 3 Cow. 324.

Where a mortgagee makes an absolute assignment of his mortgage debt and of the mortgage, such assignment is sufficient to vest in the assignee the full legal title of the mortgage to the mortgaged premises, although no words of inheritance are used. *Barnes v. Boardman*, 3 L. R. A. 786, and *note*, 149 Mass. 106.

Form and sufficiency of assignment.

An assignment in short form on the back of a mortgage may be made by a corporation as well as by an individual, and without the appointment of an attorney appearing in the instrument. *Chilton v. Brooks*, 69 Md. 584.

The omission of the words "of Baltimore City," from the name of the assignor in the assignment of a mortgage is immaterial, where the mortgage itself gives the full name of the assignor corporation, and it also appears on the back of the assignment. *Ibid.*

An assignment neither attested by a witness, nor acknowledged in such manner as to dispense with such attestation, is not sufficient to convey the legal title of the mortgage, but only an equity. *Sanders v. Cassady*, 86 Ala. 246.

And the assignee cannot execute a power of sale thereby given, unless the debt secured has been transferred to him so as to pass the legal title thereto. *Sanford v. Kane*, 8 L. R. A. 724, and *note*, 133 Ill. 199. See *Sanders v. Cassady*, 86 Ala. 246.

So an assignment not under seal without purporting to convey an estate in the land does not confer the mortgagee's title on the assignee so as to authorize him to execute the power of sale contained in the mortgage. *Dameron v. Eskridge*, 104 N. C. 621.

Yet the assignee of a mortgage can enforce it, although there are no apt words of conveyance in his assignment to carry the legal title. *Johnson v. Beard (Ala.)* June 18, 1891; *Martinez v. Lindsay (Ala.)* Jan. 30, 1891.

The validity of the assignment of a mortgage cannot be impeached by the mortgagor in a suit by the assignee to enforce it. *Johnson v. Beard, supra.*

But an action instituted by the assignee may be defeated by the mortgagor by showing that there was no legal assignment. *Salinas v. Pearsall*, 24 S. C. 179.

The mortgage partakes of the negotiability of its principal, the note, without any formal assign-

ment or delivery, or even mention of the former, and the transfer without notice will not be affected by any undisclosed lien or secret trust. *Hagerman v. Sutton*, 8 West. Rep. 312, 91 Mo. 519. See *Carpenter v. Longan*, 38 U. S. 18 Wall. 271, 21 L. ed. 313; *Lewis v. Kirk*, 28 Kan. 497. *Contra* in Minnesota. *Oster v. Mickley*, 35 Minn. 245.

Assignment as collateral security.

Where the assignment of the notes and mortgage was as collateral security, it transferred the legal title, and being for a loan, it constituted a mortgage. *Rice v. Dillingham*, 78 Me. 62. See *Pond v. Eddy*, 113 Mass. 149; *Cutts v. York Mfg. Co.* 18 Me. 191; *Slee v. Manhattan Co.* 1 Paige, 48, 2 L. ed. 557.

The assignment of a mortgage by the mortgagee, as collateral security for his own debt, is in substance a mortgage or pledge of the transferred security. *Gilbert v. Thayer*, 6 Cent. Rep. 218, 104 N. Y. 200.

The foreclosure of the mortgage assigned as collateral, and purchase by the assignee at the sale as against the assignor, work no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right, by payment of the debt, to reclaim and hold his own property discharged of the assignee's lien upon it. *Gilbert v. Thayer*, 6 Cent. Rep. 218, 104 N. Y. 200; *Hoyt v. Martense*, 16 N. Y. 231; *Slee v. Manhattan Co. supra.*

Where by the laws of New York such assignee is the "trustee of an express trust," and may sue without joining the assignor, the judgment is conclusive against the assignor as to the amount of the debt, not only in that State, but in all other States. *Chew v. Brumagen*, 80 U. S. 13 Wall. 497, 20 L. ed. 663. See *Cummings v. Morris*, 25 N. Y. 625; *Considerant v. Brisbane*, 22 N. Y. 369; *St. John v. American Mut. L. Ins. Co.* 18 N. Y. 31.

Where the holder of the assigned mortgage takes a conveyance of the mortgaged property without a judicial sale and releases the mortgage, he may be treated as having wrongfully converted the property of the debtor, who may hold the creditor for the value thereof, and have his debt satisfied and recover the balance. *Kelly v. Matlock*, 85 Cal. 122.

Where a mortgage of real estate has been assigned as collateral security for a debt other than the mortgage debt, the property, as well after foreclosure as before, is held for the benefit of both pledgor and pledgee, and must be disposed of for the benefit of both. The price bid at the sale does not operate as payment upon the debt for which the mortgage was pledged. *First Nat. Bank of Jeffersonville v. Ohio Falls Car & L. Works*, 20 Fed.

it must be, cannot cover future advances from the assignee to the assignor.

New Hampshire Bank v. Willard, 10 N. H. 210; *North v. Crowell*, 11 N. H. 251; *Page v. Ordway*, 40 N. H. 253; *Johnson v. Richardson*, 38 N. H. 353; *Abbott v. Thompson*, 58 N. H. 255.

In *Hoyt v. Martense*, 16 N. Y. 234, the court said, in considering the effect of an assignment, it was, in effect, a mortgage of a mortgage.

See also *Whitney v. McKinney*, 7 Johns. Ch. 146, 2 L. ed. 250.

The mortgage, in the hands of an assignee, is subject to the same objections and equities that it is in the hands of the assignor.

Freeman v. Auld, 44 N. Y. 50; *Olds v. Cummings*, 31 Ill. 188; *Union College v. Wheeler*, 61 N. Y. 88-104.

The assignee, holding a mortgage as collateral security, can recover judgment only for

the sum for which the mortgage can legally be held as collateral.

Underhill v. Atwater, 22 N. J. Eq. 16; *Van Deventer v. Stiger*, 25 N. J. Eq. 224; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Fletcher v. Chase*, 16 N. H. 38.

As to creditors, even if the assignment could be held as security for future advances, the description of the indebtedness should be definite in amount or character.

Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106; *Hart v. Chalker*, 14 Conn. 79; *Bramhall v. Flood*, 41 Conn. 68; *Tully v. Harloe*, 35 Cal. 302.

The assignment of the mortgage as collateral left the general property of the mortgage in Mowry.

Wheeler v. Newbould, 16 N. Y. 398; *Farwell v. Importers & T. Nat. Bank*, 90 N. Y. 488.

Rep. 69; *Brown v. Tyler*, 8 Gray, 135; *Montague v. Boston & A. R. Co.* 124 Mass. 242; *Stevens v. Dedham Inst. for Sav.* 129 Mass. 547; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 N. Y. 176; *Smith v. Bunting*, 86 Pa. 116; *Slee v. Manhattan Co.* 1 Paige, 43, 2 L. ed. 557.

Where the mortgage was foreclosed without making such assignor a party, and the property was sold for more than the claim it was transferred to secure, and was purchased by the assignee, he is liable to account to the assignor for the excess. *Hoyt v. Martense*, *supra*.

Such sale and purchase work no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right to redeem. *Gilbert v. Thayer*, 6 Cent. Rep. 222; 104 N. Y. 200; *Dalton v. Smith*, 86 N. Y. 183.

An agreement by the assignee that in case the mortgaged property is sold he will pay to the mortgagee any sum obtained by him in excess of the debt for which the mortgage was assigned, will not affect the validity of a purchase by the assignee at a foreclosure sale under the mortgage. *Eaton v. Rocca*, 75 Cal. 98. See *Henley v. Hotaling*, 41 Cal. 28; *Manasse v. Dinkelspiel*, 68 Cal. 404.

The guaranty by the owner of a mortgage, upon assigning the same, against loss from the mortgage, was limited to the amount paid on the assignment, and the plaintiff, in delaying unreasonably the collection of the mortgage, released the mortgagee from all liability on his guaranty. *Griffith v. Robertson*, 15 Hun, 345; *Leonard v. Morris*, 9 Paige, 91, 4 L. ed. 630.

Mortgagee cannot transfer the security without the debt.

A mortgagee, not in possession of the premises, has a mere chattel interest, which is transferable by a sale or assignment of the mortgage itself, together with the debt for the security of which it is given, but not by a grant in fee of the land it covers. *Miner v. Beekman*, 1 Jones & S. 95; *Runyan v. Mersereau*, 11 Johns. 534; *Jackson v. Bronson*, 19 Johns. 325; *Astor v. Hoyt*, 5 Wend. 618; *Astor v. Miller*, 2 Paige, 68, 2 L. ed. 318; *Lane v. Shears*, 1 Wend. 433; *Stoddard v. Hart*, 23 N. Y. 558; *Kortright v. Cady*, 21 N. Y. 343; *Waring v. Smyth*, 2 Barb. Ch. 119, 135, 5 L. ed. 580, 586; *Aymar v. Bill*, 5 Johns. Ch. 570, 1 L. ed. 1178.

A sale, pledge or mortgage of collateral interest in the land by which the debt was secured is ineffectual, and passes nothing, either absolutely or conditionally. *Power v. Lester*, 23 N. Y. 533; *Jackson v. Willard*, 4 Johns. 41; *Packer v. Rochester & S. R. Co.* 17 N. Y. 296.

A transfer of the mortgage without the debt is a 13 L. R. A.

nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it. *Merritt v. Bartholick*, 36 N. Y. 45, 1 Trans. App. 64; 3 Pom. Eq. Jur. 186.

The incident cannot be separated from the principal, as the latter always draws with it the former. *Power v. Lester*, 17 How. Pr. 417; *Cooper v. Newland*, 17 Abb. Pr. 844; *Brant v. Clark*, 27 N. J. Eq. 235; *Gausen v. Tomlinson*, 23 N. J. Eq. 405.

The debt cannot reside in one person and the pledge in another. *Aymar v. Bill*, *supra*.

A conveyance by a mortgagee to a third person, of the mortgaged property, retaining to himself the debt intended to be secured, is a nullity. *Devlin v. Collier* (N. J.) May 27, 1891.

Assignment of mortgage debt carries with it the security.

The general rule is familiar that an assignment or transfer of a mortgage debt carries with it an equitable right to an assignment of the mortgage. *Sturtevant v. Jaques*, 14 Allen, 523; *Morris v. Bacon*, 123 Mass. 58; *Batesville Institute v. Kauffman*, 35 U. S. 18 Wall. 151, 21 L. ed. 775; *Carpenter v. Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 313; *Barnes v. Boardman*, 3 L. R. A. 735, 149 Mass. 114.

In some jurisdictions it is held that the mere transfer of the debt carries the mortgage with it. 2 Washb. Real Prop. 3d ed. 114, 118.

This doctrine has not prevailed in Massachusetts. In such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and the latter might obtain a conveyance by a bill in equity. *Wolcott v. Winchester*, 15 Gray, 461, 464; *Young v. Miller*, 6 Gray, 152; *Barnes v. Boardman*, *supra*.

Assignment of a debt carries the mortgage with it, and the mortgage can have no validity apart from the debt other than as an incident to the debt. *Union Mut. L. Ins. Co. v. Slee*, 10 West. Rep. 159, 123 Ill. 57; *Olds v. Cummings*, 31 Ill. 188; *Delano v. Bennett*, 90 Ill. 533; *Towner v. McClelland*, 110 Ill. 542.

An assignment of a note secured by mortgage carries with it the mortgage security. *Wildsmith v. Tracy*, 80 Ala. 258; *Thomson v. Madison B. & A. Asso.* 1 West. Rep. 299, 103 Ind. 279; *Lee v. Clark*, 6 West. Rep. 205, 89 Mo. 553; *Hagerman v. Sutton*, 8 West. Rep. 312, 91 Mo. 519; *Carpenter v. Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 313; *Laberge v. Chauvin*, 2 Mo. 179; *Anderson v. Baumgartner*, 27 Mo. 87; *Mitchell v. Ladew*, 36 Mo. 526; *Watson v. Hawkins*, 60 Mo. 550; *Logan v. Smith*, 62 Mo. 459; *Goodfellow v. Scilwell*, 73 Mo. 19; *Joerdens v. Schrimpf*, 77 Mo. 383; *Boatmen's Sav. Bank v. Grewe*, 84 Mo. 477.

An assignment of a note secured by a special mortgage and vendor's privilege carries with it

The conveyances of June 29 and December 31, 1880, to Mowry, the mortgagee, effected a merger of the legal and equitable estates. This, too, would be the legal effect of his deed of November 14, 1888, to N. S. Mowry.

James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; *Starr v. Ellis*, 6 Johns. Ch. 393, 2 L. ed. 161; *Mills v. Comstock*, 5 Johns. Ch. 214, 1 L. ed. 1061; *Gardner v. Astor*, 3 Johns. Ch. 58, 1 L. ed. 540.

Messrs. J. W. Remick and E. C. Mowry, contra.

Clark, J., delivered the opinion of the court:

This is a motion to vacate a decree for foreclosure of a mortgage by a creditor of the estate of N. S. Mowry, who at his decease was the owner of the equity of redemption in the mortgaged premises. N. S. Mowry died in

the spring of 1889, insolvent. The petitioner became a creditor of N. S. Mowry's estate in October, 1889, by an assignment of a judgment against Mowry and others. The foreclosure proceedings were by bill in equity filed November 6, 1889, in which the administrators upon the estate of N. S. Mowry were made defendants; and at the March Term, 1890, the bill was ordered taken as confessed, and a decree rendered that, unless the defendants pay to the plaintiff, within sixty days from March 18, 1890, the sum of \$24,902.16, with interest from that date, and costs of suit taxed at \$10.75, a writ of possession issue to the plaintiff to put and secure it in possession of the premises. A writ of possession issued May 20, and the plaintiff was put in possession May 21, 1890. At the September Term, 1890, the motion to vacate the decree was made, and denied sub-

both the mortgage and the privilege. *Forstall's Succession*, 39 La. Ann. 1063; *Race v. Bruen*, 11 La. Ann. 34; *Scott v. Turner*, 15 La. Ann. 346; *Jeckel v. Fried*, 18 La. Ann. 132; *Frost v. McLeod*, 19 La. Ann. 80; *Perot v. Levasseur*, 21 La. Ann. 539; *Miller v. Cappel*, 26 La. Ann. 234; *Thomson v. Madison B. & A. Asso.* 1 West. Rep. 289, 108 Ind. 279; *Lee v. Clark*, 6 West. Rep. 205, 89 Mo. 558; *Hagerman v. Sutton*, 8 West. Rep. 812, 91 Mo. 519.

The indorsement of mortgage notes, and the delivery thereof, operate as an assignment of a mortgage securing them, and transfer the same equitable rights in the mortgage that the holder had in the notes. *Converse v. Michigan Dairy Co.* 45 Fed. Rep. 18; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 289, 113 Ind. 373.

The assignee takes subject to all equities, latent or open, of third persons. The "equity" in such a case must be some subsisting claim to or against the thing in action itself, or the fund which it represents. 2 Pom. Eq. Jur. 169; *Davies v. Austen*, 1 Ves. Jr. 247, per Lord Thurlow; *Mangles v. Dixon*, 3 H. L. Cas. 702, 731; *Beebe v. Bank of New York*, 1 Johns. 529, 552; *Bush v. Lathrop*, 22 N. Y. 535; *Schafer v. Reilly*, 50 N. Y. 61; *Union College v. Wheeler*, 61 N. Y. 88; *Greene v. Warnick*, 64 N. Y. 220, 224, 225; *Murray v. Lylburn*, 2 Johns. Ch. 441, 443, 1 L. ed. 440, 444.

The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds. 3 Pom. Eq. Jur. 187; *McClintic v. Wise*, 25 Gratt. 448; *Stevenson v. Black*, 1 N. J. Eq. 338; *Salzman v. Creditors*, 2 Rob. (La.) 241; *Ventress v. His Creditors*, 30 La. Ann. 359; *Waterman v. Hunt*, 2 R. I. 298; *Bryant v. Damon*, 6 Gray, 564; *Warden v. Adams*, 15 Mass. 233; *Cullum v. Erwin*, 4 Ala. 452; *Forwood v. Dehoney*, 5 Rush, 174; *Clowes v. Dickenson*, 5 Johns. Ch. 235, 1 L. ed. 1063; *Pattison v. Hull*, 9 Cow. 74; *Mechanics Bank v. Bank of Niagara*, 9 Wend. 410.

But the following cases hold that they both share ratably: *Donly v. Hays*, 17 Serg. & R. 400; *Dixon v. Clayville*, 44 Md. 573; *McClanahan v. Chambers*, 1 T. B. Mon. 43; *Belding v. Manly*, 21 Vt. 550; *Van Rensselaer v. Stafford*, Hopk. Ch. 569, 2 L. ed. 526.

Assignment of bonds secured by mortgage.

An assignee of bonds secured by mortgage takes subject to the equities existing between his assignor and a purchaser subject to the mortgage, and cannot hold the latter personally liable for the debt where the assignor has entered into a valid agreement that such purchaser shall not be held personally liable. *Duncan v. Finn*, 79 Iowa, 658. 18 L. R. A.

The holder of non-negotiable bonds, secured by mortgage, with coupons attached, indorsed and transferred before due, takes subject to the defenses between the original parties. *Richardson v. Woodruff*, 20 Neb. 132.

The assignee of a bond, with notice of the illegality of the contract which forms the consideration, will not be protected by a declaration of no set-off. *Griffiths v. Sears*, 3 Cent. Rep. 240, 112 Pa. 523; *Duquesne Bank's App.* 74 Pa. 426; *Pom. Eq. Jur.* § 751.

An assignment of a mortgage which did not expressly assign the bond, but stated that the mortgage was made to secure the payment of a certain sum, "according to the conditions of the bond accompanying the same," is a valid assignment of the bond. *Yates County Nat. Bank v. Baldwin*, 43 Hun, 136.

Where an assignee of a bond and mortgage allowed the mortgagee to take the same for the purpose of getting dates, or for some purpose other than to sell, and the mortgagee sold them, it was held that such assignee had not parted with the possession so as to destroy his lien. *Ibid.*

Parties have a right to make a contract giving an assignee of a fractional part of a bond and mortgage priority of payment. *Thayer's App.* (Pa.) 8 Cent. Rep. 479; *Patriok's App.* 105 Pa. 356; *Donley v. Hays*, 17 Serg. & R. 400.

A bond and mortgage, although originally executed for a different purpose and without consideration, are valid and enforceable in the hands of the assignee, where mortgagor executes an agreement consenting to the assignment, and covenants that there is due and unpaid the full amount purporting to be secured by the bond and mortgage. *Houseman v. Bodine*, 122 N. Y. 158.

Assignment of notes secured by mortgage.

The assignment of one or more notes made to the same person and secured by a mortgage operates as an assignment *pro tanto* of the mortgage, and that the holders of the several notes have priority of lien in the order in which their respective demands become due. The notes so assigned stand as so many successive mortgages. *Parkhurst v. Watertown S. E. Co.* 6 West. Rep. 284, 107 Ind. 594; *Studebaker Mfg. Co. v. McCargur*, 20 Neb. 500; *Blair v. White*, 61 Vt. 110; *State Bank v. Tweedy*, 3 Blackf. 447; *Hough v. Osborne*, 7 Ind. 140; *Davis v. Langsdale*, 41 Ind. 399; *Doss v. Ditmars*, 70 Ind. 451; *The Bank of United States v. Covert*, 13 Ohio, 240.

So an indorsee of a part of such notes so secured by mortgage is entitled in equity to payment out of the mortgaged fund, in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to

ject to exception. The petitioner does not charge any fraud on the part of the administrators of Mowry's estate in not resisting the foreclosure nor offer to redeem the mortgage, but, as the right of the petitioner to appear is not questioned, we express no opinion upon that point. The facts stated show no error in the decree of foreclosure, and the motion to vacate was rightfully denied. The mortgage was given January 23, 1877, by the Waumbeck Lumber Company, to W. G. R. Mowry to secure a note dated October 1, 1876, payable on demand, for \$20,282.28, no part of which has ever been paid. April 27, 1878, W. G. R. Mowry assigned the mortgage to the plaintiff, "together with all the debts, claims, and demands upon which the same is predicated, with all the rights thereunto in any wise appertaining," as security for the repayment to the plain-

tiff of \$3,975, and as security for all other sums of money for which he was then indebted or liable, or might thereafter become liable, to the plaintiff. June 29, 1880, Charles G. Smith, assignee in bankruptcy of Waumbeck Lumber Company, conveyed the mortgaged premises to Charles A. Sinclair, and on the same day Sinclair conveyed one undivided half to W. G. R. Mowry, the mortgagee; and on December 8, 1880, he conveyed the other half to McKean and Fletcher; and on December 31, 1880, McKean and Fletcher conveyed their half to W. G. R. Mowry; and on November 14, 1888, W. G. R. Mowry conveyed the premises to N. S. Mowry. Each of these conveyances were made subject to the mortgage from the Waumbeck Lumber Company to W. G. R. Mowry. Upon these facts, as against W. G. R. Mowry, the plaintiff is entitled to a decree for the

those retained by the mortgagee. *People's Sav. Bank of Evansville v. Finney*, 68 Ind. 480; *Shaw v. Newson*, 78 Ind. 336; *Doss v. Ditmars*, 70 Ind. 451. See also *Richardson v. McKim*, 20 Kan. 346; 2 Jones, *Mortg.* § 1699-1701; *Mechanics Bank v. Bank of Niagara*, 9 Wend. 410; *Bryant v. Damon*, 8 Gray, 564; *Wright v. Parker*, 2 Ark. 212; *Monroe v. His Creditors*, 2 Rob. (La.) 280; *Winters v. Franklin Bank*, 33 Ohio St. 250.

Upon assignment of a mortgage securing several notes, one of which is overdue, the assignee takes subject to any equities existing between the mortgagor and mortgagee in respect to the notes not due. *Abele v. McGuigan*, 73 Mich. 415.

Where the mortgagee retains the remainder of a series of notes, the assignee is entitled, as against the mortgagee, without regard to the order in which the notes held by the two parties mature. *Anderson v. Sharp*, 4 West. Rep. 443, 44 Ohio St. 280; *Parkhurst v. Watertown S. E. Co.* 6 West. Rep. 284, 107 Ind. 594. See *State Bank v. Tweedy*, 8 Blackf. 447; *Hough v. Osborne*, 7 Ind. 140; *Davis v. Langsdale*, 41 Ind. 399; *Doss v. Ditmars*, 70 Ind. 451; *Bank of United States v. Covert*, 13 Ohio, 240.

The assignment carries with it the right to payment from the proceeds of the land of the notes assigned in preference to those retained, though the assignment was made without recourse. *Jenkins v. Hawkins*, 34 W. Va. 799.

One of two notes assigned after maturity, the other assigned before maturity to another person, is extinguished where, between the assignments, the assignor takes in exchange a part of the mortgaged property worth more than the note assigned after its maturity. *Massachusetts Loan & T. Co. v. Moulton* (Iowa) Oct. 16, 1890.

Assignee of mortgage takes subject to equities.

The assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but also to all equities which third persons could enforce against the assignor. *Bush v. Lathrop*, 22 N. Y. 535; *Schafer v. Reilly*, 50 N. Y. 61; *Union College v. Wheeler*, 61 N. Y. 86; *Greene v. Warnick*, 64 N. Y. 220; *Crane v. Turner*, 67 N. Y. 437; *Westbrook v. Gleason*, 79 N. Y. 23; *Temple v. Whittier*, 5 West. Rep. 144, 117 Ill. 232; *Ranney v. Hardy*, 1 West. Rep. 52, 43 Ohio St. 157.

And the Recording Act has no application to protect the assignee against a defense founded upon such equity. *Frear v. Sweet*, 118 N. Y. 454; *Schafer v. Reilly*, *supra*.

The assignee of a paid mortgage of real estate takes it subject to the defense that it has been paid, although it is not satisfied of record. *Redin v. Branhan*, 43 Minn. 283.

It is a general rule that the assignee of a chose in 13 L. R. A.

action takes it subject to all equities to which it would be subject in the hands of the assignor. *United States v. Sturges*, 1 Paine, 584; *DeWolf v. Howland*, 2 Paine, 363; *Foot v. Ketchum*, 15 Vt. 258, 40 Am. Dec. 679; *Mott v. Clark*, 9 Pa. 399, 49 Am. Dec. 599; *Murray v. Ijilburn*, 2 Johns. Ch. 441, 1 L. ed. 440; *Kleeman v. Frisbie*, 63 Ill. 484; *Clute v. Robison*, 2 Johns. 595; *Willis v. Twambly*, 13 Mass. 204; *Olds v. Cummings*, 31 Ill. 188; *Davies v. Austen*, 1 Ves. Jr. 249; *Covell v. Tradesman's Bank*, 1 Paige, 135, 2 L. ed. 590.

Although the assignee had no equitable notice of any equitable lien upon the mortgaged premises, the mortgagor may claim the same rights against him, as he could against the mortgagee. *Hubbard v. Turner*, 2 McLean, 534; 2 *Hov. Frauds*, 133; *Norrish v. Marshall*, 5 Madd. 481.

On general principles the mortgagor may claim the same rights against the assignee of the mortgage as he could against the mortgagee. A payment to the mortgagee, subsequent to the assignment, of which the mortgagor had no notice, will be allowed against the assignee. If the mortgagor have any set-off or mutual credit against the mortgagee, it is not affected by the assignment. *Hubbard v. Turner*, *supra*; *Niagara Bank v. Roosevelt*, 9 Cow. 419; 2 *Hov. Frauds*, 133; *Norrish v. Marshall*, *supra*.

But the assignee of a mortgage takes it discharged of the equities of persons not parties to it, of which he has no notice. *Bigley v. Jones*, 5 Cent. Rep. 674, 114 Pa. 510; *Mott v. Clark*, 9 Pa. 399; *Pryor v. Wood*, 31 Pa. 142.

So the rule that the assignee of a mortgage takes it subject to all equities to which it would be subject in the hands of the assignor does not embrace equities or defenses springing from default, or even fraud, of the assignor, committed subsequent to the assignment, and which had no existence and were simply possibilities at the time of the assignment. The rule excludes defenses and rights after the assignment. *Bush v. Cushman*, 27 N. J. Eq. 134; *Cornish v. Bryan*, 10 N. J. Eq. 146; *Losey v. Simpson*, 11 N. J. Eq. 258; *Coster v. Griswold*, 4 Edw. Ch. 374, 6 L. ed. 910; 2 *Lead. Cas. Eq.* Pt. 238.

Nor does the rule include latent equities in favor of third persons in the subject involved in the assignment, of which he had no notice. While it is the duty of the purchaser to inquire of the mortgagor, he is not required to inquire of the whole world as to latent equities. *Silverman v. Bullock*, 98 Ill. 19; *Moore v. Holcombe*, 3 Leigh, 597, 24 Am. Dec. 637; *James v. Morey*, 2 Cow. 298; *Hovey v. Hill*, 3 Lans. 172; *Tison v. People's Sav. & Loan Asso.* 57 Ala. 331; *Livingston v. Dean*, 2 Johns. Ch. 480, 1 L. ed. 457; *Livingston v. Hubbs*, 2 Johns. Ch. 513, 1 L. ed. 470; *Mott v. Clark*, 9 Pa. 399; *Redfearn v. Fer-*

amount of his indebtedness to the plaintiff, for which the mortgage is held as collateral security, and that was the amount allowed in the decree of foreclosure. Assuming that the estate of N. S. Mowry holds both the right of the Waumbec Lumber Company, the original mortgagor, to redeem, and the right of W. G. R. Mowry to fulfill the condition of the assignment to the plaintiff by paying the indebtedness for which the mortgage note is held by the plaintiff as collateral security, these rights being acquired from W. G. R. Mowry, both the estate, and the creditors of the estate, are bound by the terms of the assignment of the mortgage to the plaintiff.

The motion to vacate the decree is based upon the claim that the assignment of the mortgage to the plaintiff was valid only to the extent of \$3,975, the actual indebtedness of W. G. R. Mowry to the plaintiff at the time of the

transfer, and that the stipulation in the assignment covering future indebtedness is repugnant to Gen. Laws, chap. 136, § 3, and inoperative. It is also claimed that the conveyances by Sinclair, June 29, 1880, and by McKean and Fletcher, December 31, 1880, to W. G. R. Mowry, the mortgagee, extinguished the mortgage title by merger, excepting as to the existing indebtedness of W. G. R. Mowry to the plaintiff. The fact that the assignment of the mortgage to the plaintiff covered future advances did not change the character of the debt secured by the mortgage. Section 3, chap. 136, Gen. Laws, provides that "no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted after the execution and delivery of such mortgage."

rier, 1 Dow, P. C. 50; Clute v. Robison, 2 Johns. 566; Olds v. Cummings, 31 Ill. 188; Pryor v. Wood, 51 Pa. 148; Westfall v. Jones, 23 Barb. 10.

On discharge of debt mortgagee regarded as trustee.

The mortgagee or his assigns, after a discharge of the debt or liability, is regarded as a trustee for the mortgagor and his assigns, and holds the property, if at all, under an obligation to reconvey, and thus fulfill that resulting trust. Upham v. Brooks, 2 Woodb. & M. 413; Aymar v. Bill, 5 Johns. Ch. 570, 1 L. ed. 1178.

The assignee of a note and deed of trust securing the same is not authorized to appoint a new trustee, by a provision in the deed empowering the *cestui que trust* "or their legal representatives" to make such appointment. Fuller v. Davis, 63 Miss. 73.

A mortgagee who assigns the debt holds the legal title to the mortgage entirely for the benefit of the assignee, and retains no title which he can assert in any action or proceeding; and payment to the assignee revests all title in the mortgagor. Barnes v. Boardman, 3 L. R. A. 785, and note, 149 Mass. 106.

A mortgagee, or his assigns, is precluded by Ala. Code from claiming title under the mortgage, if the mortgage debt has been paid, although the mortgage and payment were made before the passage of the Act. Abbett v. Page (Ala.) May 20, 1891.

But a mortgagee cannot be required to release one of several lots covered by the mortgage, upon the payment of the proportionate share of such lot; but the whole amount of the mortgage must be paid by the owner of any lot who desires to redeem. Coffin v. Parker, 127 N. Y. 117.

A clause in an assignment of a mortgage, that it is "without recourse . . . in any event whatever," cannot prevent the assignor's liability for a fraudulent representation as to what had been paid to him upon the mortgage. Hexter v. Bast, 126 Pa. 52.

Evidence of payments made to a mortgagee, without suing the mortgagor, at times not specified, is insufficient to defeat the mortgage in the hands of an assignee under an assignment made by the mortgagee in his lifetime. Nau v. Brunette (Wis.) April 9, 1891.

Any assignee of a mortgage is liable to the penalty imposed by Neb. Comp. Stat., chap. 78, § 29, for refusal or neglect to execute a discharge after payment, although no formal assignment is made on the mortgage. Daniels v. Densmore (Neb.) May 8, 1891.

Priority among assignees.

The order of the respective assignments is wholly immaterial upon the rights of priority among the assignees. 3 Pom. Eq. Jur. 184; Winters v. Franklin Bank, 33 Ohio St. 250; Bank of United States v. Co-13 L. R. A.

vert, 13 Ohio, 240; People's Sav. Bank of Evansville v. Finney, 63 Ind. 460; Does v. Dittmars, 70 Ind. 451; Stanley v. Beatty, 4 Ind. 134; Hough v. Osborne, 7 Ind. 140; Murdock v. Ford, 17 Ind. 52; Davis v. Langdale, 41 Ind. 399; Crouse v. Holman, 19 Ind. 30; State Bank v. Tweedy, 8 Blackf. 447; Herrington v. McCollum, 73 Ill. 476; Funk v. McReynolds, 83 Ill. 481; Koester v. Burke, 81 Ill. 496; Vansant v. Allmon, 23 Ill. 30; Flower v. Elwood, 66 Ill. 438; Gardner v. Diederichs, 41 Ill. 158; Walker v. Schreiber, 47 Iowa, 529; Grapengether v. Fejervary, 9 Iowa, 168; Rankin v. Major, 9 Iowa, 297; Hinds v. Mooers, 11 Iowa, 211; Sangster v. Love, 11 Iowa, 560; Maselle v. Sharpe, 13 Iowa, 542; Isett v. Lucas, 17 Iowa, 508; Wood v. Trask, 7 Wis. 568; Marine Bank v. International Bank, 9 Wis. 57; Lyman v. Smith, 21 Wis. 874; Mitchell v. Ladew, 36 Mo. 523; Thompson v. Field, 38 Mo. 320; Ellis v. Lamme, 42 Mo. 158; Richardson v. McKim, 20 Kan. 346; Gwathmey v. Ragland, 1 Rand. 466; Wilson v. Hayward, 6 Fla. 171; Hunt v. Stiles, 10 N. H. 466; Gilman v. Moody, 43 N. H. 239; Phelan v. Olney, 6 Cal. 478; Grattan v. Wiggins, 23 Cal. 16. For a criticism on this doctrine, see Granger v. Crouch, 86 N. Y. 494, 498.

If the assignee of a note first maturing delays in enforcing his security, even though the second and other subsequent notes should have become due and payable, his priority is not thereby lost. Lyman v. Smith, 21 Wis. 674; People's Sav. Bank of Evansville v. Finney, *supra*.

When a judgment at law has been recovered on a note by its holder, the judgment takes the place of the note in the order of priority under the mortgage. Funk v. McReynolds, 83 Ill. 481.

According to this rule it would be impossible for a holder of a note or notes first maturing, to foreclose the mortgage entirely, and by a sale of the premises cut off the rights of the other holders. Cooper v. Ulmann, Walk. Ch. (Mich.) 251; Wilcox v. Allen, 36 Mich. 190; Donley v. Hays, 17 Serg. & R. 400; Hancock's App. 34 Pa. 155; Dixon v. Clayville, 44 Md. 573; Chew v. Buchanan, 30 Md. 387; Andrews v. Hobgood, 1 Lea, 698; Smith v. Cunningham, 2 Tenn. Ch. 565; Ewing v. Arthur, 1 Humph. 537; Parker v. Mercer, 6 How. (Miss.) 220; Henderson v. Herrod, 10 Smedes & M. 631; Bank of England v. Tarleton, 23 Miss. 173; Pugh v. Holt, 27 Miss. 461; Jefferson College v. Prentiss, 29 Miss. 46; Adams v. Lear, 3 La. Ann. 144; Delephine v. Campbell, 52 Tex. 4; Paris Exch. Bank v. Beard, 49 Tex. 358; Robertson v. Guerin, 50 Tex. 817.

An assignment of a certain share in a mortgage, with no agreement as to priority of lien, although the mortgage is for separate instalments, leaves the parties with equal claims and without preference. Jennings v. Moore, 33 Mich. 231.

The assignment of a mortgage given for an existing debt, as security for future advances, is not within the prohibition of the statute. The foreclosure proceedings are based upon the original mortgage debt, and the plaintiff is entitled, as against W. G. R. Mowry, the mortgagee, and assignor of the mortgage, and all parties deriving title from him with notice of the assignment, to a decree for the amount of its claims against W. G. R. Mowry, for which the mortgage, by the terms of the assignment, is held as collateral security, not exceeding the amount of the mortgage debt.

The claim that the mortgage debt became extinguished by merger is not sustained. By the assignment of the note and mortgage to the plaintiff, April 27, 1878, W. G. R. Mowry parted with his title as mortgagee, which he never regained; and, when he acquired the title of the mortgagor two years afterwards, there was no merger, because there was no union of estates.

Exceptions overruled.

Smith, J., did not sit. The others concurred.

ALABAMA SUPREME COURT.

AMERICAN FREEHOLD LAND MORTGAGE CO. of London, Limited, Appt., v.

William B. SEWELL *et al.*

(.....Ala.....)

1. A mortgagor who has conveyed the lands to a third person cannot exercise any election as to redemption from foreclosure sale.
2. A cross-bill for cancellation of a contract sued upon, on the ground of usury, must be dismissed if it fails to offer to do equity by paying principal and legal interest.
3. A loan is an Alabama contract when the application is made, the money paid over to the borrower, and the notes and mortgage executed in that State, although the debt is made payable in New York and the money was sent from that State to the mortgagee's agent in Alabama to be paid over on the execution of the papers.
4. Inconsistency or repugnancy of allegations is waived by failure to demur.

(April 28, 1891.)

APPEAL by complainant from a decree of the Chancery Court for Elmore County dismissing a bill filed to confirm in complainant a title to land acquired by it at a sale under a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. Webb & Tillman and Caldwell Bradshaw, for appellant:

The expression, "No foreign corporation shall do any business in this State, without having at least one known place of business," does not include appellant's loan of money to Sewell.

Christian v. American F. L. Mortg. Co. 89 Ala. 198; 2 Morawetz, Priv. Corp. § 662; *Equitable L. Assur. Soc. v. Vogel*, 76 Ala. 441; *Beard v. Union & A. Pub. Co.* 71 Ala. 60; *People v. Tax Comrs.* 23 N. Y. 242; *Colorado Cooper Mfg. Co. v. Ferguson*, 18 Am. & Eng. Corp. Cas. 178; *Doty v. Michigan Cent. R. Co.* 8 Abb. Pr. 427; *State v. Smith*, 68 Miss. —; *Jahier v. Rascoe*, 62 Miss. 699; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17, 38; *People v. American Bell Teleph. Co.* 29 Am. & Eng. Corp. Cas. 616, *note*.

Sale, and purchase by the mortgagee, is a valid foreclosure until set aside.

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Craddock v. American F. L. Mortg. Co. 88 Ala. 281; *Alexander v. Hill*, Id. 488; *Ezzell v. Watson*, 88 Ala. 122; *Harris v. Miller*, 71 Ala. 26.

The mortgage was an executed contract after foreclosure sale.

Craddock v. American F. L. Mortg. Co. supra. Until set aside, the statutory right of redemption is a mere personal right.

Powers v. Andrews, 84 Ala. 289; *Commercial R. E. & Bldg. Assn. v. Parker*, 84 Ala. 298.

After the sale by Sewell to Whetstone, which was before he filed his answer, he lost all right of election to set aside the foreclosure sale.

Usury is largely a question of intention.

Uhlfelder v. Carter, 64 Ala. 527; *Call v. Palmer*, 116 U. S. 101, 29 L. ed. 560; *Arnold v. Potter*, 22 Iowa, 200; *Eslava v. Crampton*, 61 Ala. 507; *Barr v. Collier*, 54 Ala. 41; *Dozier v. Mitchell*, 65 Ala. 511.

The laws of Alabama, not those of New York, on the subject of usury, govern the case.

Wharton, Conf. L. 2d ed. §§ 505, 505a, 507, 508, 510; *Rorer*, Interstate Law, p. 48; 1 *Randolph*, Com. Paper, §§ 43, 45; 1 *Dan. Neg. Inst.* § 894; *Connor v. Bellamont*, 2 Atk. 382; *Chapman v. Robertson*, 6 Paige, 627, 3 L. ed. 1128; *Arnold v. Potter*, 22 Iowa, 194, 200; *Dugan v. Lewis*, 12 L. R. A. 93, 79 Tex. 246, decided by the Supreme Court of Texas, January 15, 1891; *Scott v. Perlee*, 39 Ohio St. 68; *Kellogg v. Miller*, 2 McCrary, 395, 13 Fed. Rep. 198; *Pancoast v. Travelers Ins. Co.* 79 Ind. 178; *Townsend v. Riley*, 46 N. H. 310; *Fisher v. Otis*, 8 Chand. (Wis.) 88; *Bolton v. Street*, 3 Coldw. 81; *Kilgore v. Dempsey*, 25 Ohio St. 413.

Appellant actively seeking relief must offer to do equity.

1 *Pom. Eq. Jur.* §§ 391, 397; *Tongue v. Nutwell*, 31 Md. 302; *Uhlfelder v. Carter*, 64 Ala. 527, 532; *Eslava v. Elmore*, 50 Ala. 587; *Rogers v. Torbut*, 58 Ala. 525; *Hudnut v. Nash*, 16 N. J. Eq. 553; *Givans v. McMurtry*, Id. 463, 473; *Conover v. Van Mater*, 18 N. J. Eq. 487; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87.

The principles of the foregoing cases apply equally as well when the Statute of Usury declares a forfeiture of the principal amount loaned as when only the interest.

1 *Story*, Eq. Jur. § 301; *Williams v. Fitzhugh*, 87 N. Y. 444; *Mason v. Gardiner*, 4 Bro. Ch. 486; *Fulton Bank v. Beach*, 1 Paige, 433, 2 L. ed. 705.

Messrs. Sample & Gunter for appellees

Coleman, J., delivered the opinion of the court:

The Corbin Banking Company, doing business as bankers in New York City, negotiated a loan between the plaintiff, a corporation under the laws of England, and William B. Sewell, the defendant, a resident citizen of Alabama. The loan was secured by a mortgage on lands in Elmore County, Ala. Under a power of sale included in the mortgage, the land was sold, and plaintiff, the mortgagee, became the purchaser. By the laws of this State a foreclosure of a mortgage, in accordance with its provisions, is a valid, legal foreclosure, and, there being no fraud or undue advantage, is absolute and final against all persons except against the mortgagor or his privies, although the mortgagee himself is the purchaser at his own sale. A mortgagor (or his privies or assignees who have become such before a foreclosure) may disaffirm and avoid the sale and foreclosure when the mortgagee becomes the purchaser, no such authority having been granted in the mortgage, seasonably expressed. The mortgagee also may, by bill in chancery, compel the mortgagor to elect whether he will ratify or disaffirm the sale, and if the sale is disaffirmed, the bill being framed for that purpose, upon sufficient proof the court will decree a foreclosure. Acting under these principles, the plaintiff, having purchased the mortgaged lands at a sale made in pursuance of the terms of the mortgage, filed the present bill, in which the defendant is required to elect whether he will ratify or disaffirm, and, in the event he disaffirms the sale, the court is prayed for a decree of foreclosure. The mortgage and notes are headed at Elmore County, Ala., and purport to have been dated and signed there. By the averments of the bill the mortgage is made a part of the bill. It has this provision in it: "It is further agreed between the parties hereto that the notes herein described and this mortgage shall be governed and construed by and under the laws of the State of Alabama, where the same is made." The note, bearing 8 per cent interest on its face, and interest coupons, are made payable at the office of the Corbin Banking Company, New York City. The defendant William B. Sewell answered the bill, and elected to disaffirm the sale. In his answer he states "that the said transaction was made in the State of Alabama on the 5th day of March, 1887, or about that time;" and this admission is followed with the statement that Gaddis was the agent of the complainant, and acting in its behalf, doing business in this State; and that plaintiff had not complied with the Constitution and laws of the State prohibiting the doing of business by a foreign corporation in the State without having a known place of business and an authorized agent; and further averring there was usury in the transaction; and asked that the answer be taken as a cross-bill; and prayed for affirmative relief. In answer to the cross-bill, the plaintiff denied that the transaction was made in Alabama, but averred that the contract loan was effected wholly in New York; and,

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for further answer to the cross-bill, the plaintiff averred that defendant Sewell, after the filing of the original bill, and before filing his answer and cross-bill, had sold, by lease and quitclaim, all his interest in the land to one William H. Whetstone. A copy of the conveyance to Whetstone, with the certificate of acknowledgment, is made an exhibit to the answer to the cross-bill. Plaintiff then amended its original bill by adding thereto an averment that the contract loan was made wholly in New York City, and not in Alabama. To the bill as amended the respondents answered, admitting the averment of the amendment to be correct, and, by way of answer and plea, set up the New York Statute, which prohibits a greater rate of interest than 6 per cent and which declares all contracts in which usurious interest is charged to be null and void. The pleadings have been stated at length, in order that we may be the better understood in considering the several questions of law discussed and insisted upon in argument. The chancellor dismissed plaintiff's bill and defendants' cross-bill, holding that the contract was governed by the laws of New York, and was null and void.

The foreclosure of the mortgage by sale, under power given in the mortgage, cut off the equity of redemption, as fully as a foreclosure by a decree by the court. The mortgagor in such a case may come into a court of equity, and in this court alone, and have the sale set aside, and thus become reinvested with the equity of redemption. But to obtain this relief, he must offer to do equity. *Garland v. Watson*, 74 Ala. 324; *Harris v. Miller*, 71 Ala. 32; *Craddock v. American L. & Mortg. Co.* 88 Ala. 281; *Alexander v. Hill*, 88 Ala. 487; *Ezell v. Watson*, 83 Ala. 120; *Knox v. Armistead*, 87 Ala. 511.

The purchaser of the equity of redemption succeeds to all the rights of the mortgagor. The court does not set aside the sale on the ground that the equity of redemption still exists in the mortgagor, but on the theory that the mortgagee stands in the relation of a trustee, who has obtained an advantage over his *cestui que trust*, and, out of great caution, a court of equity permits the *cestui que trust* to elect within a reasonable time whether he will disaffirm the sale. *Thomas v. Jones*, 84 Ala. 304. After the foreclosure there is no property right in the mortgagor; nothing that can be levied on or sold or assigned. We do not now refer to the statutory right of redemption amended by the Acts of 1888-89, p. 764, but to the redemption rights of the mortgagor growing out of the transaction under consideration. He has the option to ratify or disaffirm, and no one who was not the owner of the equity of redemption, or his privies, at the time of the foreclosure by sale, and who has not in some way estopped himself, can assert this election. The only purpose and effect of a decree setting aside the sale is to restore to him the equity of redemption, and this will be done only upon his doing equity. If, therefore, after the foreclosure of the mortgage, the mortgagor sells and conveys the lands to a third person, he is not in a position to ask the court to

grant this relief, or to exercise any election in the matter. *McCall v. Mash*, 89 Ala. 487. If the bill had been amended under Chancery Rule 48, and averred that after the filing of the bill, and before the respondent filed his answer and cross-bill, the respondent had sold and conveyed the lands to William H. Whetstone, and the averments had been sustained by proof, we would hold that defendant was estopped from asserting the right of election, and complainant would have been entitled to a decree confirming the foreclosure; or complainant might have dismissed his bill without prejudice, and, the mortgage being valid and fully executed, could have successfully maintained a suit in ejectment for the recovery of the land, without interference by a court of equity, at the suit of the mortgagor. An answer is intended merely to bring forward a defense to the bill or cross-bill, as the case may be, and the only relief granted upon a mere answer is that the defendant be dismissed. If proof had been offered to sustain this ground of defense,—which we do not find in the record,—not having been charged in the bill, no affirmative relief on this ground could be granted, for the want of proper averment. It has been settled by numerous decisions that he who comes into a court of equity for relief must do equity, and this rule has been strictly applied in all cases when the complainant has applied to be relieved from a charge of usurious interest. The same rule is applied to a respondent who seeks affirmative relief by a cross-bill. When the respondent prayed in his cross-bill for the cancellation of the contract, failing to offer to do equity, by offering to pay the principal and legal interest, his cross-bill was without equity, and should have been dismissed. *Fulton Bank v. Beach*, 1 Paige, 429, 2 L. ed. 703; 1 Pom. Eq. Jur. § 391; *Mobile Branch Bank v. Strother*, 15 Ala. 51; *Hudnit v. Nash*, 16 N. J. Eq. 553; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87; *Eslava v. Elmore*, 50 Ala. 587; *Rogers v. Torbut*, 58 Ala. 525.

The important question is to determine what law governs the contract, and to do this the first inquiry is to ascertain the place of the contract. The facts in the case of *Farrrior v. New England Mortg. Secur. Co.*, 88 Ala. 277, were almost identical with those in the present case. In the second paragraph of the opinion in that case this court said: "The bill shows on its face with sufficient certainty that the notes and mortgage were presumptively executed and delivered in this State. They all bear date April 13, 1886, the notes and mortgage alike being dated in Alabama. There is contained, moreover, in the body of the mortgage this declaration: "It is further agreed between the parties hereto that the notes herein described and this mortgage shall be governed and construed by and under the laws of the State of Alabama, where the same is made:" the word, "made," as here used, obviously meaning "executed," and the latter word involves the act of delivery. The acknowledgment, moreover, taken, before the notary, imports, in express words, that the grantor executed the mort-

gage on the day it bore date. . . . It was immaterial, therefore, that the notes were made payable in New York. The loan of the money and the taking of the security by mortgage were prima facie executed in Alabama."

The averments of the original bill in this suit are substantially the same. Does the proof sustain these allegations, or does it support the amendment to the bill, which alleges the transaction to have been executed in New York? There can be no doubt that the evidence fixes Alabama as the *locus contractus*. The presumption arising from the written instruments is fully sustained by the facts testified to by Gaddis, none of which are disputed in any way by the testimony of any other witness. The application for the loan was made in Alabama; the money was paid to the borrower in Alabama, upon the execution of the notes and mortgage, which was done in Alabama, and at the time of their execution and in consideration thereof. Prior to that time all that had been done was merely preliminary. Some of these preliminary acts, such as making out the application, had been performed in Alabama; others, such as the payment of the money by the loan company to the Corbin Banking Company, were done in New York. The Corbin Banking Company did not receive the money from the lender, or hold it as the agent of the borrower. As yet, the borrower had no claim upon it, and the Corbin Company was not responsible to the borrower for its use. The check sent out to Alabama was payable to Gaddis, not to Sewell, the borrower. It was to be paid over to the borrower after he had executed the contract by giving a note and mortgage upon the property designated in the application, and which was situated in Alabama; but, until this was done, there was no contract for the loan to Sewell, which Sewell could enforce against anyone. The negotiation ended in a contract when the note and mortgage were executed by Sewell. The proof shows that the note and mortgage were not made and sent to New York for delivery before the payment of the money, but the contrary is true. The money was sent out to Alabama before the execution of the notes and mortgage, and then and there paid over upon their execution. Until then the money was not subject to his order. Gaddis further testifies that, by previous arrangement with the Corbin Banking Company, he was paid in cash by the company, for his services in procuring the loan, 3 per cent on the amount loaned. He further says: "I received the mortgage and notes from said Sewell at the instance of the Corbin Banking Company of New York, and sent them to the Corbin Banking Company in New York." "I had the mortgage recorded after it was delivered to me."

Having arrived at the conclusion that the contract was made in Alabama, the stipulation to pay 8 per cent interest was in accordance with the *lex loci contractus*. If a valid contract where made, it is, as a general rule, valid everywhere. Under a valid contract, parties may agree for the payment of such

rates of interest as may be allowed by the law of the place of making or performance of the contract. This proposition is conceded. *Depau v. Humphrys*, 8 Mart. (N. S.) 27; *Andrews v. Pond*, 38 U. S. 13 Pet. 78, 10 L. ed. 67; 2 Kent, Com. § 460; *Hanrick v. Andrews*, 9 Port. (Ala.) 80; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *Hitchcock v. United States Bank*, 7 Ala. 433.

Proof without allegation, or allegation without proof, does not authorize relief. The *allegata* and *probata* must correspond, and both be sufficient. Are the pleadings in condition to entitle plaintiff to the benefit of the conclusion reached from the evidence as to the *locus contractus*? We have stated them as they appear in the record. The original bill averred that the contract was made in Alabama. By adding an amendment, it was averred that the contract was made in New York. The first averment was not stricken out. Both averments are in the bill, inconsistent and repugnant to each other as they are. The answer is in the same condition. The original answer to the original bill admitted and averred that the contract was made in Alabama, and the defense was usury, under the law of Alabama, and also that the contract was void, upon the ground that complainant had "no known place of business or authorized agent, as required by the Constitution and laws of Alabama." To avoid the effect of this defense, undoubtedly, the bill was amended so as to aver the contract was made in New York. To meet the force of the amendment made to the bill, respondent, both by answer to the amendment and plea, admitted and set up that the contract was made in New York, and pleaded the New York Statute, which declares contracts for a higher rate of interest than 6 per cent to be null and void. The original answer remains as first drawn, admitting and averring that the contract was made in Alabama. No objection was taken by either party for inconsistency in the pleadings. We know the distinguished counsel representing the parties to this cause did not overlook or fail to appreciate the condition of the pleadings. They were left in this condition, no doubt, intentionally. At the time the pleadings were framed, and when the cause was submitted for decree in the chancery court, no adjudication had been made by this court construing the constitutional and statutory provisions, which prohibited the doing of any business in this State by a foreign corporation without having "a known place of business and an authorized agent" in this State. Previous decisions of this court had declared the constitutional provision self-executing, and the learned counsel did not know and could not tell what was necessary to be done in order to comply with the constitutional requirement. Plaintiff evidently was preparing to meet whatever construction the court might place upon the evidence in construing the law in regard to foreign corporations, and respondents' object apparently was to force plaintiff to shipwreck in either aspect, and for this purpose admitted that the contract was made in Alabama, or in New York, as

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plaintiff might aver. If the proof showed that it was an Alabama contract, then respondents, for a defense, pleaded a non-compliance with the Alabama laws; if the proof showed that it was a New York contract, then defendants would insist that the contract was void under the New York Statute. Whether correct or not as to the purpose of counsel, the pleadings are as stated, and the rights of the parties under them as they are must be adjudicated. An amendment to a bill is a mere continuation, and the whole is but one bill. In the case of *Lockett v. Hurt*, 57 Ala. 200, the bill was filed in a double aspect—*first*, asserting a right to redeem lands under a sheriff's sale; and, *second*, asserting the invalidity of the sheriff's sale. This court held that the plaintiff was entitled to relief. In the case of *Ray v. Womble*, 56 Ala. 86, referring to the case of *Lockett v. Hurt*, *supra*, it was held that the inconsistency of the bill in the latter was not inquired into, because the assignments of demurrer did not embrace the cause of repugnancy in the bill. We hold that the failure of the defendants to demur to plaintiff's bill, or otherwise object to it, on account of inconsistent or repugnant allegations, was a waiver of the defect; and, if the proof shows that plaintiff was entitled to relief under either aspect of his case, the court below erred in not granting relief. Our conclusion has been that the *locus contractus* was Alabama, and that consequently the New York Statute was no defense.

We are further confirmed in our conclusion that plaintiff is entitled to relief by the leading authorities relied on by both appellant and appellees to sustain their respective contentations. The facts in the case of *Chapman v. Robertson*, 6 Paige, 627, 8 L. ed. 1128, were that Robertson, a citizen of New York, being in England, applied to Chapman for a loan of £800 to be secured by bond and mortgage on lands in New York. It was agreed that Robertson should return to New York and execute his bond and mortgage, and have the same recorded, and transmit it to complainant in England, and, upon receipt of the security, the £800 were to be deposited in London, with Robertson's bankers, for his use. On a bill filed in New York, the same defense was made as in the present case, viz., that the contract was made in England, and the money payable in England, and, being in violation of the Usury Laws of England, the contract was void. The court held that, the security being upon land situated in New York, the place of the domicile of the mortgagor, although the money was payable in England, the contract was governed by the laws of New York, and the plaintiff was granted relief. The conclusion of this decision has been followed in other courts, and adopted as a sound construction of the law applicable in such cases. *Dugan v. Lewis*, 12 L. R. A. 93, 79 Tex. 246; *New England Mortg. Secur. Co. v. McLaughlin* (in MS., from Supreme Court of Georgia, October Term, 1890); *Boone, Mortg. § 86*; *Hitchcock v. United States Bank*, *supra*.

We are aware that the soundness of the

reasoning in the decision in *Chapman v. Robertson*, *supra*, has been questioned, and Jones, in his work on Mortgages (vol. 1, §§ 660, 661), says it has been overruled. Most of the authorities which criticise the principle of law laid down, generally concede the correctness of the conclusion of the learned chancellor who rendered the decision in the case of *Chapman v. Robertson*. Judge Story (Conf. L.) in his criticism (sec. 293c), referring to the case of *Chapman v. Robertson*, says: "The decision itself seems well supported in point of principle; for the parties intended that the whole transaction should be in fact, as it was in form, a New York contract, governed by the laws thereof, *and the repayment of the debt was there to be made.*" The italics are ours. There are no facts in the case, except those which arise from the making of the note and mortgage in New York, which authorize the assumption that the money was to be repaid in New York. The two differ as to the place of payment; Story holding it to be a New York contract, and consequently the place of payment presumptively was in New York; the former holding that, as no place of payment was fixed, the law fixed it in England; but further held that although, as a mere personal contract, it would be wholly inoperative until it was received by the lender in England, where the money was then to be deposited with the borrower's banker for his use, yet, on account of the character of the property, being real or heritable property, and the further fact that the mortgage was executed in New York upon property in that State, and being valid by the *lex situs*, which was also the law of the domicile of the mortgagor, it was the duty of the court to give full effect to the security, without reference to the Usury Laws of England, which neither party intended to evade by the execution of the mortgage upon the lands in New York. It is insisted by appellant that the rule declared in *Chapman v. Robertson* is fully sustained by principle and authority, and applies in the present case; and, on the other hand, it is insisted by appellees that *Chapman v. Robertson* is not based upon sound principles of law, has been overruled, and that Story's criticisms are well founded. We have cited both authorities, because both sustain our conclusion, so far as granting relief to plaintiff.

In the case of *Hitchcock v. United States Bank*, *supra*, the court, referring to the case of *Chapman v. Robertson*, 6 Paige, held that the facts of the case were sufficient to fix New York as the *locus contractus*. It says: "There the facts were substantially the same as in the preceding case, with the additional fact (which also exists in this case) that a mortgage was executed by a debtor on lands lying in New York, the place where the contract was made, though to be performed in England." The court further held that "the cases cited from 8 Mart. (N. S.) [*Depau v. Humphrys*, *supra*], and 6 Paige are identical with this, and, in our opinion determine the law correctly." The italics are ours. If the principles declared in the case of *Chapman v. Robertson* are correct, it is the duty of this 13 L. R. A.

court to hold the security valid, without reference to the Usury Laws of New York. On the other hand, if the facts of the case in *Chapman v. Robertson* are sufficient to fix the *locus contractus* in New York, as held by Story, and by this court in 7 Ala., *supra*, then the facts of the case under consideration, as we have shown, are much more potent to fix the *locus contractus* in Alabama; and, this being established, it is conceded the parties could contract for either rate of interest, without regard to the Usury Laws of the place of payment. The case before us does not require an adjudication of the question whether, when the *locus contractus* and *locus solutionis* is wholly in the same State, and where usurious contracts are declared void by statute, and the debt is secured by a mortgage upon property in another State where a higher rate of interest is legal, the parties may legally contract for the higher rate. Anything we might say on this subject would be regarded as mere dictum, inasmuch as we hold the present contract to have been made in Alabama, and in this respect the conclusion of this court differs from that reached in the case of *Dugan v. Lewis*. The case of *Dugan v. Lewis*, *supra*, was very similar to the case under consideration, and, if the facts had been detailed literally, probably the two would be identical in all respects. The Texas case regarded New York as the *locus contractus* and *locus solutionis*, and followed *Chapman v. Robertson*, *supra*, citing other authorities sustaining it. Judge Henry, by whom the opinion in the Texas case was rendered, brings forward, as an additional argument, this proposition, founded upon the doctrine that the contracting parties have the right to stipulate for the rate of interest legal at either of the two *loci*. He says there is no reason why their making their contract in one State instead of in the other, nor why their making it payable in one instead of in the other, should have a controlling influence over the question. Doing either will, in the absence of other evidence, serve to show their purpose, and control the result. But not so when they otherwise distinctly provide, or when, from other facts, their intention can be more satisfactorily ascertained. The general rule is, the validity of a contract, is determined by the place of the contract, and the intention of the parties only looked to in construing the contract, or, as forcibly put in brief of counsel, the "venue of the agreement determines its validity, and not the venue of the intention." *Cubbedge v. Napier*, 62 Ala. 522. The necessities of trade, commerce, and progress may demand that the principle of *mutatis mutandis* be expanded and applied to other things "than names, offices, and the like." The evidence fails to establish that the plaintiff charged any higher rate of interest than 8 per cent. There is no evidence tending to show that plaintiff knew of, was connected with, or in any manner interested in, the commissions paid, or agreed to be paid, to Gaddis or the Corbin Banking Company to procure the loan. *Guin v. New England Mortg. Secur. Co.* (Ala.) 8 So. Rep. 888; *Call v. Palmer*, 116 U. S. 101, 29 L. ed. 560. Under the recent de-

cisions of *Nelms v. Edinburgh A. L. Mortg. Co.* (Ala.) and *New England Mortg. Secur. Co. v. Ingram* (Ala.), both in MS., the averments and proof show a compliance with the law which requires that foreign cor-

porations shall have a known place of business and authorized agent.

Reversed and remanded.

Walker, J., did not sit.
Rehearing denied.

NEW YORK COURT OF APPEALS.

Cornelia GILMAN, *Reept.*,

v.

Preble TUCKER, *Appt.*

(..... N. Y.)

1. A statute is void as depriving one of his property without due process of law which provides that if a title to real estate, purchased at execution sale, is, at the suit of the judgment debtor, adjudged void, the judgment shall be of no effect unless within twenty days the plaintiff pays to the purchaser at such sale or his grantee the amount of the bid, with interest and costs of defending the title acquired, and that, in the event of plaintiff's failure to pay, the title shall be valid in the grantee; especially so where the judgment debtor would derive no benefit from the payment because the annulment of the

sale would revive the lien of the original judgment, and an assignee has a right to recover from his grantee the amount paid for the land.

2. Property rights are created by the rendition of a judgment, which the Legislature has no power to reach and destroy.

(October 6, 1891.)

APPEAL by defendant from an order of the General Term of the Superior Court for the City of New York, affirming an order of the Special Term, which denied his motion for an order declaring the judgment obtained by plaintiff to be of no force or effect because of plaintiff's failure to comply with the provisions of Code Civ. Proc., § 1440. *Affirmed.*

The facts are stated in the opinion.

NOTE.—The doctrine of caveat emptor applies to execution sales.

The doctrine of *caveat emptor* applies to every purchaser of real estate at a sheriff's sale on execution. *Froet v. Yonkers Sav. Bank*, 70 N. Y. 553; *Freeman, Executions*, 517, § 310; N. Y. Code, § 1440; N. Y. Const. art. 1, § 6; *Westervelt v. Gregg*, 12 N. Y. 209; *Cooley, Const. Lim.* 335; *Woodcock v. Bennett*, 1 Cow. 711; *Day v. Bach*, 87 N. Y. 56; *Code Civ. Proc.* § 1479; *Place v. Riley*, 98 N. Y. 1.

Section 1440 of the New York Code, as amended by § 2, chap. 681, of the Laws of 1881, has no application where relief is sought against a fraudulent act of the defendant. *McIntyre v. Sanford*, 2 N. Y. Civ. Proc. 306.

Reluctance of the court to annul a statute.

Courts are extremely reluctant to pass upon the constitutionality of a legislative enactment, and in an early case *Mr. Justice Johnson*, speaking for the New York Court of Appeals, said: "We ought not to pass upon the question of the constitutionality of a statute, unless the determination of the point is necessary to the determination of the cause." *Free v. Ford*, 6 N. Y. 176.

Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. *Allor v. Wayne County Auditors*, 43 Mich. 76.

Before the judiciary can with propriety declare an Act of the Legislature unconstitutional, a case should be presented in which there is no rational doubt. *Bank of Newbern v. Taylor*, 1 Law Repos. 246; *Ex parte M'Collum*, 1 Cow. 550; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44.

The determining of a question, involving the inquiry whether an exercise of power by the legislative department of the State is constitutional, is readily conceded to be not only a matter of delicacy, but of grave import, and demands the most deliberate and mature consideration. It should not, moreover, be decided but in cases of clear necessity, and where the character of the act done is in plain and obvious conflict with the Constitution. 18 L. R. A.

It has been aptly said to be an inquiry, "whether the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people, as expressed in the Constitution." *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 542.

Where a judge is satisfied upon full consideration that an Act of the Legislature is contrary to the Federal Constitution, the supreme law which he is bound to obey, and which must prevail over any Act that comes in conflict and cannot stand with it, or is for any other reason invalid, he has no choice; and all that is left him is honestly and fearlessly to do his duty from the faithful discharge of which no upright judge can shrink if he would. On the other hand, a judge should not suffer himself to be betrayed to pronounce an Act unconstitutional or invalid on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a just and proper sense of judicial duty. *Regents of University v. Williams*, 9 Gill & J. 365, 81 Am. Dec. 72.

It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles. *Ham v. M'Claws*, 1 Bay. 98.

Nor will a court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who has therefore no interest in defeating it. *People v. Besselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *Cooley, Const. Lim.* 197.

A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the Constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the Constitution of the United States or of the State. *Com. v. Clapp*, 5 Gray. 97.

A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provisions of the Federal or State Constitution. *Com. v. Maxwell*, 27 Pa. 444, 456; *Cooley, Const. Lim.* 5th ed. 211, and *note*.

Messrs. Esek Cowen and Charles J. Hardy, for appellant:

Section 1440 of the Code of Civil Procedure is not a violation of any constitutional provision of this State, or of the United States.

By it a party having paid and extinguished the debt of a defendant in an execution, on receiving a deed of the debtor's land, if the debtor resumes the title to the land, he must pay back the amount of the debt. In other words, the person paying the debt, in case of the failure of his title, is given a species of equitable lien on the debtor's land, and is not to be divested of the title by the debtor, unless that lien is paid.

See *McIntyre v. Sanford*, 89 N. Y. 684.

The Legislature may constitutionally pass laws which render valid and legal the doings of public officers who have exceeded their authority, although by said law individuals may be deprived of vested rights.

Smith, Com. on Const. Constr. 409.

Where the Legislature might, without any violation of the Constitution, have authorized certain conduct on the part of public officers, it may ratify and validate such conduct by a subsequent Act.

Bell v. Vanderbilt, 67 How. Pr. 340; *Ensign v. Barse*, 10 Cent. Rep. 254, 107 N. Y. 329;

What is due process of law.

What constitutes due process of law has been exhaustively defined in *Desty's Federal Constitution*, at page 282. The term is construed to mean such an exertion of the powers of government as the settled maxims of the law permit and sanction. *Bertholf v. O'Reilly*, 8 Hun, 16, 18 Am. L. Reg. N. S. 119; *Ex parte Ah Fook*, 49 Cal. 402.

It simply requires that a person should be brought into court and have an opportunity to prove any fact for his protection. *People v. Essex County Suprs.* 70 N. Y. 229.

It means law in its regular course of administration through courts of justice (*Baker v. Kelley*, 11 Minn. 480; *Rowan v. State*, 30 Wis. 128; *State v. Becht*, 23 Minn. 413), a timely and regular proceeding to judgment and execution. *Dwight v. Williams*, 4 McLean, 586.

It generally implies and includes parties, judge, regular allegations, and a trial according to some settled course of judicial proceedings (*Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372; *Huber v. Rely*, 53 Pa. 112; *Rees v. Watertown*, 86 U. S. 19 Wall. 122, 22 L. ed. 70; *Westervelt v. Gregg*, 12 N. Y. 202), a legal proceeding under direction of a court (*Newcomb v. Smith*, 1 Chand. 71); 'intending to secure the right of trial according to the forms of law' (*Parsons v. Russell*, 11 Mich. 113), the law of the land (*Re Meador*, 1 Abb. U. S. 331; *Den v. Hoboken Land & Imp. Co.* *supra*; *James v. Reynolds*, 2 Tex. 251); a present existing rule, and not an *ex post facto* law (*Hoke v. Henderson*, 4 Dev. L. 15; *Taylor v. Porter*, 4 Hill, 146; *Wynehamer v. People*, 13 N. Y. 408; *Norman v. Helst*, 5 Watts & S. 171; *Den v. Hoboken Land & Imp. Co.* *supra*); a law existing at the time of the vesting of rights. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 658, 7 L. ed. 558; *Osborn v. Nicholson*, 80 U. S. 13 Wall. 682, 20 L. ed. 695; *Taylor v. Porter*, *supra*; *Wynehamer v. People*, 13 N. Y. 378.

That it means a trial according to some settled course of procedure is not universally true. *Greene v. Briggs*, 1 Curt. C. C. 311; *Den v. Hoboken Land & Imp. Co.*, *Hoke v. Henderson*, and *Taylor v. Porter*, *supra*; *Vanzandt v. Waddel*, 2 Yerg. 260; *State Bank v. Cooper*, Id. 599; *Jones v. Perry*, 10 Yerg. 59.

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Duanesburg v. Jenkins, 57 N. Y. 177; *Horton v. Thompson*, 71 N. Y. 522; *People v. McDonald*, 69 N. Y. 363.

Mr. Everett P. Wheeler, with **Messrs. Tucker, Hardy & Wainwright**, also for appellant:

The Legislature had power to regulate the form of the execution, and it also had power to regulate the remedy of parties aggrieved by defects of form.

This is in strict analogy to the authorities which hold that the Legislature has power to pass a statute curing defects in proceedings for the sale of property for non-payment of taxes or assessments.

Bowns v. May, 120 N. Y. 357. See also *Terrel v. Wheeler*, 123 N. Y. 76; *Clement v. Jackson*, 92 N. Y. 591; *Ensign v. Barse*, 10 Cent. Rep. 254, 107 N. Y. 329; *Williams v. Albany County Suprs.* 122 U. S. 154, 30 L. ed. 1088; *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473; *People v. Turner*, 117 N. Y. 227.

Previous to 1827 it was the law of this State that a mortgage or other security taken upon a loan of money at a usurious rate was void. Nevertheless it was also the law that a party seeking equitable relief in reference to such mortgage or security was obliged, as a condition of obtaining this relief, to tender the amount

It does not necessarily import a jury trial (*Re Meador*, 1 Abb. U. S. 317), but includes summary remedies. *Martin v. Mott*, 25 U. S. 12 Wheat. 19, 6 L. ed. 537; *United States v. Ferreira*, 54 U. S. 13 How. 41, 14 L. ed. 42; *Re Meador and Den v. Hoboken Land & Imp. Co.* *supra*.

Civil proceedings for contempt are not included. *State v. Becht*, *supra*.

A statute making the property owner liable for damages resulting from the illegal use of property by a tenant is valid. *Bertholf v. O'Reilly*, 8 Hun, 16, 18 Am. L. Reg. N. S. 124; *Dobbins v. United States*, 96 U. S. 395, 24 L. ed. 637.

An assessment for grading and improving streets is not a taking of property without compensation, or without due process of law. *People v. Brooklyn*, 4 N. Y. 419.

Private property may be taken by a commander in war in case of exigency, but the case must be urgent. *Mitchell v. Harmony*, 54 U. S. 13 How. 115, 14 L. ed. 75. And see *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Clark v. Mitchell*, 64 Mo. 564.

Provisions for searches and seizures to aid in the collection of the revenue are not repugnant to the Fourth Amendment to the Federal Constitution. *Re Platt*, 7 Ben. 261; 19 Int. Rev. Rec. 132; *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 277, 15 L. ed. 374; *Ames v. Port Huron Log D. & B. Co.* 11 Mich. 139.

So, processes for seizure and assessment are within the discretion of the Legislature (*Pullan v. Kinsinger*, 2 Abb. U. S. 84; *Davidson v. New Orleans Admrs.* 96 U. S. 97, 24 L. ed. 616), but Congress has no power to provide for the absolute forfeiture of land as a penalty for the non-payment of taxes, without any process. *Martin v. Snowden*, 18 Gratt. 100.

A Confiscation Act does not authorize seizure and confiscation without due process of law. *Hodgson v. Millward*, 3 Grant, Cas. 406.

Congress has no power to organize a board of revision to nullify confirmed titles. *Reichert v. Feips*, 73 U. S. 6 Wall. 160, 18 L. ed. 849.

A trial before a board of election officers is not due process of law. *Huber v. Rely*, 53 Pa. 112.

By "without due process of law" is meant all the guarantees set forth in the Sixth Amendment. *James v. Reynolds*, 2 Tex. 251; *Jones v. Montes*, 15 Tex. 353.

which he had actually received, with legal interest.

Livingston v. Harris, 3 Paige, 527, 3 L. ed. 261; *Tupper v. Powell*, 1 Johns. Ch. 439, 1 L. ed. 203; *Fanning v. Dunham*, 5 Johns. Ch. 122, 1 L. ed. 1080.

This would seem to be in complete analogy to the present case. A statute may be constitutional in part, even though there are constitutional objections to another part.

Sedgw. Stat. Const. 413, 414; *People v. Green*, 58 N. Y. 295.

The requirement that the plaintiff shall repay to the defendant the amount due at the sale is valid, for the effect of this payment was undoubtedly to extinguish a debt due from the defendant in the first suit, the plaintiff in the second.

McIntyre v. Sanford, 89 N. Y. 634, 2 N. Y. Civ. Proc. 306.

Mr. Charles E. Hughes, with **Mr. George H. Fletcher**, for respondent:

The Amendment of 1881, to section 1440 of the Code of Civil Procedure, authorizes an unlawful deprivation of property and is unconstitutional.

See *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542; *Taylor v. Porter*, 4 Hill, 140; *Westerell v. Gregg*, 12 N. Y. 202.

If the Legislature cannot take the property of A and give it to B, it cannot compel A to pay sums that he does not owe under penalty of forfeiture of property.

It is difficult to perceive how any equitable claim can exist against anyone for the cost of void proceedings.

Cooley, Taxn. 2d ed. p. 553, note 1.

The attempt of the Legislature to charge property with the expenses of an invalid proceeding *in invitum* against the owner, is unconstitutional and void.

Bowe v. U. S. Reflector Co. 36 Hun, 407; *Weston v. Watts*, 45 Hun, 219; *Union Distilling Co. v. Union Pharmaceutical Co.* 6 N. Y. Supp. 540.

Where a betterment statute went so far as to attempt to create a lien upon the property of the adjudged owner for the purchase money without reference to its amount or to the benefit which the owner had derived, the Act was held void.

Madland v. Benland, 24 Minn. 372.

No a tax statute which had been construed as giving the holder of an invalid tax title a lien for "the money paid upon the sale" without regard to the question whether the owner was legally liable for the whole of the purchase money, as representing a valid obligation, was held void if such were the proper construction.

Hart v. Henderson, 17 Mich. 218.

It is not competent by legislation to bring into existence and establish against a party a demand which previously he was neither legally nor equitably bound to recognize and satisfy.

Cooley, Const. Law, 327; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

The Statute makes no provision for a judicial inquiry or for a judicial determination of the facts upon which the forfeiture is predicated and is therefore void.

See 2 Kent, Com. 13; *Wynehamer v. People*, 18 N. Y. 378; *Taylor v. Porter*, 4 Hill, 140; 18 L. R. A.

Campbell v. Evans, 45 N. Y. 356; *Rockwell v. Nearing*, 35 N. Y. 302; *Cooley*, Taxn. 2d ed. 465; *Lawton v. Steele*, 7 L. R. A. 184, 119 N. Y. 226; *Cooley*, Const. Lim. 6th ed. 444; *Ick v. Anderson*, 57 Cal. 251; *Lowry v. Rainwater*, 70 Mo. 152.

Where the Legislature seeks to enforce the performance of some act which public policy may seem to require, it is not competent to deprive the citizen of his rights of property, solely by virtue of a legislative enactment, because of his failure to comply with a prescribed condition.

People v. Otis, 90 N. Y. 48. See also *Reed v. Wright*, 2 G. Greene, 15; *Scharf v. Tasker* (Md.) Jan. 22, 1891; *Marshall v. McDaniel*, 13 Bush, 378.

If this were a curative statute, it would be invalid.

Hart v. Henderson, 17 Mich. 218; *Cromwell v. MacLean*, 123 N. Y. 474.

In case of a void judicial sale, if the lien be a valid one and is based upon an equitable or legal obligation of the owner, it is just that he should reimburse the defendant to the extent to which he has been benefited by the discharge of the lien. This result may be reached by compelling the owner to make the payment as a condition of granting relief.

See *Howard v. North*, 5 Tex. 290; *Johnson v. Caldwell*, 58 Tex. 217; *McLaughlin v. Dantel*, 8 Dana, 183. See also *M'Ghee v. Ellis*, 4 Litt. 245; *Muir v. Craig*, 3 Blackf. 292; *Hawkins v. Miller*, 26 Ind. 178; *Price v. Boyd*, 1 Dana, 436; *Jones v. French*, 92 Ind. 138; *Short v. Sears*, 93 Ind. 505; *Bentley v. Long*, 1 Strobb. Eq. 52.

In another class of cases the Legislature has made it a condition of granting relief against void tax sales, that the owner shall pay all taxes assessed against the property.

The validity of such a statute was denied in—*Wilson v. McKenna*, 52 Ill. 43. See *Craig v. Flanagan*, 21 Ark. 819; *Pope v. Macon*, 23 Ark. 644.

Clearly, however, an owner, as a condition of reclaiming his property, cannot be compelled to pay an invalid tax.

Hart v. Henderson, 17 Mich. 218; *Cooley*, Const. Lim. 6th ed. 453, note. See also *Conway v. Cable*, 37 Ill. 82; *Douglass v. Flynn*, 43 Ark. 393; *Kelso v. Robertson*, 51 Ark. 397.

It has been held to be within the legislative power to secure to the person who has made improvements in good faith a return for the benefit conferred upon the owner, by substantially giving to the latter an option to obtain the value of his land, less the improvements, or to recover his land and pay for the improvements.

Ross v. Irving, 14 Ill. 171.

Where the Legislature has sought to compel the owner to pay that which he is under no moral or equitable duty to pay, the Statute has been pronounced void.

Madland v. Benland, 24 Minn. 372.

Ruger, Ch. J., delivered the opinion of the court:

This appeal involves the construction and constitutionality of section 1440 of the Code of Civil Procedure as amended by chapter 681 of the Laws of 1881, relating to the sale,

redemption and conveyance of real property sold on execution.

The questions arise upon the affirmance by the general term of an order of the special term, denying the defendant's motion to set aside and vacate a judgment entered herein for the plaintiff. No claim was made but that the judgment was regular and authorized by the evidence in the case, or that there was any statute or rule of law which required the court to set aside such judgment. The purposes of the Act referred to, if valid, do not require an order of the court to render them effective. The contention is that the defendant is entitled to the relief asked for, because the plaintiff did not, within twenty days after the recovery of the judgment, make certain payments to the defendant, in default of which the section referred to declares the judgment to be of "no force or effect." Even if it be conceded that the provisions of the Code are valid, it does not follow that the defendant is entitled, as of course, to the relief demanded. It is not required by the language of the Statute, and the court might well have said, in the exercise of its discretion, that the defendant should be left to the remedies which the Statute gave him, and that it would not determine the controversy in a summary way upon motion. But we are disinclined to dispose of the appeal on this point, as important questions are raised by the case, which, in the interest of justice, require an early disposition.

The evidence in the case shows that previous to the commencement of this action the defendant had, as a subsequent judgment creditor of the plaintiff, acquired the right to a deed from the sheriff, by the redemption from the purchaser, upon an execution sale, of a house and lot in New York belonging to the plaintiff, and she, believing the sale to have been unauthorized and illegal, brought this action to compel a determination of the defendant's claim under such redemption. In answer to the action the defendant set up title in himself through the proceedings to redeem from the former judgment creditor, who had bid it in on an execution sale upon a judgment in his favor against the plaintiff. The question litigated upon the trial was as to the validity of the execution upon which such sale was had. The trial court found that it was "a void process, and that, therefore, the sale under that void process was also void and of no effect, and therefore the defendant Tucker could and did take no valid title by reason of his redemption from a sale which was void." *Place v. Riley*, 98 N. Y. 1.

Judgment was therefore rendered in favor of this plaintiff, with costs, and that judgment was affirmed, not only by the general term, but also by this court, with costs. It is claimed that this judgment is ineffective, because the plaintiff did not within twenty days after its recovery, in compliance with section 1440, pay to the defendant the moneys required to be paid by that section. The section, as amended, read as follows: "The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by

virtue of an execution, is not divested by the sale, until the expiration of the period within which it can be redeemed, as prescribed in this article and the execution of the sheriff's deed. But if the property is not redeemed and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate from the time of the sale." Then follows the Amendment: "And if the title of such grantee, or his assignees, is adjudged, *for any reason or cause whatsoever*, to be null and void in any action for that purpose brought by the judgment debtor, or his assignees, such judgment shall have *no force or effect*, unless, within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assignees, the sum of money which was paid upon the sale with interest from the time of the sale as prescribed in this article, including the costs and expenses of defendant in defending the action in which such judgment was recovered, to be adjusted by a judge of the court in which said action was brought; and in the event of plaintiff's failure to pay such purchase money and expenses within the time aforesaid, *said title shall be valid in said grantee.*" It was also provided that if, in any pending action to recover such property, an appeal had been taken, the plaintiff should have twenty days from final judgment in his favor to make the payments required.

In considering the meaning and effect of the Amendatory Act, it is desirable to have in mind the previous condition of the law on the subject. The Code of Civil Procedure, which was a substantial re-enactment of the provisions of the Revised Statutes in respect to this subject, provided that on a sale of lands on execution the debtor's title should not be divested until fifteen months after the sale. This period was allowed him and his judgment and mortgage creditors to enable them to redeem from the sale. The first year was allowed to the debtor and the three succeeding months to the creditors entitled to the benefit of the redeeming Statute. On the expiration of the fifteen months, in case there was no redemption by the owner, the sheriff was bound to execute a deed of the premises to the purchaser on the sale, or to his assignees, or to the person entitled thereto under the provisions of the Statutes relating to redemption (§ 1471). Upon a redemption by the judgment debtor, or his heirs, executors, or assignees, the sale and certificates thereof became null and void and no conveyance therefore was required to be executed, as the judgment became satisfied to the extent of the sum collected and applied on the execution, and the title of the property sold remained in the judgment debtor (§ 1448). In case of a redemption by a judgment or mortgage creditor, he was required not only to pay the amount specified by the Statute to the person from whom he redeemed, but also to execute a satisfaction of his judgment or mortgage, stating that the redemption satisfies the judgment or mortgage in full, or to a specified amount (§ 1463). The purchaser of real property, sold by virtue of an execution, who has been

evicted from the possession thereof, or against whom judgment is rendered in an action to recover the same in consequence, first, of any irregularity in the proceedings concerning the sale; or, second, if the judgment upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact, may recover the purchase money paid by him, with interest, from the person for whose benefit the property was sold (§ 1479). In case of a sale upon a judgment based upon an "irregularity in the proceedings concerning the sale," the judgment under which the sale was made is revived and becomes valid to enable the judgment creditor to collect the sum paid on the sale, with interest (§ 1480). It is also provided that a judgment creditor, who completes proceedings for redemption, acquires all the right, title and interest in the property which the purchaser acquired by the sale (§ 1471). The protection which this scheme affords persons who have purchased land on an illegal sale is apparently sufficient for all of the requirements of justice or equity, independent of the amended section. Thus, when such sale is declared void, the security of the judgment creditor is restored for the purpose of enabling him to reimburse himself for the moneys paid on the sale, and a purchaser, on redemption, whose title is defeated for any of the causes specified, is authorized to recover the purchase money paid by him from the judgment creditor, or those who represent him.

These provisions gave an adequate and sufficient remedy to all of the parties interested where there had been an illegal sale on execution. The judgment creditor lost no rights by making such sale and the innocent purchaser and his assignees were protected, as well where the judgment was founded upon irregularities in the proceedings concerning the sale as when it had been reversed or vacated.

There could, of course, be no just foundation for a claim by the judgment creditor to be reimbursed by anyone when his judgment had, for any reason, been reversed or set aside, because in that event his claim would itself be extinguished and he would have suffered no loss.

A point is made by the respondent upon the language of the Act, that the defendant, being a redeeming creditor, does not come within its terms. By the express language of the Act, its provisions would seem to be operative only where the land had not been redeemed. There can be no question, we think, but that, under the language of the Statute, the land had, within its meaning, been redeemed, and the defendant was therefore precluded from availing himself of its benefits. If this should be held to be the true construction of the Act, its operation would then be confined to those who purchased on the sale, and their assignees alone, and would thus exclude the defendant from the benefit of the Act. It is contended, however, by the appellant that a redeeming creditor comes within the spirit of the Act, and should therefore be held to be within its meaning.

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We should be reluctant, under any circumstances, to extend by construction the scope and application of a statute which seems to be so uncalled for and inequitable as this, and particularly so when the redeeming creditor has an adequate remedy for any loss which he may have incurred; but where a party is excluded from the benefit of an Act by its express language the court is not at liberty to extend its operation by construction for the purpose of bringing him within its spirit. But, however this may be, we think that it is due to the gravity and importance of the questions raised that we should base our decision upon those more important points presented by the objections to the validity of the Amendment.

It is to be observed, in the first place, that the Act is predicated upon the existence of a final judgment determining, not only that the property to be affected has been illegally sold, but that it still belongs to the plaintiff therein, and that the defendant has no legal claim thereto, but also awards to the plaintiff the costs of the action, and, impliedly, holds that defendant is not entitled to such costs. The Act contains, therefore, the most ample concession that the party against whose rights it is aimed is, in law, the absolute owner of the property to be affected by the Amendment, and is a judgment creditor of the defendant to the extent of the costs included in the judgment. It then proceeds to declare how he may be divested of this title and property, and provides that, after recovering a judgment awarding him the title unless he pays, within a limited time, to the defendant an arbitrary sum, his property shall, by force of the Act alone, be transferred to his adversary.

The sole aim of the Statute thus seems to be to effect a change of title and to wrest from one person the property which has been finally adjudged to be his and vest it in another, by mere force of the legislative will. No obligation to make the payments referred to existed at law, and none was created by the Act, but it simply declared that unless they are made the defaulting party shall forfeit his property and it shall be transferred to another, who had neither legal nor equitable claim to it. In effect, it reverses the judgment and gives to one that which the courts have deliberately adjudged belongs to another.

The plaintiff contends that the Statute is unconstitutional, because it deprives the owner of his property without due process of law and we are of the opinion that the claim is well founded. It cannot be the subject of doubt, that an Act of the Legislature, which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law whatever may be the pretext upon which it is founded. It was said by Justice Jewett, in *Embury v. Conner*, 8 N. Y. 511, after a review of the authorities: "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property

to another without the consent of the owner. although compensation be made." And it is laid down in Cooley's Constitutional Limitations (p. 444), as an elementary principle, that a party cannot "by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which a forfeiture shall be declared in due form. Forfeiture of rights and properties cannot be adjudged by legislative Acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law."

The Act comes clearly within the spirit of our decision in *Cromwell v. MacLean*, 123 N. Y. 474, where Judge Peckham, in relation to a tax sale, says: "Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner still retained his title, the effect of the Act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under three invalid leases.

Has the Legislature of this State the right to take the property of A and transfer it to B under the guise of confirming sales made of such land *in invitum*; but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. The property thus taken is not taken by due process of law.

What difference does it make to say that the Legislature is acting only in a way of validating proceedings to collect a tax, which, in justice, the owner of the land ought to pay? The answer is, that the proceedings have been so fatally defective that no title has passed, and the owner has his title to his property the same as if no proceedings had been taken. Where is the authority in such case for the Legislature to itself transfer the title of his property to someone else?"

It is obvious that if the Legislature could not directly confirm such sale, the court ought not to strain to discover such an illegal intention in the words of an Act, whose motives and purposes are ambiguous and indefinite.

Tested by these rules, we are unable to see how this Act can be supported and at the same time effect be given to the constitutional guaranty. It was said by Judge Earl, in *Stuart v. Palmer*, 74 N. Y. 183, that "the constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

A consideration of the results which may be reached through the provisions of this Act, when construed according to the plain meaning of its language, demonstrates the impossibility of reconciling its provisions with the requirements of the fundamental law. The obvious intention of the Act is to take away from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself. If he remains in possession of the property he is deprived of any remedy to protect his possession, and if his adversary has succeeded in obtaining possession, he is deprived of any remedy to recover it, except upon the condi-

tion that he pays as much, or more, than it is probably worth. An owner may, therefore, under this law, be stripped of his property under a void proceeding, be turned out of possession and denied any affirmative relief in the courts, unless upon the condition that he pays for the property its value, as determined by a judicial sale, and, in addition thereto, a sum for costs and expenses, the amount of which he has no means of ascertaining, and which may also exceed the value of the property in litigation.

A more effectual scheme to deprive an owner of his property could hardly be conceived. Whether he abandons it to the wrong-doer or elects to seek his remedy in the courts, the property as a subject of value has passed from him irrecoverably. It is not claimed by the appellant that the change of title, intended to be effected by this Statute, is to be produced by any process of law, or as the result of any judicial proceeding whatever; and the Statute in plain language declares that it shall take place as a consequence of the owner's successful attempt to establish his right through any action at law, upon a failure to make the payments required. The Statute is intended to execute itself and pass the title upon the expiration of the time limited by the Statute. One of the arguments by which the Statute is attempted to be sustained is the claim that the Legislature has, in effect, required the owner to repay certain sums of money which had theretofore been appropriated to her use, and inasmuch as she has had the benefit of the amount bid on the sale, it is argued that it is in accordance with equitable rules that he should be required to repay such sums before recovering back her property.

We do not think it is competent for the Legislature to deny, for any cause, a party who has been illegally deprived of his property, access to the constitutional courts of the State for relief. If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment. But, however this may be, the act does not seem to furnish any foundation for the argument. The plaintiff has never, in fact, been relieved from her liability to pay the original judgment, and has not derived any benefit from the attempted sale. That liability was revived against her in favor of the judgment creditor when she recovered judgment for the land, and no provision is made by the Act for the satisfaction of that lien, although the payment required by the Statute be actually made by her. The lien is given to one party and the payment is required to be made to another, and in the absence of any provision in the Statute making such payment a satisfaction it is difficult to see why the lien does not remain and the judgment stand unsatisfied.

The payment required was also unnecessary for the protection of the redeeming creditor, as he had his right of action to recover back the money paid by him from the person to whom it was paid. The section, as amended, thus secured to the judgment cred-

itor, not only a lien on the land for the original debt, but leaves him in possession of an equivalent sum received from the redeeming creditor, and the redeeming creditor is entitled to receive not only the money required to be paid under this Statute by the owner, but also acquires a cause of action against the judgment creditor to recover back the money expended by him on redemption. Both of these parties, therefore, have, by this Act, double security for the same debt and no provision is made by the Statute that the payment required to be made by the owner shall satisfy any of these liabilities. It would therefore seem that, in fact, no benefit accrued to the plaintiff from the moneys paid on the sale, and no pretense was left for the requirement made by the Statute.

But a further answer to the claim is found in the fact that the Statute proceeds upon no such theory and purports to make no such application. No reference is made in it to the liabilities of the judgment debtor, or provision made for their satisfaction, and the sum required to be paid by her has no reference to the existence of any lien or debt, or its amount. Indeed, it requires the payment, as well when it has been judicially pronounced that there is no debt, as when one may, in fact, exist. The Act makes no distinction between cases where the judgment upon which the sale was made has been reversed and set aside, and those in which the process alone has been adjudged to be void. It wholly ignores any such distinction and requires the payment to be made, as well where no claim ever existed, as where a legal claim has been illegally attempted to be enforced. It furnishes no argument in favor of the legality of this Act, to say that some of the consequences following its enactment could, under special conditions, have been constitutionally produced, if provided for in some other way. The broad question here is, whether this enactment construed according to its plain meaning and intent, enables one person to acquire the property of another against his will, except by due process of law. If it does the courts must condemn it as violative of the fundamental law. The vicious purpose of the Act is so thoroughly interwoven with the whole scheme of the enactment as to render it impossible to eradicate its objectionable features without reconstructing the entire section. It is not, therefore, a case where any part of the Act can be supported.

We also think the Act violates the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition, this judgment became an evidence of title, and could not be taken from the plaintiff without destroying one of the instrumentalities by which her title was manifested. A Statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another (*Re Jacobs*, 98 N. Y. 98, and authorities there cited). In the one case it

deposits the owner directly, and in the other renders him defenseless against any assault upon his property. Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as where it attempts to do the same thing directly. Even assuming that it might be lawful for the Legislature to impose a condition upon the right of a party to maintain a particular action to recover real property, no such case is here provided for. This Statute makes any action at law to establish his right subject to its provisions, and thus deprives him of all remedy for the wrong done him. It not only does this, but it attempts to reverse a judgment and give to the defeated party the fruits of a recovery awarded to another. We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect.

We have been referred to no authority which justifies legislation taking such rights away arbitrarily, and we know of no theory upon which it can be sustained. Instances where land subject to a lien for taxes has been sold therefor, and the owner has been required to pay the taxes, as a condition of maintaining an action to recover the land, or the borrower of money, at usurious rates, is required to repay the sum equitably due before maintaining a suit in equity to enforce a forfeiture of the securities held by the creditor, are, obviously, not analogous to the case under consideration.

We are therefore of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail.

Another serious objection to the law seems to exist in the ambiguity of the provisions relating to the time limited for making the payments required by it. The language of the Statute requires the payment to be made within twenty days after judgment, and the subsequent portions of the section, providing that in case of pending appeals the payment might be made within twenty days after final judgment, would seem to imply that, in other cases, the time must be limited by the original judgment. If this be so it might be that a defendant, by taking an appeal and staying proceedings, could defeat any effort of the owner to make the payments, and thus compel him to lose his land although he might be willing to comply with the statute. This seems to show the recklessness with which the owner's interests were regarded and the injustice which may be perpetrated under its provisions.

It is not without a feeling of satisfaction that we have found this amendatory Statute unconstitutional, for in every view in which it may be considered, it impresses us with the conviction that it is grossly inequitable and unjust. We can discover no reason in

the situation of the purchaser at an illegal execution sale under the existing law which justifies the adoption of the careless, ill-considered and inequitable provisions which distinguish this legislation.

The amended section is subject to many other criticisms, which we have not felt

called upon to make, as those already referred to fully justify the conclusion we have reached in the case.

The order should therefore be affirmed, with costs.

All concur (Earl, J., in result), except Finch, J., absent.

VIRGINIA SUPREME COURT OF APPEALS.

George W. HUBBLE, *Plff. in Err.*,

v.

M. A. E. COLE.

(.....Va.....)

Damages to a tenant, resulting from an injunction obtained without sufficient cause by the lessor, which prevented him from cultivating the land, may be recovered in an action on the covenants in the lease, although there may also be a remedy on the injunction bond.

(July 9, 1891.)

ERROR to the Circuit Court for Smyth County to review a judgment in favor of defendant in an action brought to recover damages for an alleged breach by defendant of covenants contained in a lease which she had executed and delivered to plaintiff. *Reversed.*

The facts are stated in the opinion.

Mr. F. S. Blair for plaintiff in error.

Messrs. Buchanan & Buchanan, for defendant in error:

The remedy for injury or damage resulting from an injunction in this State is upon the injunction bond.

Va. Code 1887, § 8442.

No action can be maintained for instituting a civil suit unless it was done maliciously and without probable cause.

4 Minor Inst. pt. I. pp. 482, 483.

We have no case, so far as we can ascertain, where damages have ever been allowed for injuries resulting from an injunction except upon or by reason of the bond and the statute which requires it.

See *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245.

Could any other action be resorted to by the injured party he would then have two actions, one on bond, and case, or covenant for damages, and thus be enabled to split his action, which is not permissible.

See 7 Rob. Practice, 177, note 81; *Bender-nagle v. Cocks*, 19 Wend. 207, 82 Am. Dec. 448.

Should no bond be given or condition imposed by the court, and the injunction be granted, the resulting injury would be the act of the court, and therefore *damnum abque*

NOTE.—*Injunction granted with caution.*

A preliminary injunction frequently operates as a decision of the whole question, and should not be granted where other remedies suffice. *Burch v. Cavanaugh*, 12 Abb. Pr. N. S. 410.

It should be issued with caution, and, so to speak, reluctantly, and only in a case reasonably free from doubt. *Higginson v. Farmers L. & T. Co.* 22 Hun, 479; *Woodward v. Harris*, 2 Barb. 499; *Van Veghten v. Howland*, 12 Abb. Pr. N. S. 461; *Ramsey v. Erie R. Co.* 38 How. Pr. 193; *Redfield v. Middleton*, 7 Bosw. 849; *Gurnee v. Odell*, 13 Abb. Pr. 264; *Roberts v. Mathews*, 18 Abb. Pr. 199; *Brooklyn C. & J. R. Co. v. Brooklyn City R. Co.* 33 Barb. 420; *Central Cross Town R. Co. v. Bleecker St. & F. R. Co.* 49 How. Pr. 233.

It should not be granted in every case in which plaintiff brings himself within the letter of the rules allowing the issuance of the writ. Regard should be had to the nature and extent of the injury which plaintiff would suffer if the injunction should be withheld, and also to the consequences to defendant if granted. *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371; *Gallatin v. Oriental Bank*, 16 How. Pr. 233; *M'Cafferty v. Glazier*, 10 How. Pr. 475.

It should not be granted in every instance of a *prima facie* case of probable right to a final injunction, but only in cases where without it the court cannot by its judgment do justice between the parties. *Van Veghten v. Howland*, *supra*.

It should not be granted where all the equities are disapproved. *Central Cross Town R. Co. v. Bleecker St. & F. R. Co.* *supra*.

It should only be granted where it appears by the complaint that the plaintiff is entitled to the relief
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demanded, and where it also appears by affidavit that sufficient ground exists therefor. *Fowler v. Burns*, 7 Bosw. 687. See *Hascall v. Madison University & B. E. Soc.* 8 Barb. 174.

Statutory conditions must be complied with.

Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute; and it is error, in such case, to grant the injunction without the required bond. *Miller v. Parker*, 73 N. C. 58.

But the bond must be construed and governed by the statute in force at the time of its execution, and a statute then enacted, but which does not take effect until after such execution, cannot have a retroactive operation so as to affect a bond given prior thereto, since the question is one which goes to the contract itself and not merely to the remedy thereon. *Mix v. Vail*, 38 Ill. 40.

But in the absence of any statute prescribing the conditions of the bond, it rests in the discretion of the court to fix the terms upon which the relief may be granted, and where plaintiff gives such bond as is required by the court, and fails to prosecute his suit successfully, he is liable for all damages sustained by reason of the injunction. *Newell v. Partee*, 10 Humph. 325; *Foster v. Shephard*, 33 Tex. 687; 2 High. Inj. § 1620.

Bond must indemnify for damages sustained.

The recitals of an injunction bond may vary somewhat in phraseology, but the pivotal idea remains the same—they all aim to protect the defendant against loss or damage by reason of the injunc-

injuria, unless the injunction should be sued out maliciously and without probable cause.

Young v. Gregorie, 3 Call, 447; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060. See *Hilliard, Inj.* p. 89; *High, Inj.* ed. 1890, § 1648, p. 101; *Lawton v. Green*, 64 N. Y. 826; *Keber v. Mercantile Bank*, 4 Mo. App. 195.

Lacy, J., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court of Smyth County, rendered at the March Term, 1890. The action is covenant, and the declaration set forth that on the 30th day of December, 1881, in the County of Smyth, the defendant leased for the term of five years to the plaintiff, in consideration of the sum of \$3,000, to be paid to her as stated in the deed of lease executed by them, certain real estate situated in the said county, with conditions stated and set forth in said deed; that the plaintiff performed all the covenants of the said deed on his part, but that the defendant did not perform on her part, setting forth the breaches, and by injunction prevented the plaintiff from cultivating the land, etc., and deprived him of the use and profit of the said land mentioned in the declaration from the 28th day of November, 1883, until after the expiration of the lease; that the said injunction was by decree of the Supreme Court of Appeals of Virginia dissolved, and the bill dismissed; and laid his damages at \$4,500. The defendant demurred to the declaration, which demurrer the court sustained, and rendered judgment for the defendant, from which judgment the plaintiff applied for and obtained a writ of error to this court. The ground of

the court's decision is that the common-law action of covenant will not lie when the alleged breach was by legal process, as by injunction; that, when damage was caused, and the injunction not sustained, the injunction bond furnished the only remedy, all others being merged therein. Mr. High says (*High, Inj.* § 1648): "Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause; and the rule has been broadly stated that no such right of action exists. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action in the case will lie,"—citing *Cox v. Taylor*, 10 B. Mon. 17. Mr. Barton says, in his *Chancery Practice* (p. 478): "The right to damages upon the dissolution of an injunction is independent of any statutory provision upon the subject, and amid some conflict of the decided cases it is said that this right is cumulative of, and in addition to, the right of action at law upon the injunction bond. While the court decrees damages upon the dissolution, it cannot go beyond the injunction bond, so far as the penalty is fixed therein, and, when damages have been thus awarded, the decree of the court is conclusive as to the amount which can be recovered in an action on the bond; but not so the right of action on the contract, whose covenants have been broken." Mr. Lawson says (*Lawson, Rights, Rem. & Pr.* § 3704): "It is now held that the defendant in an injunction suit has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy upon the

tion, if the court should finally decide that the plaintiff was not entitled thereto. *Allen v. Brown*, 5 Lans. 511.

Damages cannot be recovered beyond the amount specified in the undertaking on which the injunction is obtained. *Pacific Mail S. S. Co. v. Toll*, 10 N. Y. Week. Dig. 269, affirmed 85 N. Y. 646.

Where a preliminary injunction is vacated upon stipulation, the sureties on the undertaking are only relieved from liability for damages accruing subsequent to the time of its vacation; they are still liable for all damages which accrued prior thereto the same as if it had been vacated on motion or by a decision of the court. *Dickerson v. Hermann*, 10 N. Y. Week. Dig. 268.

What damages may be considered.

The loss of the use and rental of the premises during the time defendant was enjoined is a proper element of damages to be recovered in an action upon the bond. *Smith v. Wells*, 46 Miss. 64; *Hoemer v. Campbell*, 86 Ill. 572; *Richardson v. Allen*, 74 Ga. 719. But see *Hill v. Hill*, 59 Vt. 125.

So, too, damages for the crops which defendant was prevented by the injunction from harvesting may properly be allowed (*Allen v. Brown*, 5 Lans. 511), as well as waste committed upon the premises while defendants were deprived of their possession by the injunction. *Richardson v. Allen*, *supra*; 2 High, Inj. 8d ed. § 1673.

The damages which the enjoined party may be entitled to for losses and injuries sustained by the operation of the writ are as various as the subjects which may be affected by such restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual loss, which is the natural and 13 L. R. A.

proximate result of the injunction. *Bullock v. Ferguson*, 30 Ala. 227; *Collins v. Sinclair*, 51 Ill. 828; *Hale v. Meegan*, 30 Mo. 272; *Brown v. Tyler*, 34 Tex. 168; *Moulton v. Richardson*, 49 N. H. 70; *Hord v. Trimble*, 1 Litt. 413.

If the restraint keeps the owner of the property out of possession, or deprives him of its use, the compensation is given upon the same principle as in other cases of wrongful deprivation. Where a party was prevented from enjoying the benefit of his real estate by injunction which was obtained without cause, the value of the use and occupation was given as damages. *Rutherford v. Moore*, 24 Ind. 311; *Fleming v. Bailey*, 44 Miss. 132. See *Sturges v. Knapp*, 36 Vt. 439; 2 Sutherland, Dam. 60.

The only liability created by an injunction bond is for such damages as are actually sustained by the wrongful suing out of the injunction. *Staples v. White*, 88 Tenn. 30.

The dissolution of an injunction is *prima facie* evidence that the defendant has sustained damages. *Lemeunier v. McCleary*, 41 La. Ann. 411.

In a suit upon an injunction bond conditioned "for the payment of any decree or order that may be awarded . . . and all such costs and damages" the penalty of which, with interest, is less than the amount for which the obligor became liable, plaintiff may recover the whole penalty, with interest to the date of the judgment, and that aggregate to carry interest after the date of the judgment. *State v. Purcell*, 31 W. Va. 44.

Upon a proceeding to ascertain the damages sustained by a party in consequence of an injunction restraining him in the exercise of some legal right, it is proper to allow the expenses incurred upon a reference. *Holcomb v. Rice*, 119 N. Y. 598.

bond." *Mitchell v. Southwestern R. Co.* 75 Ga. 398; *Manlove v. Vick*, 55 Miss. 567; *Gorton v. Brown*, 27 Ill. 489; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Hayden v. Keith*, 32 Minn. 277.

In some of the States this matter is regulated by statute, and it is provided by law that before decree defendant may file his account for all damages, and have them in that suit allowed; but when there is no specific mode prescribed by the statute of assessing damages, and no such provision exists by statute, the right of action at law is in addition to the remedy upon the bond. The declaration states a good cause

of action, and the demurrer should have been overruled. The defendant was undoubtedly bound by her deed; and if, without sufficient cause (and the dissolution of the injunction and dismissal of the bill is conclusive of that), the defendant deprived the plaintiff of the benefits and profits accruing to him thereunder, she should undoubtedly respond in damages.

The judgment appealed from is erroneous, and the same will be reversed and annulled, and the cause remanded for a new trial to be had therein, when the demurrer must be overruled, and the case proceeded in to final judgment upon the merits.

MICHIGAN SUPREME COURT.

WHITE SEWING MACHINE CO.

v.

Milo H. DAKIN *et al.*, Appts.

(.....Mich.....)

1. The interlineation of an agreement to pay attorneys' fees in that clause of a bond to secure an agent's possible indebtedness to his principal, in which the obligors bind themselves to pay the penalty which has been fixed at a definite amount, is not a material alteration which will avoid the bond, under a statute providing that in suits on such bonds if a breach is found to exist the jury shall assess the damages, after which judgment shall be entered for the penalty and execution issued for the damages assessed.

2. Alteration of a bond after execution, by an agent of the obligee without authority, express or implied, will not avoid it.

(July 23, 1891.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of

plaintiff in an action upon a penal bond. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hanchett, Stark & Hanchett, for appellants:

If made with fraudulent intent the alteration of this bond, even if immaterial, will discharge the sureties.

1 Greenl. Ev. § 568.

If Mr. Van Ness, acting for the White Sewing Machine Company, inserted the words "attorneys' fees" after the execution of the bond without the knowledge and consent of the defendants, intending thereby to produce some benefit to the Company, his act was a fraud on the defendants, even though the insertion of the words in no way changed their liability, or affected the instrument.

Adams v. Frye, 8 Met. 108; *Van Brunt v. Eoff*, 35 Barb. 501; *Turner v. Billagram*, 2 Cal. 523.

Any material alteration made in this instrument without the consent of the defendants after they executed it discharges them from liability.

NOTE.—Party producing instrument must account for alterations.

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance of alteration. He may show that the alteration was made by another, without his concurrence, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise. Cal. Code Civ. Proc. § 1932.

Evidence tending to show that the alteration or erasure was made by a stranger to the instrument is always competent as by intendment of law, where such appears to be the case, and there is no procurement or connivance by either party, an alteration or erasure does not avoid the instrument. *Hunt v. Gray*, 35 N. J. L. 227; *Ford v. Ford*, 17 Pick. 418; *Davis v. Carlisle*, 6 Ala. 707; *Piersol v. Grimes*, 30 Ind. 129, 35 Am. Dec. 673; *Crockett v. Thomson*, 5 Sneed, 342; *Boston v. Benson*, 12 Cush. 61; *Nichols v. Johnson*, 10 Conn. 192; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Bigelow v. Stilphen*, 35 Vt. 521; *Boyd v. McConnell*, 10 Humph. 68; *Croft v. White*, 23 Miss. 455; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412.

The material alteration of a written instrument 13 L. R. A.

without the knowledge or consent of the maker renders it absolutely void, even in the hands of an innocent holder. *Angle v. Northwestern L. Ins. Co.* 92 U. S. 330, 23 L. ed. 556.

Some cases hold that in the case of a deed any alteration, whether material or not, avoids it. *Den v. Wright*, 7 N. J. L. 212; *Wallace v. Harnstad*, 15 Pa. 462, 53 Am. Dec. 603.

If the alteration is noted in the attestation clause, it is sufficient. If it appears in the same ink and handwriting with the body of the instrument, it may suffice. If the alteration is against the interest of the party claiming under the instrument, it is presumed properly made. *Bailey v. Taylor*, 11 Conn. 531.

Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. *Trowel v. Castle*, 1 Keb. 23; *Fitzgerald v. Fancouberge*, Fitzg. 207, 213; *Bailey v. Taylor*, 11 Conn. 531, 534; *Gooch v. Bryant*, 13 Me. 388, 390; *Pullen v. Hutchinson*, 25 Me. 249, 254.

The general rule is that where any suspicion is raised, as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. Exceptions to the rule undoubtedly

People v. Brown, 2 Dougl. 9; *Wait v. Pomerooy*, 20 Mich. 425; *Holmes v. Trumper*, 22 Mich. 427; *Miller v. Finley*, 26 Mich. 249; *Bradley v. Mann*, 37 Mich. 1; *Aldrich v. Smith*, Id. 468.

The alteration makes a provision for an attorneys' fee, and this renders void the entire clause providing for an additional 10 per cent.

Bullock v. Taylor, 39 Mich. 137; *Meyer v. Hart*, 40 Mich. 517, 522.

The insertion of these words, then, effected a material alteration of the contract, and although the change was favorable to the defendants they are released from liability.

People v. Brown, *supra*; *Brandt, Suretyship*, § 388; *Hewins v. Cargill*, 67 Me. 554.

Mr. John M. Brooks, for appellee:

The entire provision for the 10 per cent in case of suit, with or without the words "attorneys' fees," is absolutely void. In either case, the purpose is to impose upon the obligors the cost of possible litigation, and an agreement to pay more than the taxable costs is void.

Bullock v. Taylor, 39 Mich. 137; *Myer v. Hart*, 40 Mich. 517-522; *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Martin v. Belmont Bank Trustees*, 13 Ohio, 258.

Such provision being void, the insertion of the words, "attorneys' fees," if made after the execution of the bond, would not be a material alteration, as it would not change the liability of the obligors.

Miller v. Finley, 26 Mich. 249-253, affirmed in *Gano v. Heath*, 36 Mich. 441; *Leonard v. Phillips*, 39 Mich. 132; *Goodenow v. Curtis*, 33 Mich. 505, 509; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 432, 437; *Weaver v. Bromley*, 8 West. Rep. 190, 65 Mich. 213.

A material alteration, if made by one having authority, avoids an instrument, while an immaterial alteration does not; and the intent is unimportant.

Fuller v. Green, 64 Wis. 159; *Robinson v.*

Phanix Ins. Co. 25 Iowa, 430, 435; *Leonard v. Phillips*, *Goodenow v. Curtis* and *Weaver v. Bromley*, *supra*.

An agent to sell goods and receive and transmit the price to his principal, is not the agent of his principal to alter a note so received; and an alteration by him is simply deemed a spoliation.

Bigelow v. Stilphen, 35 Vt. 521; *Hunt v. Gray*, 35 N. J. L. 227.

Champlin, Ch. J., delivered the opinion of the court:

This is an action on a bond given by Milo H. Dakin as principal, and Aaron T. Bliss and Anthony Byrne as sureties, to the plaintiff, to secure any indebtedness incurred by Dakin to the plaintiff while acting as its agent in selling sewing machines. In January, 1888, Mr. Van Ness, an agent of the plaintiff, employed to procure dealers in the White sewing machines, made a contract with the defendant Dakin, by which Dakin was given the exclusive right to deal in White sewing machines within certain territory. It is the custom of the plaintiff to require dealers to give a bond to secure the company on any indebtedness to them which may be incurred by such dealers. Blank forms are furnished by the company and are filled out by Van Ness when needed. Mr. Dakin signed the bond in this case, and obtained the signatures of the defendants Bliss and Byrne as sureties, and delivered it to Mr. Van Ness, who forwarded it to the plaintiff. The formal part of the bond, before stating the conditions, reads as follows: "Know all men by these presents, that Milo H. Dakin, Aaron T. Bliss and A. Byrne are hereby held and firmly bound, severally and individually, unto the White Sewing Machine Company in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the White Sewing Machine Company, their repre-

ly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument. *Smith v. United States*, 39 U. S. 2 Wall. 219, 17 L. ed. 788.

The party who produces an altered instrument is generally bound to explain the alteration or erasure, if it is in a material point. *Jackson v. Osborn*, 2 Wend. 555; *Chappell v. Spencer*, 23 Barb. 584.

This is especially the rule where the alteration is suspicious, and is beneficial to the holder. *Tillou v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564; *Acker v. Ledyard*, 8 Barb. 514; *O'Donnell v. Harmon*, 3 Daly, 424.

The instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effects upon the parties respectively, ought to be submitted to the jury; and the court cannot presume, from the mere fact that an alteration appears on the face of the instrument, whether under seal or otherwise, that it was made after the signing. *Maybee v. Sniffen*, 2 E. D. Smith, 1, 10.

The party introducing or offering in evidence a deed that has been altered by erasure or interlineation must show that the alteration was made before delivery. *Jordan v. Stewart*, 23 Pa. 244.

But it has been held that the presumption, in the first instance, is, that the alteration apparent on its face was made before execution, so that it will be 18 L. R. A.

admitted in evidence without any proof on the subject. *Printup v. Mitchell*, 17 Ga. 558; *Boothby v. Stanley*, 34 Me. 115.

The nature of the alteration should doubtless be considered in determining whether the party offering the instrument is bound to give evidence explaining the alteration. If the alteration make the deed more favorable to the party producing it, that alteration becomes suspicious and must be explained; while in other cases no explanation need be given. *Huntington v. Finch*, 3 Ohio St. 445; *Wilde v. Armsby*, 6 Cush. 314.

If the alteration be merely verbal and immaterial, it will not affect the instrument, though made after delivery. *Arnold v. Jones*, 2 R. I. 345; 3 Phillips, Ev. 388, *note*.

It is not every alteration that will destroy an instrument. In order to produce that effect the alteration must be material. *Flint v. Craig*, 39 Barb. 319. And the weight of adjudication inclines to the view that an alteration obviously non-prejudicial in its nature will not vitiate the instrument. *Sip v. Huey*, 3 Ark. 33; *Hornby v. Matcham*, 16 Sim. 325; *People v. Muzzy*, 1 Denio, 239; *Dunn v. Clements*, 52 N. C. 58; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Landron v. Paul*, 20 Vt. 217; *Nichols v. Johnson*, 10 Conn. 192.

For further authority upon this subject, see *notes* to *Wilson v. Hayes* (Minn.) 4 L. R. A. 196; *Palmer v. Poor* (Ind.) 6 L. R. A. 409, and *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743.

representatives or assigns; for which payment (together with 10 per cent attorneys' fees thereon in case of suit on this bond) well and truly to be made, they bind themselves, their heirs, executors and administrators, and separate estates, jointly and severally, firmly by these presents. Sealed with their seals. Dated the twenty-fifth day of January, one thousand eight hundred and eighty-eight." Then follows the condition of the bond, which was to pay, or cause to be paid, any and every indebtedness or liability then existing, or which may thereafter in any manner exist, or be incurred on the part of Milo H. Dakin to the White Sewing Machine Company, etc. The words "attorneys' fees" appear to have been interlined in the bond between the words "10 per cent" and the word "thereon." The only questions presented by the record are: *first*, was the insertion of the words "attorneys' fees" a material alteration, if inserted after the bond was executed? *Second*, if inserted by Van Ness after it was executed, and before it was forwarded by him to the plaintiff for acceptance or rejection, did it render the bond invalid in hands of the plaintiff?

Clearly the alteration by the insertion of the words "attorneys' fees" was immaterial. An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto. Am. & Eng. Encyclop. Law, p. 505. This instrument is not a money bond, and the action upon it is regulated by the Statute, which provides that, "when an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought." And "upon the trial of such action, if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them." And "in every such action, if the plaintiff recover, the verdict of the jury, assessing the plaintiff's damages, shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited, as in other ac-

tions of debt, together with the costs of suit, and with a further judgment that the plaintiff have execution to collect the amount of damages so assessed by the jury; which damages shall be so specified in such judgment." 2 How. Stat. §§ 7737-7739. The penalty of this bond is \$1,000, no more and no less, and no recovery can exceed that amount. *Bishop v. Freeman*, 42 Mich. 583; *Odd Fellows v. Morrison*, 42 Mich. 523; *Spencer v. Perry*, 18 Mich. 394. The damages, including the interest, where it is proper to allow it to be assessed under the conditions, cannot exceed the penalty; and, if they equal the penalty, they can only draw interest from the date of the judgment. In this case, as in the other cases under the Statute, the recovery and judgment would be for the penalty of the bond, and the further judgment that the plaintiff have execution for the damages assessed. The promise to pay 10 per cent as attorneys' fees is no part of the penalty of the bond, and by no possibility can it affect the judgment to be rendered upon the bond, nor the amount of damages to be assessed.

Second. If any alteration was made after the execution of the bond, it was done by Van Ness, and although he was the agent of the plaintiff, and received and forwarded the bond in question to the plaintiff for its approval or rejection, yet there is no testimony in this record tending to show that he was expressly or impliedly authorized to make any alteration in the bond. The rule of law is that, when an alteration is made by a third party, it is an act of spoliation, and the alteration, although material, cannot invalidate the written instrument; and, when the spoliation is done by the agent of one of the parties, it will not avoid the contract, if the agent had no express or implied authority to do it. 1 Am. & Eng. Encyclop. Law, p. 505; *Van Brunt v. Eoff*, 35 Barb. 501; *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. L. 227; *Bigelow v. Stilphen*, 35 Vt. 521; *Miller v. Reed*, 3 Grant, Cas. 51, 27 Pa. 244; *Terry v. Hazlewood*, 1 Duvall, 104.

The declaration counts upon the bond as being in a penalty of \$1,000, and assigns breaches of the conditions. It follows that the bond would be a valid instrument in the hands of the plaintiffs for what it was before the alteration was made.

The errors assigned must be overruled, and *the judgment affirmed*, with costs in both courts. The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Richard P. HALLOWELL, Assignee, etc.,
of Joseph W. Smith,

vs.
BLACKSTONE NATIONAL BANK.

(.....Mass.....)

1. A pledge of securities as collateral for a note which authorizes their sale "on the non-performance" of the promise, and the application of the proceeds to pay the note, and makes the surplus applicable "to any other note or

claim" held by the pledgee against the pledgor, is an absolute pledge of the securities for such other notes or claims, the right to enforce which does not depend on non-payment of the principal note.

2. Failure to pay the whole of a demand note when demanded, or to procure the extension of the balance as a time loan, is a breach of an agreement to pay on demand, within the meaning of a provision in a pledge of collaterals that in the event of such breach their surplus, after satisfying the note, may be applied to other demands against the maker; and the fact that the holder has agreed not to press the demand without further notice is immaterial.

NOTE.—See note to Fall River Nat. Bank v. Slade (Mass.) 12 L. R. A. 131.

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3. Claims against the firm of which the maker of a note is a member are included in a provision in his pledge of collaterals to secure the note that, on his failure to pay it when due, any excess of the collaterals may be applied to "any other note or claim" held against him by the pledgee.

(September 3, 1891.)

REPORT from the Supreme Judicial Court for Suffolk County (Field, Ch. J.) for the opinion of the full court of a suit brought to redeem certain securities which had been pledged by complainant's insolvent assignor to defendant as collateral for certain of his obligations. *Bill dismissed.*

Complainant's assignor executed and delivered to defendant a note, of which the following is a copy:

25000 Dolls. Boston, Mass. Dec. 14, 1888.

On demand, after date, with interest at per cent, I promise to pay to the Blackstone National Bank of Boston, or order, at said Bank, Twentyfive Thousand ¹⁰⁰ Dollars, for value received, having deposited with this obligation as Collateral Security,

149 Shares Smith & Dove Man'g Co.,

200 " Pacific Guano Co., with

authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale, or otherwise, at the option of the said Blackstone National Bank, on the non-performance of this promise, said bank applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank. Should the market value of any security pledged for this loan, in the judgment of the holder or holders hereof, decline, I hereby agree to deposit on demand (which may be made by a notice in writing, sent by mail or otherwise to my residence or place of business) additional collateral, so that the market value shall always be satisfactory to said bank, and failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately reimburse themselves by the sale of the security; and it is hereby agreed that the holder or holders of this note, or any person in his or their behalf, may purchase at any such sale.

Joseph W. Smith.

[Indorsed on back]: Waiving demand and notice.

Geo. W. Dove.

Jan. 3, 1889—Received five thousand dollars.

Jan. 5, 1889—Received five thousand dollars.

The further facts sufficiently appear in the opinion.

Mr. J. B. Warner, for plaintiff:

There was no such "non-performance" by Smith as entitled the Bank to cut off by a sale his right to redeem his stock.

The security is primarily pledged for his note alone, and if this note was not dishonored the defendant acquired no further claim to the stock.

Hathaway v. Fall River Nat. Bank, 181 Mass. 14.

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The conduct of the Bank in assuring Smith that the demand was not then insisted on, and the resulting understanding, upon which Smith must be presumed to have relied, supply all the elements of estoppel.

Blake v. Exchange Mut. Ins. Co. of Phila., 12 Gray, 285; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.

But even if the note was so dishonored, when the plaintiff offered to pay it, that the Bank already had a right to sell the stock, still the right of redemption was not cut off so long as the Bank held the stock.

The terms of the note do not make the stock security for other debts simply upon non-payment of the note. Upon non-payment the stock may be sold, but it is not until it has been sold, the note paid, and a surplus obtained, that the right of the Bank to apply that surplus takes effect.

Hathaway v. Fall River Nat. Bank, *supra*.

The plaintiff's offer to pay the note, being accompanied with present ability and actual intention to pay, has, at least in equity, all the effect which a tender upon the same condition could have.

Cumnock v. Newburyport Sav. Inst. 2 New Eng. Rep. 588, 142 Mass. 342, 347.

The duties of pledgor and pledgee are reciprocal, and the right to a return of the security is indissolubly bound with the obligation to pay.

Whether or not this right is correctly treated as making a strict legal condition, as in many cases (*Cortelyou v. Lansing*, 2 Cal. Cas. 200; *Halpin v. Phenix Ins. Co.* 118 N. Y. 165; *Cass v. Higgenbottom*, 1 Cent. Rep. 315, 100 N. Y. 248; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Stuart v. Bigler*, 98 Pa. 80), it would probably be recognized in some way, even at law, so far as to prevent an enforcement of the debt if the creditor had destroyed the security or expressly refused to restore it.

In equity the creditor's obligation to return the security is concurrent with that of the debtor to pay his debt, and the debt cannot be enforced unless at the same time the security is restored.

Palmer v. Hendrie, 27 Beav. 349; *Kinnaird v. Trollope*, L. R. 39 Ch. Div. 636.

The mere fact that a return of the security is refused seems, in this court, to be sufficient ground for proceedings in equity to obtain it on payment of the debt.

Bartlett v. Johnson, 9 Allen, 580; *Fowle v. Ward*, 113 Mass. 548; *Hathaway v. Fall River Nat. Bank*, *supra*. See *Newton v. Fay*, 10 Allen, 504; *Kemp v. Westbrook*, 1 Ves. Sr. 278.

In the sense that a debt owed by my firm can be enforced against all the members, including me, the firm debt is my debt; but the expression "claims against me" naturally points to individual, not joint, claims, and it is a matter for consideration which is meant.

Emerson v. Knower, 8 Pick. 63.

The property was Smith's individually, and he would not naturally devote it to paying firm debts. Considering the usual mercantile view of a firm, which the law recognizes as different from the legal view (*Corey, Accounts*, chap. 4), Smith would hardly have intended

anything but his own debts when he used the word "me."

The personal and the partnership relations are not to be confused, and should be recognized as distinct unless there is a clear intention to treat them on the same footing.

Re Tuff, L. R. 19 Q. B. Div. 88; *Westenholt v. Sheffield Union Bkg. Co.* 54 L. T. N. S. 746.

The form of the note was a printed blank furnished by the Bank, and was such as would, presumably, have been used if Smith had not been a member of any firm. It is a mere accident that the language can cover a state of facts which neither party had in mind, and it would strain too far the effect of a printed form to make it cover more than was obvious at the time.

Cotton v. Atlas Nat. Bank, 4 New Eng. Rep. 859, 145 Mass. 43. See *Ex parte Freen*, 2 Gill & J. 246; *Ohuek v. Freen*, Mood. & M. 259; *Ex parte McKenna (City Bank Case)*, 3 De G. F. & J. 629.

Mr. Frank E. Fitz, for defendant:

A borrower can bind collateral deposited with his obligation as security, also, for other obligations which may be held against him by the holder of the principal obligation.

Richardson v. Washington Bank, 8 Met. 536; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Moors v. Washburn*, 6 New Eng. Rep. 680, 147 Mass. 344; *Fall River Nat. Bank v. Slade*, 12 L. R. A. 181, 153 Mass. —.

Parties having a legal capacity to contract have a right to make such stipulations between themselves as they see fit, provided they do not contravene the law; and such stipulations are to be faithfully observed by the contracting parties.

Jarvis v. Rogers, 15 Mass. 397; *Adams v. Nichols*, 19 Pick. 275; *McCarren v. McNulty*, 7 Gray, 189; *Brown v. Foster*, 118 Mass. 166; *Miller v. Lord*, 11 Pick. 11.

It was not competent to show at the hearing by extrinsic parol evidence that neither party to the note spoke of the acceptances, when said note was signed, there being no ambiguity as to its terms.

Blackmer v. Davis, 128 Mass. 538; *Chemical Electric L. & P. Co. v. Howard*, 150 Mass. 495.

The debt due from a partnership is also due from each member of a partnership, and may be enforced against the separate property of each.

Newman v. Bagley, 16 Pick. 570; *Allen v. Wells*, 22 Pick. 450; *Stevens v. Perry*, 113 Mass. 380.

Each partner is a debtor *in solido* for the whole amount of a joint debt.

Benchley v. Chapin, 10 Cush. 173; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282; *Hanson v. Paige*, 3 Gray, 239; *Collins v. Charlestown Mut. F. Ins. Co.* 10 Gray, 155; *Barry v. Foyles*, 26 U. S. 1 Pet. 311, 7 L. ed. 157.

A partnership is not a legal entity.

Faulkner v. Hyman, 2 New Eng. Rep. 181, 142 Mass. 53, 55; *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 513.

Where a firm obligation is several as well as joint, a bank can apply the individual deposit of a partner to the payment of a debt of the firm.

Eyrich v. Capital State Bank, 67 Miss. 60. 18 L. R. A.

Where a statute has made a partnership debt joint and several so that its creditors can sue a single partner therefor, a defendant can set off his claim against the firm in an action by such single partner against him on an individual debt.

Allen v. Maddox, 40 Iowa, 124. See *Leach v. Lambeth*, 14 Ark. 668.

The clause in the note "that such surplus or any excess of collaterals upon this note shall be applicable to any other notes or claim against me held by said Bank" relates to such notes or claims as might be held by the creditor at the time recourse was had to the collateral.

San Antonio Nat. Bank v. Blocker, 77 Tex. 73, 78.

Holmes, J., delivered the opinion of the court:

This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant as collateral security for a loan to Smith. The main question is whether the defendant can hold the stock as security not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the non-performance of this promise, said Bank applying the net proceeds to the payment of this note and accounting to me for the surplus, if any." It then goes on, and these are the important words, "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said Bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or claim was conditional upon Smith's non-performance of his promise. We think it doubtful, at least, whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so we are of opinion that Smith did not perform his promise within the meaning of the note. The Bank demanded payment of Smith on January 8, 1889, and he made partial payments, but failed to pay the residue and requested the Bank to make the balance a time loan, which the Bank refused. This was a non-performance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the Bank to give notice before taking further steps, such as selling the security, and this it did. We neither construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the Bank. On January 8, if not before, the Bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the Bank is entitled to hold the security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the ac-

ceptances were "claims against him" and that the words used in his note were broad enough to embrace firm acceptances unless there is some reason in the contract, the circumstances, or mercantile practice, to give them a narrower meaning. *Singer Mfg. Co. v. Allen*, 122 Mass. 487; *Chuck v. Freen*, Mood. & M. 259.

If Smith had had private dealings and a private account with the Bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note, in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte McKenna (City Bank Case)*, 3 DeG. F. & J. 629. See Lindley, Partn. 5th ed. 119, note.

But we are called on to construe a printed form used by the Bank and presented by it for those who borrow from it to sign. The question is, What is the reasonable interpretation of such words when insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff alone. The printed form, it may be assumed, would have been used by the Bank equally in a case where the borrower was the principal man in his firm and the only one known to the Bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the Bank held was unknown. This being so in the opinion of a majority of the court, there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

Decree accordingly. *Bill dismissed.*

Caroline E. DODGE, *Appt.*,

v.

BOSTON & PROVIDENCE R. CO.

(.....Mass.....)

A grandchild of one granting land to a railroad company, who has ceased to be a

member of the latter's household, has no rights under a clause in the deed entitling the grantor and his family to free passage over the road as long as the granted land shall continue to be used for railroad purposes under the charter of the grantees.

(September 2, 1891.)

A PPEAL by complainant from a decree of the Supreme Judicial Court for Suffolk County dismissing her bill filed to enforce performance of a condition in a deed by John C. Dodge, deceased, granting land to defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Miss Caroline E. Dodge, appellant, *is propria persona*:

The usage of the word "family" among other things, includes "descendants."

See Crundon's Concordance; *Spencer v. Spencer*, 11 Paige, 160, 5 L. ed. 92; Redf. Wills, pt. 2, p. 395; *Williams v. Williams*, 1 Sim. N. S. 357, 371; Webster, Dict. title, *Family*.

Mr. J. H. Benton, Jr., for defendant:

The primary meaning of the word "family" is "the collective body of persons who live in one house and under one head or management."

Webster, Dict.; Worcester, Dict.; Psalms lxviii. 6.

The secondary meaning is "those who descend from one common progenitor; a tribe or race, kindred, as the human family, the family of Abraham."

Webster, Dict.; Worcester, Dict.; Judges xiii. 2.

It is to be presumed that this word was used in its primary, usual and ordinary sense, and not in its secondary sense.

If the agreement in the deed bears the construction put upon it by the plaintiff, it was against public policy, and void. A railroad corporation cannot bind itself to carry in perpetuity the descendants of any person free of charge. Such a corporation is only a trustee of the public highway, and an agreement of that kind would be a direct violation of its duty as such trustee.

Worcester v. Western R. Corp. 4 Met. 564, 568.

But assuming that the contract to carry the descendants of the grantor is upon adequate consideration and not against public policy, it was not with the plaintiff, and cannot be enforced by her.

Re Empress Engineering Co. L. R. 16 Ch. Div. 125.

This contract, if it bears the construction put upon it by the plaintiff, cannot be enforced in equity. Upon such construction it is a contract to carry an indefinite number of persons in perpetuity, and any decree for its performance would necessarily be as indefinite in its terms as the contract itself.

Atlanta & W. P. R. Co. v. Speer, 32 Ga. 550; *Blanchard v. Detroit L. & L. M. R. Co.* 31 Mich. 43; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259; *Blackett v. Bates*, L. R. 1 Ch. App. 117; *Powell D. Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. App. 831.

NOTE—*Deed, construction of consideration clause; rights thereunder.*

In order to merit the interposition of the powers of a court of chancery the agreement must be 18 L. R. A.

found to be fair and equitable, certain, and consistent with public policy, and just in all its parts, or at least tend to produce a just end. *Griffith v. Frederick County Bank*, 6 Gill & J. 424; *Seymour v. DeLaney*, 3 Cow. 445; *Modisett v. Johnson*, 2 Blackf.

Specific performance of this contract, construed as the plaintiff construes it, ought not to be ordered, because the plaintiff asks for nothing which she cannot obtain by purchase.

Murray v. Stevens, 110 Mass. 95; *Wilson v. Northampton & B. J. R. Co.* L. R. 9 Ch. App. 379.

Lathrop, J., delivered the opinion of the court:

This is a bill in equity, filed on February 23, 1888, for specific performance of an agreement alleged to have been made by the defendant, in 1836, with John C. Dodge, the plaintiff's grandfather. The case was heard before a single justice of this court upon the pleadings and evidence, and comes before us on the plaintiff's appeal from a decree dismissing the bill.

From the evidence it appears that the defendant corporation, on December 23, 1833, took by the right of eminent domain a parcel of land belonging to John C. Dodge in the Town of Attleborough, and, having constructed its road over the land so taken, began to run trains of cars from Boston to Providence on August 23, 1835. By deed dated September 1, 1836, and acknowledged on

May 6, 1837, John C. Dodge conveyed a right of way over the land so taken to the defendant. After the description of the premises conveyed, and before the habendum, were the following clauses: "It being understood and agreed by and between the said parties to this deed that the said corporation shall erect, make, and keep up all necessary fences between the lands of the grantor and the land taken for said railroad. And it is further agreed by and between the said parties to this deed, and the said corporation by the acceptance of this deed do covenant and agree to and with the said grantor, for themselves, their successors and assigns, that the said grantor and his family shall have and enjoy the right of free passage on and over said railroad in the cars of said corporation, their successors and assigns as long as the land and appurtenances hereinbefore described shall continue to be used as a railroad, or for railroad purposes under the charter of said corporation."

It further appears from the evidence that in 1836 John C. Dodge had nine sons living with him; that in 1854 or 1855, he left this Commonwealth and did not return to it; and died in January, 1866; that the plaintiff's

431; *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373; *Ohio v. Baum*, 6 Ohio, 268.

In all cases where a consideration is required, a party suing on a contract must show that the consideration flowed from him (*Boulton v. Jones*, 2 Hurlst. & N. 564; *Mitchell v. Lapage*, Holt, N. P. 253; *Boston Ice Co. v. Potter*, 123 Mass. 28; as privity or reciprocal recognition is essential to establish a contractual relation. *Thomas v. Thomas*, 2 Q. B. 359; *Leake*, Cont. 2d ed. 612; 1 Wharton, Cont. § 508.

The consideration may be some benefit to the defendant, but it must be some detriment to the plaintiff, and it must move from the plaintiff. 1 Wharton, Cont. § 506.

The promise so far as the promisee is concerned must not have been gratuitous. He must have done something or suffered something at the promisor's request, as a reason for the promise, as no one can sue on a contract to which he was not a party. See *Anderson v. Longden*, 14 U. S. 1 Wheat. 35, 5 L. ed. 42; *Shear v. Mallory*, 13 Johns. 497; *Tweddle v. Atkinson*, 1 Best & S. 393; *Price v. Easton*, 1 Barn. & Ad. 433.

Thus, a bill for a specific performance can only be brought by those who are parties to the contract. *Tasker v. Small*, 3 Myl. & C. 69; *Wood v. White*, 4 Myl. & C. 460; *Paterson v. Long*, 5 Beav. 136; *French Civil Code*, art. 1165; 1 Wharton, Cont. § 734.

Rules for construction.

All the terms of a deed should be construed together. *Lowdermilk v. Bostick*, 98 N. C. 299; *Jones v. Pashby*, 5 West. Rep. 571, 62 Mich. 614; *Grueber v. Lindenmeier*, 42 Minn. 99.

The construction must be upon the entire deed, and not on disjointed parts. *Grueber v. Lindenmeier* and *Jones v. Pashby*, *supra*; *Baldwin v. Marton*, And. 225.

Every word and clause should be given some force and meaning, so far as possible. *Robinson v. Missisquoi R. Co.* 4 New Eng. Rep. 391, 59 Vt. 426. See *Coleman v. Sherwin*, Carth. 98; *Shrewsbury's Case*, 9 Coke, 47.

Courts should ascertain and give effect to the real intention of the parties; and such intention must 13 L. R. A.

be gathered from the whole instrument. *Richter v. Richter*, 10 West. Rep. 250, 111 Ind. 456; *Lehndorf v. Cope*, 11 West. Rep. 620, 122 Ill. 317; *Co. Litt.* 814b.

Where that intention is clearly revealed, it furnishes the rule by which deeds as well as statutes and other contracts must be construed. *Case v. Dexter*, 9 Cent. Rep. 259, 106 N. Y. 553.

Such a construction ought to be made of deeds, that their end and design should take effect; and such construction should be made of their words as is most agreeable to the intent of the grantor. These maxims are founded upon the highest authority.—Coke, Plowden, and *Lord Chief Justice Hale*; and the law commends the *astutia*, the cunning of judges, in construing words in such a manner as shall best answer the intent. *Smith v. Packhurst*, 3 Atk. 136.

For in expounding a grant according to the intent, it must be done according to the intent at the time of the grant (*Alderman of Chesterfield's Case*, Cro. Eliz. 35); in the light of the surrounding circumstances. *Newaygo Mfg. Co. v. Chicago & W. M. R. Co.* 7 West. Rep. 334, 64 Mich. 114; *Zimmer v. Miller*, 1 Cent. Rep. 702, 64 Md. 236.

The law in the true construction of grants hath respect to the estate of the grantor; to the ability of the grantee; to the consideration which leads the estate; and to the recompense, and loss which is sustained. *Gough v. Howarde*, 3 Bulst. 125.

Words in grants should be construed according to a reasonable and easy sense, and not be strained to things unlikely and unusual. *London v. The Chapter of Southwell*, Hob. 304.

Technical rules of construction are not to be resorted to, when the meaning of the maker of a deed is obvious. *Henderson v. Mack*, 32 Ky. 379.

Such rules are not favored, and are not to be so applied as to defeat the intention of the parties, but effect must be given to such intention if practicable, when no principle of law will be thereby violated. *Grueber v. Lindenmeier*, 42 Minn. 99.

Judges in their judgments have great regard to the generality of the cases, and to the inconveniences which may ensue either way; *talit interpretatio semper flenda est, ut evitetur absurdum, et inconvenientia, et ne iudicium sit illusorium*. *Case of Alton Woods*, 1 Coke, 52.

father, a son of John C. Dodge, was living with him in 1836, and continued to live with him from that time until about a year after his own marriage in 1846; that he left the Commonwealth in 1850, and returned to it in 1885 or 1886, and now resides here.

In regard to the plaintiff, the testimony shows that she was born in 1854 or 1855, in the State of Pennsylvania; that when she was a child she lived for some time in the family of her grandfather after he left this Commonwealth; and that she returned here with her father in 1885 or 1886, and has since lived with him.

The evidence was somewhat conflicting on the question whether the defendant has by its acts recognized the plaintiff as a person entitled to ride free over its road. It does appear that when she was a child she occasionally went over the road, when accompanied by her father or mother, and was allowed to do so; and that, since she came of age, passes had been occasionally given to her, she claiming the right to have them, but, as she states in her brief, "usually on objection by the officer of the Company." On this state of the evidence we need not consider how far the defendant would be bound by what the plaintiff contends is the practical construction put upon the deed by the officers of the defendant corporation. We find nothing in the evidence to show conclusively that what was accorded to her after she came of age was other than as a favor.

We pass, therefore, to the consideration of the construction of the deed. The word "family" has several meanings. Its primary meaning is the collective body of persons who live in one house and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor.

Unless the context manifests a different intention, the word "family" is usually construed in its primary sense. In *Rer v. Darlington*, 4 T. R. 797, under the Settlement Act of 8 and 9 Wm. III., chap. 30, which provided for the granting of a certificate to a poor person who wished to remove from his own parish to another; and that the latter parish should "be obliged to receive and provide for the person mentioned in the certificate, together with his or her family,"—it was held that the certificate did not extend to a grandchild of the person receiving it, who lived with his father, but not with his grandfather.

Lord Kenyon, *Ch. J.*, said: "In common 13 L. R. A.

parlance, the family consists of those who live under the same roof with the *pater-familias*; those who form (if I may use the expression) his fire-side. But when they branch out, and become the heads of new establishments, they cease to be part of the father's family." See also *Oystead v. Shed*, 18 Mass. 520; *Bowditch v. Andreu*, 8 Allen, 339; *Poor v. Humboldt Ins. Co.* 125 Mass. 274; *Bates v. Dawson*, 128 Mass. 334; *Bradlee v. Andrews*, 137 Mass. 50; *Phelps v. Phelps*, 143 Mass. 570, 4 New Eng. Rep. 183.

The plaintiff, however, contends that the words "so long as the land and appurtenances hereinbefore described shall continue to be used as a railroad or for railroad purposes under the charter of said corporation" imply perpetual succession, and must necessarily include all the descendants of John C. Dodge.

But we are of opinion that these words are words of limitation of the grant, and not words extending the meaning of the word "family."

By the charter of the defendant corporation, the Commonwealth reserved the right, at any time after twenty years from the opening for use of the road, to purchase of the corporation its railroad, and its franchise, property and privileges. Stat. 1831, chap. 56, § 12. The words "under the charter of the corporation" were therefore necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes.

So, too, the words, "used for railroad purposes," were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by Dodge should revert to him, the parties would naturally provide that the contract to carry should be at an end.

Other contingencies might also happen.

By the Statute of 1830, chap. 81, passed on March 11, 1831, the charter of the defendant corporation could be repealed at the pleasure of the Legislature; its franchise might be forfeited for misuser or nonuser; or it might be surrendered.

All these considerations show that the words in question were words of limitation, and did not extend the word "family" so as to include the descendants of John C. Dodge to the remotest generation. We are of opinion, therefore, that the plaintiff, after she ceased to be a member of her grandfather's household, was not entitled to a free pass over the road of the defendant as one of his family.

Decree dismissing the bill affirmed.

MICHIGAN SUPREME COURT.

Robert BALLENTINE *et al.*

Raymond S. WEBB.

(.....Mich.....)

1. **The business of slaughtering animals for food is not a nuisance**, as a matter of law, independently of the manner in which it is conducted, if the slaughter-house is situated in a new and sparsely settled portion of a city, in the neighborhood of stockyards and other slaughter-houses.
2. **The noise made by hogs kept in confinement for the purpose of slaughter** is not such a nuisance as to justify the destruction of a slaughter-house business for the sole purpose of ridding a neighborhood of such noise.
3. **That the existence of a slaughter-house depreciates the value of neighboring property** is not sufficient ground to justify a decree interfering with the business carried on therein.
4. **A decree which attempts to enjoin a nuisance caused by the manner of carrying on a business** should specifically point

out the things which are to be done and to be refrained from in order to abate the nuisance.

5. **A slaughter-house business will be destroyed** by a court of chancery at the instance of persons who moved into its neighborhood after it was established, only when it is injurious to health, where it was located at the outskirts of a city in a locality where similar kinds of business had been already established.

(December 24, 1890.)

CROSS-APPEALS from a decree in chancery of the Circuit Court for Wayne County enjoining the carrying on of a slaughter-house business in such a way as to make it a nuisance. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Parker & Burton for complainants.

Messrs. Conely, Maybury & Lucking, for defendant:

That the slaughter-house diminishes the value of the neighboring lands, considered alone, can be no ground for an injunction.

Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 537, 539; *Zabriske v. Jersey City & B. R. Co.*

NOTE.—*When injunction will be denied to restrain an alleged nuisance.*

An injunction will not be granted to restrain the erection of a slaughter-house and place for keeping hogs, where, by the answer and affidavits, it appears the defendants intend to carry on the business so as not to be a nuisance. If it should be carried on in such manner as that it becomes a nuisance, it will then be enjoined. *Atty-Gen. v. Steward*, 20 N. J. Eq. 415.

A trade or business will not be enjoined unless it appears, from the place or manner in which it is carried on, that it materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable; in such case it is a nuisance, which it is the duty of the court to restrain. *Ross v. Butler*, 19 N. J. Eq. 294.

Occupying real property in cities as a hog-yard, and fat and offal-boiling house is *prima facie* a common nuisance; but this presumption may be rebutted by showing that the business is so conducted and carried on as not to endanger the health, or interfere with the comfort, of the neighboring inhabitants. *Dubois v. Budlong*, 15 Abb. Pr. 445.

Until the Legislature provide a remedy, or until the fact of a nuisance is established by proof, it would be wrong to restrain a lawful calling merely because it does or might offend the senses of some. *Ibid.*

In the case of *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 821, the chancellor held that the occupation of a building in a city, as a slaughter-house, was *prima facie* a nuisance to the neighboring inhabitants, and might be restrained by injunction. And in that case he refused to dissolve the injunction, and retained it until the hearing; although the defendant, in his answer, denied that a slaughter-house was a nuisance. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Rex v. White*, 1 Burr. 337; 3 Bl. Com. 217; *Brady v. Weeks*, 3 Barb. 157.

But the discomfort must be physical, not such as

depends on taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. For a strikingly similar definition, see *Walter v. Selfe*, 15 Jur. 418, 4 Eng. L. & Eq. 15; *Westcott v. Middleton*, 10 Cent. Rep. 202, 43 N. J. Eq. 478.

Slaughter-houses not necessarily a nuisance.

Slaughter-houses in a city or town were once reckoned by the courts as nuisances *per se*, and they are still so classed in the opinion of the court in *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378, decided as late as 1877; but it is said in a late work of merit that the wonderful improvements wrought by science in all departments of life has shown that this position cannot now be upheld in reference to any trade, and that slaughter-houses are now regarded merely as *prima facie* nuisances. *Wood, Nuisances*, §§ 503, 504, and cases there cited.

While it is true that persons living in a city must suffer the consequences which come from the bustle and noise incident to the activity of business and the manner in which it may be done, and from the various causes which are produced by a dense population against which there is no legal ground for complaint, they are entitled to protection against the carrying on of a trade or business in a manner which materially injures their property or affects their health, or renders the enjoyment of it physically uncomfortable. *Crump v. Lambert*, L. R. 3 Eq. Cas. 408; *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 821; *Brady v. Weeks*, 3 Barb. 157.

No action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful, which the law declares to be lawful. *New York & E. R. Co. v. Young*, 33 Pa. 175; *Renwick v. Morris*, 3 Hill, 621; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Angell, Highways*, § 237; *Addison, Torts*, § 1040; *Porter v. North Missouri R. Co.* 33 Mo. 128; *Mononga-*

19 N. J. Eq. 814, 818; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 342, 343; 2 Story Eq. Jur. § 925.

The remedy by injunction must be confined to that specific thing which constitutes the actual nuisance, as shown by the proofs.

Welch v. Stowel, 2 Dougl. 832; *Wreford v. People*, 14 Mich. 41, 46; *Babcock v. New Jersey S. Y. Co.* 20 N. J. Eq. 296.

Courts will rarely interfere by injunction, where it may be stopped by indictment.

Morris & E. R. Co. v. Prudden, *supra*.

If a business is lawful and is carried on in a suitable place, even though to the annoyance of neighbors, still courts will not enjoin.

Doelner v. Tynan, 38 How. Pr. 182-186, and many cases cited; *Gilbert v. Showerman*, 23 Mich. 448-455.

The court will consider the loss, the locality, all the circumstances and surroundings, even after a verdict that the thing is a nuisance, before giving an injunction.

Wood, Nuisances, § 483, p. 530.

Nothing can be a nuisance which is permitted to be set up by competent authority.

Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 70, 71; *Atty-Gen. v. Ewart Booming Co.* 34 Mich. 463. See also *People v. Detroit & H. Pl. Road Co.* 87 Mich. 195.

Cahill, J., delivered the opinion of the court:

The complainants are the owners of, and occupy, as residence property, lands in the northern part of the City of Detroit, lying between Trumbull Avenue and Twelfth Street, and between Merrick Avenue and Kirby Street. The neighborhood is a new one, as a residence part of the city, the complainants having for the most part moved there within a year prior to the filing of their bill in 1887. In the spring of 1886, the defendant had erected a slaughter-house on the southeast corner of Twelfth and Kirby Streets, the cost of which was something over \$4,000. Before doing so, he testified that he had acquired permission from the common council. In the near neighborhood was King's cattle-yard and Wreford's slaughter-house, both of which had been in operation some years. Defendant was engaged principally in slaughtering hogs. The hogs were received by rail, and were unloaded from a side track near the slaughter-house to the number of about 300 a week. They were usually kept in the yard at least over night, and sometimes twenty-four hours, to cool off before killing. Sometimes

hela Nav. Co. v. Coons, 6 Watts & S. 101; *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 86; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Bellinger v. New York Cent. R. Co.* 23 N. Y. 42; *Moyer v. New York Cent. & H. R. R. Co.* 88 N. Y. 351; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

The occupation of a building as a slaughter-house is to be regarded as *prima facie* a nuisance, and where such a building exists so near dwelling-houses as to impair their comfortable enjoyment, it is an actionable nuisance. *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 821.

The business of slaughtering animals ought not to be carried on in the populous parts of a city, and, more especially, when connected with slaughtering is the act of burning bristles and boiling offal. *Dubois v. Budlong*, 15 Abb. Pr. 445; 10 Bosw. 700.

And where slaughter-houses are originally erected on vacant ground, remote from human habitations, or public places, if they become nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings being subsequently erected near them, the fact of their prior existence in a place remote from dwellings is no defense. *Brady v. Weeks*, 3 Barb. 157; *Com. v. Upton*, 6 Gray, 473. And see *Bankart v. Houghton*, 27 Beav. 426; *Howell v. McCoy*, 3 Rawle, 256; 4 Walt. Act. & Def. 751.

Rule as to the measure of damages.

The rule of damage to real estate where the injury is to the value of the premises themselves, is the difference between the value of the premises before the injury and immediately after. 1 Hill, Torts, 608, § 18, a; *Wood, Nuisances*, § 853; *Seely v. Alden*, 61 Pa. 302; *Ruckman v. Green*, 9 Hun, 225; *Peck v. Elder*, 3 Sandf. 120; *Dana v. Valentine*, 5 Met. 8; *Chase v. New York C. R. Co.* 24 Barb. 273.

Where the nuisance can be abated, this rule does not apply. In such case, the measure of damages is the loss in rental value by the continuance of the nuisance. *Chipman v. Palmer*, 9 Hun, 517; *Pinney v. Berry*, 61 Mo. 359; *Park v. Chicago*, & S. W. R. Co. 43 Iowa, 636; *McKeon v. Sec.* 4 Rob. 450; *Ruff v. Rinaldo*, 55 N. Y. 664; *De Wint v. Wiltse*, 9 Wend. 326; *Jutte v. Hughes*, 67 N. Y. 297; *Baltimore* 18 L. R. A.

& P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Cal. Civ. Code, § 3480. All others are private nuisances. Id. § 3481.

Any person may maintain an action for a private and particular injury, distinct from that of the public in general for the commission of a public nuisance. *Pierce v. Dart*, 7 Cow. 606; *Langsby v. Smith*, 4 Wend. 9-25; *Cropley v. Murphy*, 1 Hill, 123; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281; *Rose v. Groves*, 5 Man. & G. 613; *Milbau v. Sharp*, 27 N. Y. 611-627; *Myers v. Malcom*, 6 Hill, 292; *Sedgw. Dam.* 32-142; *Soltan v. DeHeld*, 9 Eng. L. & Eq. 104; 1 Hill, Torts, 554; *Chichester v. Lethbridge, Willes*, 71-73; 3 Bl. Com. 219; *Co. Litt.* 56.

The writ of injunction can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191; *Reid v. Gifford*, Hopk. Ch. 416, 2 L. ed. 470; *Pollitt v. Long*, 58 Barb. 20; *Mohawk & H. R. Co. v. Archer*, 6 Paige, 83, 3 L. ed. 907; *Parker v. Winnipisogee Lake C. & W. Co.* 67 U. S. 2 Black, 545, 551, 17 L. ed. 333, 337; *Webber v. Gage*, 39 N. H. 182; *Dent v. Auction Mart Co.* 35 L. J. Ch. 555; *Atty-Gen. v. United Kingdom Elect. Teleg. Co.* 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. N. S. 165; *Cloves v. Staffordshire Potteries W. W. Co.* L. R. 8 Ch. App. 125.

To authorize a private person to maintain an action for a public nuisance, the injury which he sustains therefrom must differ in kind, not in degree, from that which is common to all. *Chicago v. Union Building Assn.* 102 Ill. 379, 40 Am. Rep. 568; *Bigley v. Numan*, 53 Cal. 403; *Jarvis v. Santa Clara Valley R. Co.* 52 Cal. 438; *Nottingham v. Baltimore & P. R. Co.* 8 McArthur, 517.

car-loads of hogs intended for King's stock-yards, as well as for the defendant's, would stand upon the track for several hours at a time, and would make considerable noise by squealing. Complainants allege in their bill that the swine confined in defendant's yards produce a large amount of manure and filth, and give off an offensive, sickening, and unwholesome stench, and that at times it becomes so unendurable that the inhabitants, of whom complainants form a part, are compelled to leave their homes; that the confined swine make a great disturbance and noise by squealing so loudly as to awaken persons from sleep, and so constantly as to disturb inhabitants at all times, both day and night. It is alleged that, in consequence of the business carried on by defendant, the land in the vicinity has become depreciated in value, and complainants charge that the stench arising from said swine, and from the drying hair taken from the slaughtered hogs, and from the said slaughter-house, constitutes a nuisance, and that the noise and disturbance made by said swine in confinement constitute a nuisance; that such nuisances are greatly injurious to the health, comfort, and property interests of the complainants; that the injury to the complainants' health and comfort cannot be measured by monetary value; that the injury to their property interests is upwards of \$5,000; and that for such injury to their health, comfort, and property, they are without any adequate relief except in equity. The prayer of the bill is for preliminary and perpetual injunction to restrain defendant from further using or employing his property for a slaughter-house wherein to slaughter swine or any other animals, and from employing the same for the purposes of confining therein quantities of swine or other animals for the purpose of slaughtering them, and for using the same or any part of it as a drying-yard for drying hair or bristles taken from the slaughtered swine; also for general relief.

Defendant answered admitting that he owned and operated the slaughter-house at the place stated in the bill, and for purposes substantially as charged, but denied that the place was uncleanly, or gave out noisome or unwholesome smells, or that the same was a nuisance in any way. Says that the slaughter-house had been erected, and was carried on, after the newest and most approved methods, and was kept as clean as is possible for such a place to be kept; that it had been constructed expressly for the purpose for which he was using it, and that if he should be prevented from making such use of it the value of the property, amounting to about \$5,000, would be almost wholly destroyed; that when defendant bought and built there, there were very few buildings in the neighbourhood; and that, as yet, the neighbourhood was sparsely settled. The case was heard before *Hon. George S. Hosmer*, circuit judge, a large number of witnesses being examined on each side, and the testimony being very conflicting. Upon the part of the complainants, the testimony tended to show that the people living in the vicinity of the defendant's slaughter-house were an-

noyed, especially during the summer months, by offensive smells coming from the direction of the defendant's place; that these smells were in some instances so offensive as to make the parties sick. It also appeared that people were kept awake at night by the squealing of hogs confined in defendant's yard. It does not clearly appear from the complainants' proof, however, whether the offensive smells of which they complain were such as were necessarily connected with a slaughter-house for the slaughtering of hogs maintained in a proper manner, or whether such smells were due to the improper conduct of the business, and in consequence of defendant's neglect to keep the place in as clean a condition as the same could be kept with proper care. There was evidence tending to show that defendant was in the habit of spreading the hair scraped from the slaughtered hogs upon the ground to dry before sending the same to market, and some of the witnesses thought that much of the unwholesome smell came from this hair. On the part of the defendant, the testimony tended to show that great care was used by defendant to keep the place clean and wholesome; that the manure and other offal was removed every day by wagons to a distance in the country; that much of the noise with which complainants found fault came from the squealing of hogs standing in cars on the track intended for King's stock-yards. A considerable number of witnesses called by the defense, who lived in the neighborhood where defendant's business was carried on, testified that they had never noticed any offensive smells, and were never disturbed by the squealing of hogs. The court below found as a fact that in the prosecution of the business conducted by the defendant he has, at various times, been guilty of maintaining a nuisance in the noxious and offensive odors from the confined swine, and from swine in the process of being slaughtered, and has also been guilty of maintaining a nuisance in the offensive odors from the drying hair and bristles taken from the slaughtered swine, and that at times, depending on the state of the weather or the direction of the wind, such nuisances have been unbearable. The decree, however, did not order the defendant to cease using the place as a slaughter-house altogether, but decreed that defendant refrain from using or employing the buildings and sheds erected on defendant's premises for the purpose of a slaughter-house wherein to slaughter hogs in such a way as to be offensive to, or become a nuisance to, the complainants; and that defendant desist and refrain from using or employing the said inclosure or buildings for the purpose of confining therein quantities of swine or other animals in such a way as to be offensive to, or to be a nuisance to, the complainants, or any of them; and that defendant desist and refrain from using said inclosure, or any part thereof, as a drying-yard in which to dry hair or bristles taken from the slaughtered swine. And the complainants were given leave to apply to the court for a further order enjoining or restraining defendant from using his premises in any wise for the purpose of

slaughtering or confining swine, if it shall appear that the further use of said buildings and inclosure by said defendant be offensive or noxious to the complainants, or any of them, because of the noises arising from the swine, or because of disagreeable odors arising from the inclosure caused by confining swine therein. From this decree, complainants and defendant have both appealed.

On the part of the complainants, it is insisted that the decree falls short of giving them the relief to which they are entitled, because, having adjudged the defendant's business to be a nuisance, such judgment was not followed by an injunction perpetually restraining defendant from further carrying on such business. On the part of the defendant, it is claimed that the complainants were not entitled to any relief under their bill and the proofs made, for the reasons: *First*. That it does not appear from the bill that the defendant is maintaining such a business as is a nuisance *per se*; that it does not appear from the bill but that the offensive odors arise from causes which can be remedied without any serious interference with the conduct of defendant's business; that there is no allegation in the bill, and substantially no proof, that defendant's slaughter-house is of itself a nuisance. *Second*. It is claimed that the decree gave no relief to complainants, and that, upon facts found by the circuit judge, the bill ought to have been dismissed. Without attempting to review the voluminous testimony in this record, we have arrived at the following conclusions:

1. That defendant's business is not of such a character as, when properly conducted, to constitute a nuisance in the neighborhood where it is situated. This is practically conceded by complainants; and, if it were not, we should not be willing to hold, as a matter of law, that a business so necessary and important as that in which defendant is engaged, and which his own profit and the convenience of the city requires should be conducted within reasonable distance of the market which he supplies, was of necessity a nuisance, independent of the manner in which it was conducted.

2. The noise made by hogs kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify a court of equity in destroying defendant's business for the sole purpose of ridding a neighborhood of such noise. We do not intend by this to intimate that we regard the squealing of pigs as a soothing sound. We have no doubt that such noises are more or less annoying to some people, depending somewhat upon their peculiar temperament. Some of complainants' witnesses testified that they did not notice the squealing of the pigs, which annoyed other members of the family; but in this age of steam and iron, the squealing of a pig is scarcely to be heard amid the multitude of greater noises that everywhere assault the ear. Within a short distance of defendant's place, and nearer to some of complainants than the slaughter-house, are the railroad tracks, over which run the engines

with their shrieking whistles, louder than the squealing of a thousand hogs, in chorus, and their automatic bells, ringing at all times of the day and night, and yet none of the complainants would think of removing the railroad from their neighborhood because of the distressing noises which arise therefrom.

3. Complainants are not entitled to a decree which would interfere with defendant's business on the ground that the existence of it in that neighborhood depreciates the value of their property. As to such injury, if any, complainants have an adequate remedy at law. *Wood, Nuis. 946; Atty-Gen. v. Nichol, 16 Ves. Jr. 342; Zabriskie v. Jersey City & B. R. Co. 13 N. J. Eq. 314; 2 Story, Eq. Jur. § 925.*

4. We are satisfied that defendant has not, at all times, conducted his business with as much care to cleanliness as he ought. His counsel urged that the testimony fails to locate any offense arising from the slaughter-house proper. If this be granted, we fail to see the force of it. Complainants are not required to nicely discriminate as to the origin of offensive smells. The evidence is convincing that they come from defendant's place of business, and his business must be regarded as including all that is incident to it. The defendant insists that this business can be carried on so as not to be injurious to the health, or seriously offensive to complainants. The decree of the circuit court recognized this possibility, and undertook to give defendant time and opportunity to abate the nuisance complained of without requiring him to stop his business altogether. The trouble with the decree is that it fails to point out specifically what defendant is required to do in order to comply with its requirements. To adjudge that defendant should so conduct his business as not to be offensive is to give him no rule of conduct which the law had not before prescribed. The decree should have specifically pointed out the things that defendant was required to do, and to refrain from doing, in order to abate the nuisance which the court found to exist.

5. Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes injurious to health that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it. So careful is the law of human life and health that no consideration of mere property rights can be allowed to weigh against them. As to other wrongs, they can, for the most part, be compensated in damages. In the recent case of *People v. Detroit White Lead Works*, 9 L. R. A. 722, 82 Mich. 471, the rule in a case at law was stated by Mr. Justice Grant as follows: "The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with

them. Whenever such a business becomes a nuisance, it must give way to the rights of the public, and either devise some means to avoid the nuisance or must remove or cease its business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is a useful one, or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuisances, § 19; *Reg. v. Train*, 2 Best & S. 640; *Works v. Junction Railroad*, 5 McLean, 425; *Respublica v. Caldwell*, 1 U. S. 1 Dall. 150, 1 L. ed. 77; *Ross v. Butler*, 19 N. J. Eq. 296; *Robinson v. Baugh*, 31 Mich. 290. It is true that, in places of population and business, not everything that causes discomfort, inconvenience, and annoyance, or which perhaps may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort, and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was *Gilbert v. Showerman*, 23 Mich. 448.

In *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 205, the rule was stated more broadly: "Any business, however lawful, which causes annoyances, which materially interfere with ordinary comfort physically of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life uncomfortable. . . . The only question is, What amounts to that discomfort from which the law will protect? The discomforts must be physical, not such as depend upon taste or imagination." This language was used in a case where the court was asked to restrain the defendants from erecting or carrying on their gas-works at the place at which they had begun to erect them or in the neighborhood of that place, and al-

though the court declined to grant the injunction on the ground that it did not clearly appear that the works, "when completed, would be a nuisance," the foregoing rule was clearly stated as one that would govern the court in dealing with the company should complaint afterwards be made. The facts in that case were that defendants proposed to erect their gas-works in a populous residence portion of the City of Newark, and such a case is to be distinguished from this, where defendant erected his place of business at the outskirts of the city, and in a locality where similar kinds of business were already established. Most of the complainants had moved into this neighborhood since the defendant's business was established; and, although they have a right to be protected from nuisances that endanger the health of themselves or their families, a court of equity, in determining whether it will destroy defendant's business at their request, will consider whether the thing complained of is noxious or only disagreeable, and in the same connection will consider the fact that complainants have voluntarily put themselves into the disagreeable neighborhood. The rule here contended for is recognized by our Statute concerning the abatement of nuisances. How. Stat. § 1643. Under the general prayer for relief, complainants are entitled to a decree requiring defendant to remove from his premises every day all manure, blood, offal, hair, and other refuse of his establishment in covered garbage wagons, such as are in use by the board of public works in the City of Detroit, or in other wagons that will effectively avoid the spread of offensive odors; to thoroughly clean, cleanse, and disinfect his premises daily; to provide sufficient pens for the hogs in store so that they shall not be crowded and rendered noisy and quarrelsome by discomfort while in confinement; and to use such other precautions as are necessary to render his place of business clean and wholesome.

No costs will be awarded to either party in this court.

The decree below as to costs is affirmed.

Morse and Grant, JJ., did not sit. The other Justices concurred.

Petition for rehearing overruled.

NEW YORK COURT OF APPEALS.

Maria STELZ
v.

Minnie SCHRECK *et al.*

(.....N. Y.....)

A tenancy by the entirety is severed by an absolute divorce between the ten-

ants, and thereafter each holds his or her proportional share of the property as a tenant in common without survivorship.

(*Earl, J., dissents.*)

(October 6, 1891.)

CROSS-APPEALS by plaintiff and defendant Schreck from an order of the General

NOTE.—*The rule as to estates by entirety, stated.* The rule in regard to estates by entirety is, that neither tenant can sever the union of interest without the consent of the other, but this is construed to mean that the one cannot sever the interest or 13 L. R. A.

make any disposition of the estate so as to affect the right of survivorship. In the case of *Washburn v. Burns*, 34 N. J. L. 18, the court, in speaking of the husband's rights in an estate by entirety, says: "The limit of this right of the husband is, that he

Term of the Supreme Court, First Department, overruling their motions for new trial of an action in which plaintiff was permitted to recover dower in an equal undivided half of certain real estate. *Affirmed.*

Statement by Peckham, J.:

Cross-appeals by the plaintiff and the defendant, Schreck, from an order of the General Term, Supreme Court, First Department, which denied the motions of both plaintiff and the defendant, Schreck, for a new trial under section 1001 of the Code of Civil Procedure on their exceptions in the case.

The premises in question, situated on the south side of Fiftieth Street, in the City of New York, were conveyed by deed on April 28, 1886, to William Stelz and Minnie Stelz,

his wife, and by force thereof the grantees became seised as tenants by the entirety. After this conveyance, William Stelz, on June 20, 1888, obtained a decree of divorce from his wife, Minnie Stelz, now Minnie Schreck, on the ground of her adultery. On October 18, 1888, William Stelz married the plaintiff, and on February 8, 1889, he died, leaving the plaintiff, his widow. His former wife, Minnie Schreck, survived him, and she, during the lifetime of Stelz, married Joseph Schreck. The plaintiff brought this action claiming dower in all the land and premises, and asking that such dower be admeasured, contending that by the judgment of divorce all estate and interest of the first wife ceased and was at an end.

The first wife, however, claimed the whole

cannot do any act to the prejudice of the ulterior rights of the wife." 1 Bishop, Married Women, § 622; Ames v. Norman, 4 Sneed, 688.

Decree of divorce severs the estate.

It is the prevailing doctrine that a severance of the marital relation by divorce also severs the estate, and after divorce they no longer hold by entirety, but as joint tenants, or tenants in common, owing to the differing policies and laws of the States. 2 Bishop, Mar. & Div. 6th ed. § 716; Harter v. Wallner, 80 Ill. 197.

The integrity of the estate is dependent upon the united effect by the marital relation. Obviously, whenever this relation is terminated or destroyed, the estate which is but a parasite of the relation of matrimony, dies with it. "One legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold in joint seisin, they must hold by moieties." See note to Den v. Hardenbergh, 18 Am. Dec. 371; 2 Bright, Husb. & W. 365.

A recent writer expresses the prevailing view in the following language: "There are differences of judicial opinion regarding this estate; as, for example, some deem husband and wife incapable of taking lands either jointly or in common, so that whatever the terms of a conveyance to them, they will hold by the entirety. Others permit them to take and hold as joint tenants or tenants in common if the deed is in express words that they shall. But all agree that this tenancy does not and cannot exist where there is no marriage. The consequence is that when the marriage ends by divorce it falls." Enyeart v. Kepler, 118 Ind. 84, 36, 10 Am. St. Rep. 94, 96; Bishop, Mar. & Div. § 1644.

Attitude of the courts as to estates of the entirety.

There is a very sturdy disposition upon the part of both the state and federal courts to resist any invasion of the ancient common-law doctrine of tenancy of the entirety. Whiton v. Snyder, 88 N. Y. 299; Baker v. Lamb, 11 Hun, 519; Wright v. Saddle, 20 N. Y. 320, 17 Alb. L. J. 393; Pollock v. Webster, 16 Hun, 104; Matteson v. New York Cent. R. Co. 62 Barb. 378; Wright v. Wright, 64 N. Y. 487; Taylor v. Young, 71 Pa. 81; Laws 1880, chap. 472; 11 Alb. L. J. 873, 402; 20 Alb. L. J. 208; 27 Alb. L. J. 162; Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 299; Gerard, Real Estate Titles, 2d ed. 72, 84; Wms. Real Estate, 5th ed. 225, note.

If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common; for, being one person in law, they cannot take the estate by moieties, but both are seised of the entirety,—the consequence of which

is, that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor. 2 Bl. Com. 182; Anderson, Law Dict. title, *Entirety*.

Under well-recognized rules of the common law parties occupying the relation of husband and wife were considered one person, and when land was conveyed to them as such, they held, not as joint tenants, but each being seised of the whole *per tout et non per my*, so that the survivor takes the whole, not by survivorship but by virtue of the original estate. Jackson v. Stevens, 16 Johns. 110, 115; Rogers v. Benson, 5 Johns. Ch. 431, 487, 1 L. ed. 1132, 1134; Barber v. Harris, 15 Wend. 615-617; Jackson v. McConnell, 19 Wend. 175, 177; Dias v. Glover, 1 Hoffm. Ch. 73, 77, 6 L. ed. 1069, 1070; Doe v. Howland, 8 Cow. 283; Torrey v. Torrey, 14 N. Y. 430; Den v. Hardenbergh, 10 N. J. L. 49; Shaw v. Hearsey, 5 Mass. 521; Thornton v. Thornton, 3 Rand. (Va.) 179; Ames v. Norman, 4 Sneed, 688; Rogers v. Grider, 1 Dana, 242; Cochran v. Keruey, 9 Bush, 136; Gibson v. Zimmerman, 12 Mo. 385; Stuckey v. Keefe, 26 Pa. 397-399; Taul v. Campbell, 7 Yerx. 319; 4 Kent. Com. 363; 2 Bl. Com. 182; Fairchild v. Chastelleaux, 1 Pa. 176; Johnson v. Hart, 6 Watts & S. 819; Ketchum v. Walsworth, 5 Wis. 102; Brownson v. Hull, 16 Vt. 309; Fisher v. Provin, 25 Mich. 347-361; Davis v. Clark, 26 Ind. 428; McDuff v. Beauchamp, 50 Miss. 531; Greenlaw v. Greenlaw, 13 Me. 182-188; 1 Wash. Real Prop. 278; Bertles v. Nunan, 92 N. Y. 152.

A married woman and her husband constitute but one person in law; and where real property is conveyed or devised to them together they do not take by moieties. Both are seised of the entirety, and not as joint tenants or tenants in common; and the survivor takes the entire estate; and the deed of one without the other (if living) is inoperative and void. Jackson v. Stevens, Jackson v. McConnell, Barber v. Harris, Torrey v. Torrey, and Doe v. Howland, *supra*.

This is the law in the State of New York as to joint ownership of husband and wife under the legislation of 1848, 1849, and 1860. Goellet v. Gori, 81 Barb. 814; Torrey v. Torrey, *supra*; Farmers & M. Nat. Bank v. Gregory, 49 Barb. 115; Freeman v. Barber, 8 Thomp. & C. 574; Beach v. Hollister, 3 Hun, 519.

A dictum in Meeker v. Wright, 76 N. Y. 282, supported by a divided court, unsettled the law for some time in that jurisdiction as it was supposed to indicate an opinion of the court of appeals that, in such cases, husband and wife took as tenants in common; but the question was finally set at rest by the decision in Bertles v. Nunan, 92 N. Y. 152, cited in the principal case, which held the law to be as stated in the context. This case overruled that of Feely v. Buckley, 28 Hun, 451. Gerard, Real Estate Titles, 3d ed. 67. See note to Baker v. Stewart (Kan.) 2 L. R. A. 434.

of the premises under the deed by right of survivorship notwithstanding the severance of the marital relations by the judgment of divorce. The court at the trial sustained the plaintiff's right to be endowed of an equal undivided half part of the land, on the ground that after judgment in the action for divorce the parties to such action became tenants in common.

Mr. George H. Kracht, for plaintiff:

The deed to William Stelz, and Minnie, his wife, created an estate by the entirety, and the consideration for the interest the said wife received in said estate from her said husband was her vow of fidelity, and she, as the wife of William Stelz, took the same upon condition implied in law that she would remain faithful to all the solemn obligations of the marriage relation; and upon breach of this implied condition, and a judgment dissolving the marriage in consequence of said breach, she forfeited her interest in said estate.

Absolute divorce from the bonds of matrimony has the same operation and effect as the death of the guilty party.

Browning v. Headly, 2 Rob. Va. 340; Schouler, *Husb. & W.* § 554; *Highley v. Allen*, 3 Mo. App. 524; *Wood v. Simmons*, 20 Mo. 363; *Renwick v. Renwick*, 10 Paige, 423, 4 L. ed. 1087; *Levins v. Sleator*, 2 G. Greene, 609; *Barber v. Root*, 10 Mass. 260; 3 Bl. Com. 188; Fitzherbert, *Natura Brevium*, 446-470; Co. Litt. 851; *Wigney v. Wigney*, L. R. 7 Prob. Div. 177.

The rules laid down in *Ames v. Norman*, 4 Sneed, 696; *Lash v. Lash*, 58 Ind. 528, and *Harrer v. Wallner*, 80 Ill. 197, are wrong in principle, contrary to reason and natural justice, and against public policy. *Barclay v. Waring*, 55 Ga. 86.

The guilty wife should not be rewarded for bringing about an absolute divorce for her adultery by having half of her former husband's property bestowed upon her, to enjoy the same in common with her paramour, her subsequent husband.

Riggs v. Palmer, 5 L. R. A. 840, 115 N. Y. 511. See *Wigney v. Wigney*, L. R. 7 Prob. Div. 228; *Piper v. Hoard*, 9 Cent. Rep. 445, 107 N. Y. 82; *Holman v. Johnson*, Cowp. 848.

The defendant, Minnie Schreck, is estopped by her own wrongful conduct from claiming title to the premises in question or any part thereof.

Bigelow, Estoppel, 870; *Herman*, Estoppel, §§ 731, 733, 740, 791; 2 Story, Eq. Jur. §§ 1538, 1544.

Mr. Edward W. Scudder Johnston, with **Mr. Lewis S. Goebel**, for defendant:

The deed to William Stelz and Minnie Stelz created a vested estate in the said Minnie Stelz to hold the whole of said estate jointly with the said William Stelz during the lives of both of them, and a vested right to take the whole of the said estate free from the interest of the other, upon surviving the said William Stelz, and these vested rights could not be divested by a subsequent decree of divorce whose effect was merely to sever the marital relation, and which, by its terms, went no further than that purpose.

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See 2 Kent, Com. 7th ed. 110; 6 Am. & Eng. Encyclop. Law, 894; Cord, *Legal & Equitable Rights of Married Women*, § 110a; Wms. Real Prop. p. 208; Challis, Real Prop. p. 804; *Jackson v. McConnell*, 19 Wend. 175; *Doe v. Howland*, 8 Cow. 277; *Dickinson v. Codwise*, 1 Sandf. Ch. 222, 7 L. ed. 808; *Fairchild v. Chastelleaux*, 1 Pa. 176; *Stuckey v. Keefe*, 26 Pa. 397; *Washburn v. Burns*, 34 N. J. L. 18; *Luz v. Hoff*, 47 Ill. 425; *Ross v. Garrison*, 1 Dana, 85; *Bevins v. Cline*, 81 Ind. 87; *Doe v. Wilson*, 4 Barn. & Ald. 308; *Maynard v. Maynard*, 36 Hun, 229; *Bertles v. Nunn*, 92 N. Y. 152; *Aetna Ins. Co. v. Reah*, 40 Mich. 241; *Chandler v. Cheney*, 87 Ind. 398; *Barnes v. Loyd*, 87 Ind. 524; *Gibson v. Zimmerman*, 12 Mo. 336; *Bram v. Bram*, 34 Hun, 489; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 546.

A divorce is a creature of the statute and its effect must be determined by the provisions of the law under whose authority it is granted. All existing rights already vested remain and are not thereby ended or taken away except such as are expressly taken away or affected by statute. There is nothing in the statutes which deprives a woman of a vested right acquired by her during her coverture, even though her husband obtained a divorce from her for her adultery.

The seisin of the entirety by each and the right of survivorship cannot be divested by subsequent statute, as these rights are conveyed by virtue of the grant and not by mere acquisition, nor will the decree of divorce disturb vested rights or gifts.

Bishop, Mar. & Div. § 670, p. 546; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Pray v. Stebbins*, 1 New Eng. Rep. 521, 141 Mass. 221; *Wait v. Wait*, 4 N. Y. 100; *Re Ensign*, 4 Cent. Rep. 876, 103 N. Y. 284; *Chase v. Chase*, 55 Me. 21; *Wells v. Wells*, 10 N. Y. S. R. 252.

An executed gift to a wife would not be set aside and revert back to the husband, where the wife was subsequently divorced from him for her cause, by the mere fact of the subsequent divorce.

Sanford v. Sanford, 45 N. Y. 728; *Borst v. Spelman*, 4 N. Y. 288; *Draper v. Jackson*, 16 Mass. 480; *Ward v. Krumm*, 54 How. Pr. 95; *Platt v. Grubb*, 41 Hun, 447.

The parties were, after the divorce, tenants in common of the land for their joint lives, with the remainder to the survivor.

1 Bishop, *Married Women*, § 621; *Gillespie v. Worford*, 2 Coldw. 632; *Allen v. McCullough*, 2 Heisk. 189; 1 Washb. Real Prop. 5th ed. p. 708; *Lewis's App.* 85 Mich. 840; *Thornton v. Thornton*, 3 Rand. (Va.) 182; *Jacobs v. Miller*, 50 Mich. 120.

Mr. S. Jones, with **Mr. A. S. Hammersley, Jr.**, guardian ad litem of respondents, H. and C. Koehler:

The original estate of said Minnie as a tenant by the entirety with her husband was reduced by the judgment of divorce to an estate of tenancy in common with him.

2 Bishop, Mar. & Div. § 716; *Ames v. Norman*, 4 Sneed, 688; *Lash v. Lash*, 58 Ind. 526; *Harrer v. Wallner*, 80 Ill. 197; *Re Benson*, 16 Nat. Bankr. Reg. 377; *Baggs v. Baggs*, 55 Ga. 590; *Freeman*, Co-tenancy in Partition, § 76; *Bright*, *Husb. & W.* p. 365; *Brownson v. Hull*, 16 Vt. 309.

Peckham, J., delivered the opinion of the court:

We agree in this case with the views expressed by the learned judges who delivered the opinions at the special and general terms of the supreme court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety. *Bertles v. Nunan*, 92 N. Y. 152; *Zornstein v. Bram*, 100 N. Y. 13, 1 Cent. Rep. 66.

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bertles v. Nunan*, *supra*.

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. *Jackson v. McConnell*, *supra*.

At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole and not of any undivided portion. They were thus seised of the whole, because they were legally but one person. Death separated them, and the survivor still held the whole, because he or she had always been seised of the whole, and the person who died had no estate which was descendible or devisable. Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect the estate conveyed, then, of course, the claim of the counsel is made out; but it is an assumption of the whole case to say that the estate vested was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as

plausible view to say that, as the estate is built upon the unity of husband and wife, it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in case of death, there are, in the case of divorce, two survivors of the marriage, and there are, from the time of such divorce, two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common, without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seisin by the entirety does not create a joint tenancy either in substance or form (19 Wend. *supra*), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seisin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of person upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would at common law have created a joint tenancy. But our Statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy (1 Rev. Stat. § 727, § 44). This Statute did not reach an estate by the entirety, nor did the Statutes of 1848 and 1849 and 1860 and 1862 (*Bertles v. Nunan*, *supra*). It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of the former species of tenancy, resulting from an absolute divorce, be changed into the latter in the face of our Statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and therefore when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our Statute.

The counsel for the defendant urges that we are giving, by this decision, a retroactive effect to a decree of divorce in a case not warranted by the Statute and in violation of the well-settled rule in this State as to the effect of such a decree. He says that we change the effect of the deed of conveyance,

and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this State only operates for the future and has no retroactive effect or any other effect than that given by statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revert in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must therefore remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common, and, of course, without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as survivor of her husband cannot be maintained. Although the question is new in this State, it has been somewhat debated in the courts of some of the other States. In *Harrer v. Wallner*, 80 Ill. 197, and *Lash v. Lash*, 58 Ind. 526, and *Ames v. Normin*, 4 Sneed, 683, similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan, in the case of *Lewis App.*,

reported in 85 Mich. 340. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state, and shall not, by his or her misconduct, cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results, according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treat the estate as dependent upon any such condition, and, however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the supreme court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affirmance should be on both appeals, without costs.

All concur, except **Earl, J.**, dissenting, and **Finch, J.**, absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary E. O'BRIEN, *per Pro. Ami*,
v.

CUNARD STEAMSHIP CO. (Limited).

(.....Mass.....)

1. **The vaccination of a passenger by a ship's surgeon** will not constitute an assault if the passenger's behavior indicates consent, whatever may be his unexpressed feelings on the subject.
2. **A steamship company is not answerable for the negligence, in vaccinating passengers,** of a surgeon carried by it in obedience to law, if it has used due care in his selection and in procuring pure virus.
3. **Evidence of the quarantine regulations** at the port of discharge, and that printed information in regard thereto was posted in different parts of the ship, as well as that the reg-

ulations were enforced, is admissible in defense of an action by a passenger against a steamship company for vaccinating him.

(September 1, 1891.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for an assault upon plaintiff by defendant's agents in vaccinating her, or for injuries resulting from their negligence, in which a verdict was directed for defendant. *Overruled.*

The first count of the declaration was for an assault, and the second for negligence. The court ruled the plaintiff could not maintain her action on either count.

At the trial the court admitted, over plaintiff's objection, the following evidence: An order of the Board of Health of the City of

NOTE.—*Negligence, when not imputable to employer for acts of employé.*

Negligence is not imputable to a master where there is no evidence that his employé was not competent to perform the duties assigned to such employé. *Reese v. Biddle*, 2 Cent. Rep. 799, 112 Pa. 72.

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A principal using due care in the selection of an employé to accomplish a certain work as an independent employment, who selects his own means and methods, is not responsible for the negligence of such employé. See note to *St. Louis, I. M. & S. R. Co. v. Yonly* (Ark.) 9 L. R. A. 604.

Boston in regard to the examination of immigrants as regards their protection from small-pox which required all unprotected persons to be vaccinated or quarantined.

Evidence that the quarantine officials on the arrival of the steamer made an examination of all, steerage passengers and passed all having tickets from the ship's surgeon and vaccinated or detained at quarantine all not having tickets or vaccination marks.

Also evidence that notices were posted up about the ship informing passengers of the necessity for vaccination.

Further facts appear in the opinion.

Messrs. E. N. Hill and Frederic Cunningham, for plaintiff:

It is no answer to a claim for an assault that the plaintiff submitted to it, if the circumstances are such that resistance would have seemed useless; consent obtained by a show of superior force, or under such circumstances that the will cannot be said to have acted freely, is not consent in contemplation of law.

Reg. v. Lock, L. R. 2 Cr. Cas. 10, and cases cited; *Rex v. Nichol*, Russ. & R. Cr. Cas. 180.

If negligence is shown on the part of the defendant, from which, under all the circumstances of the case, the jury can properly infer that the injury happened, the case should be submitted to the jury to determine whether such negligence was the proximate cause of the injury or not.

Holbrook v. Utica & S. R. Co. 12 N. Y. 296; *Crandall v. Goodrich Transp. Co.* 16 Fed. Rep. 75; *Ross v. Boston & W. R. Co.* 6 Allen, 87.

The act was performed by the surgeon of the ship, and he used the virus furnished by the owners.

See *Moore v. Fitchburg R. Corp.* 4 Gray, 465.

It must be presumed that, being the surgeon of the ship, he was the surgeon provided in compliance with Act of Congress, Aug. 2, 1882, 22 U. S. Stat. at L. 188. If so, he was one of the crew of the ship, whom the owners of the ship are required to carry and pay, and whose services they are required to furnish to any of the passengers needing them, and for his failure to give those services promptly and properly, not the surgeon, but the master, the representative of the owners in our ports, is made liable to a penalty.

See *United States v. Thompson*, 1 Sumn. 170, and cases cited in note.

Where is the sense of holding, in the case of a pilot, that the owners are liable for his negligence even when they have had no power of selection, being obliged by law to take the first one that offers?—and in the case of a surgeon that they are not liable for his negligence, though they have had the opportunity of selecting him, unless in such selection they have been wanting in due care?—especially when the pilot is employed only for a single service, and the surgeon is one of the regular crew of the ship.

"*The China*," 74 U. S. 7 Wall. 53, 19 L. ed. 67.

Messrs. George Putnam and Thomas Russell, for defendant:

The defendants' entire duty to the plaintiff was to use all reasonable care to secure pure virus and a competent physician.
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It is conceded that they performed their duty in both particulars.

They are, therefore, not liable to the plaintiff for the malpractice of the surgeon.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432; *Laubheim v. Royal Netherland S. S. Co.* 9 Cent. Rep. 732, 107 N. Y. 228; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221.

The liability of a master for the acts of his servants rests upon his right to be obeyed, and his presumed power to enforce obedience.

Quarman v. Burnett, 6 Mees. & W. 499, 509; *Shearn & Redf. Neg. § 142, note*; *Cooley, Torts*, p. 532; *Bennett v. New Jersey R. & T. Co.* 86 N. J. L. 225, 227; *Little v. Hackett*, 118 U. S. 366, 376, 29 L. ed. 652, 655; *The Bernina*, L. R. 12 Prob. Div. 58, 66.

It would be unreasonable to hold, and the law does not hold, an employer responsible for the negligence of an employé in matters where he cannot lawfully control his action.

The passenger in a public conveyance or hired carriage is not responsible for the driver's negligence, because he has no lawful control over the driver.

Little v. Hackett and *The Bernina*, *supra*; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161.

The employer of a physician to attend another has even less lawful control over the physician's methods of treatment than the passenger in a public carriage has over the conduct of the driver.

The case of the pilot is not an exception. Liability for his negligence rests partly upon the ground that public policy makes the ship responsible for its safe navigation by public agencies as well as by servants of its own selection; partly upon the power of the master to displace and control the pilot; and partly upon the ground that it is a rule of the General Admiralty Law, and not of the common law.

The China, 74 U. S. 7 Wall. 53, 67, 19 L. ed. 67, 72; *Yates v. Brown*, 8 Pick. 28.

Knowlton, J., delivered the opinion of the court:

This case presents two questions: first, whether there was any evidence to warrant the jury in finding that the defendant by any of its servants or agents committed an assault on the plaintiff; secondly, whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on shipboard while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented he could be guided only by her overt acts and the mani-

festations of her feelings. *Ford v. Ford*, 148 Mass. 578, 8 New Eng. Rep. 785; *McCarthy v. Boston & L. R. Corp.* 148 Mass. 550, 552, 2 L. R. A. 608.

It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of emigrants to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steamship stating that they are so protected, are permitted to land without detention in quarantine, or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all emigrants who desire it and who are not protected by previous vaccination, and give them a certificate, which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination were posted about the ship in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which in this particular is undisputed, it appears that about two hundred women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about fifteen feet from the surgeon and saw them form in a line and pass in turn before him; that he examined their arms and passing some of them by, proceeded to vaccinate those that had no mark; that she did not hear him say anything to any of them; that upon being passed by they each received a card and went on deck; that when her turn came she showed him her arm; he looked at it and said there was no mark and that she should be vaccinated; that she told him she had been vaccinated before and it left no mark; that he then said nothing; that he should vaccinate her again; that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave her certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary for that purpose. Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct.

The plaintiff contends that if it was lawful for the surgeon to vaccinate her the vaccination was negligently performed. "There was no evidence of want of care or precaution by the defendant in the selection of the surgeon, or in the procuring of the virus or vaccine mat-

ter." Unless there was evidence that the surgeon was negligent in performing the operation, and unless the defendant is liable for this negligence, the plaintiff must fail on the second count.

Whether there was any evidence of negligence of the surgeon we need not inquire, for we are of opinion that the defendant is not liable for his want of care in performing surgical operations. The only ground on which it is argued that the defendant is liable for his negligence is that he is a servant engaged in the defendant's business and subject to its control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law. By the 5th section of the Act of Congress of August 2, 1882 (23 U. S. Stat. at L. 188) it is provided that "every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly competent and qualified surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children, and the service of such surgeon or medical practitioner shall be promptly given in any case of sickness or disease to any of the passengers or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding two hundred and fifty dollars."

Under this Statute it is the duty of the ship-owners to provide a competent surgeon whom the passengers may employ if they choose in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer, and if they employ the surgeon they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of

the Statute of the United States applicable to such cases, and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater. It is quite reasonable that the owners of a steamship used in the transportation of passengers should be required by law to provide a competent person to whom sick passengers can apply for medical treatment, and when they have supplied such a person it would be unreasonable to hold them responsible for all the particulars of his treatment when he is engaged in the business of other persons in regard to which they are powerless to interfere.

The reasons on which it is held in the courts of the United States and of Massachusetts that the owners are liable for the negligence of a pilot in navigating the ship, even though he is appointed by public agencies, and the master has no voice in the selection of him, do not apply to this case. *The China*, 74 U. S. 7 Wall. 53-67, 19 L. ed. 67, 72; *Yates v. Brown*, 8 Pick. 23. The pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible. The business is theirs, and they have certain rights of control in regard to it. They may determine when and how it shall be undertaken, and the master may displace the pilot for certain causes. But in England it has been held that even in such cases the owners are not liable. *Carruthers v. Sydebotam*, 4 Maule & S. 77; *The Protector*, 1 W. Rob. 45; *The Maria*, Id. 95.

The view which we have taken of this branch of the case is fully sustained by a unanimous judgment of the Court of Appeals of New York in *Laubheim v. De Koninglyke*, N. S. B. Co. 107 N. Y. 228, 9 Cent. Rep. 732. See also *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432.

We are of opinion that on both parts of the case the rulings at the trial were correct.

The evidence excepted to was rightly admitted.

Exceptions overruled.

OLD COLONY R. CO.

v.

FRAMINGHAM WATER CO.

(.....Mass.....)

1. Permission to a water company to take water from a pond the shores of

NOTE.—Principles in the law of eminent domain.

The public health of cities demands an ample supply of fresh water, and for this purpose land may be condemned for necessary facilities required in supplying cities with water. *Wayland v. Middlesex County Comrs.* 4 Gray. 500; *Kane v. Baltimore*, 15 Md. 240; *Thorn v. Sweeney*, 12 Nev. 251; *Olmsted v. Morris Aqueduct Proprs.* 46 N. J. L. 495; *Balley v. Woburn*, 126 Mass. 418; *Lake Pleasanton Water Co. v. Contra Costa Water Co.* 67 Cal. 659.

In like manner, supplies of water required for health and comfort may be condemned. *Martin v. Gleason*, 139 Mass. 183; *Burden v. Stein*, 27 Ala. 104.

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which have already been appropriated to public use, and also to take and hold all land necessary for raising, holding and purifying it, impliedly authorizes the taking of previously appropriated land on the shore of the pond for a pumping station and filtering gallery, together with a right of way thereto, where such land is not indispensable to the prior appropriator while the water company could only with difficulty, if at all, do business without it.

2. A provision that a water company may be required to give security to the selectmen of the town for the payment of all damages awarded for lands taken by it, which may, upon becoming insufficient, be required to be increased, sufficiently provides for compensation to justify the taking of the land.

(May 19, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County (Field, Ch. J.) for the opinion of the full court of an action brought to restrain defendant from entering upon or using plaintiff's land. *Bill dismissed.*

The facts sufficiently appear in the opinion.

Mr. J. H. Benton, Jr., for plaintiff:

The taking upon the validity of which defendant's right to cross plaintiff's location wholly depends is a taking of a right of way across the location and tracks of an operated railroad. Such a taking is not within the authority given by the general language of the Act.

Springfield v. Connecticut River R. Co. 4 Cusb. 63; *Boston & M. R. v. Lowell & L. R. Co.* 124 Mass. 368; *Quincy v. Boston*, 148 Mass. 389.

Land appropriated to the public use of a railroad cannot be taken for any other public use without specific legislative authority. The only question, therefore, is whether the land covered by the railroad location between the tracks and the pond had been appropriated to railroad use at the time the location of the Water Company was filed. In other words, the question is, What constitutes an appropriation of land to a public use?

The term "appropriated" has been said to "embrace every mode by which property may be applied to the use of the public."

Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 35.

The real question is, Has the land been impressed with a public trust, so that it is the duty of the corporation to hold and use it for railroad purposes?

Boston & M. R. v. Lowell & L. R. Co. 124 Mass. 368; *Re Boston & A. R. Co.* 53 N. Y. 574; *State v. Montclair R. Co.* 35 N. J. L. 328; *Re New York, L. & W. R. Co.* 99 N. Y. 12, 21;

The public have a right to an ample supply of pure water, and the company to which the right of taking land has been granted has the capacity to appropriate enough for that purpose, but the appropriation must not be in excess of the actual necessities of the case. *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123.

In Massachusetts the great ponds are regarded as public property, and the riparian owner cannot claim damages for water drawn off by an aqueduct company, under legislative authority. *Fay v. Salem & D. A. Co.* 111 Mass. 27.

Under a statute authorizing a city to take the

Evergreen Cemetery Asso. v. New Haven, 43 Conn. 234, 241; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Worcester v. Western R. Corp.* 4 Met. 564; *Boston & M. R. v. Cambridge*, 8 Cush. 237.

Land acquired for station purposes is appropriated to public use.

Norwich & W. R. Co. v. Worcester County Comrs. 151 Mass. 69.

An appropriation to public use does not require actual occupation of the land.

If a railroad company acquires five acres of land for terminal freight yards and tracks convenient and suitable for that purpose in anticipation of the growth of business, and covers only a portion with yards and tracks, intending to cover the remainder as the business requires, it cannot be properly said that only the portion actually covered and built upon is appropriated to railroad purposes.

State v. Montclair R. Co. 84 N. J. L. 328; *Hendricks v. Johnson*, 6 Port. (Ala.) 473; *McDougle v. Clark*, 7 B. Mon. 448.

Where two companies commenced proceedings to condemn the same land, it was held that that company was entitled to condemn which first began proceedings.

Lake Merced Water Co. v. Coules, 31 Cal. 215. See also *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 635; *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.* 27 Fed. Rep. 770.

The necessity for land for railroad use is not confined to a present necessity, but is to be decided with reference to the prospective business of the company.

Re New York & H. R. Co. v. Kip, 46 N. Y.

546, 554; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *St. Paul U. D. Co. v. St. Paul*, 30 Minn. 363.

But this land was "occupied" by the Railroad Company within the rule established by this court in similar cases.

Wesleyan Academy v. Wilbraham, 99 Mass. 599; *Massachusetts Gen. Hospital v. Somerville*, 101 Mass. 319; *New England Hospital v. Boston*, 118 Mass. 518; *Trinity Church v. Boston*, 118 Mass. 164.

When it has been decided that land is necessary for a public use, the decision cannot be questioned in any collateral proceeding.

Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552.

The question of whether a certain piece of land is necessary for a public use, is not a judicial question at all, and cannot be passed upon by the court.

Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207.

Whether the land was reasonably necessary, and what uses of it would promote the purposes for which the corporation was established, was properly determined by its own officers in the exercise of their honest judgment and discretion.

Massachusetts Gen. Hospital v. Somerville, 101 Mass. 319.

The reasoning by which legislative intent is established in a case like this is the same as that by which a right of way by necessity is established, and rests wholly upon the fundamental fact that the grant cannot otherwise take effect. Grants to private persons by im-

waters of great ponds for the purpose of supplying its inhabitants with water, and providing for the payment of damages, the owners of mill privileges along the outlet of such ponds are entitled to compensation for the privileges thus destroyed or impaired, and parties who are using the waters for other purposes than for power are entitled to damages. Each mill-owner can bring a proceeding, and a corporation owning a mill at some distance from the stream, the water being conveyed to it by a canal, may also bring a proceeding for the assessment of damages. *Watuppa Reservoir Co. v. Fall River*, 124 Mass. 267.

Water rights may be taken so far as may be necessary for the preservation and purity of water, including prescriptive rights to discharge sewage into such waters. *Gray v. Boston*, 139 Mass. 323.

A provision empowering the owners to appraise the compensation and fix the maximum of water to be taken is not unconstitutional; the latter provision enables the commissioners to determine the damages. *Re Middletown*, 82 N. Y. 196; *Mills, Em. Dom.* 2d ed. § 83.

The right of eminent domain remains in the aggregate body of the people in their sovereign capacity; and possession of private property may be resumed by them whenever the interest or even the convenience of the State is concerned. *Whiteman v. Wilmington & S. R. Co.* 2 Harr. (Del.) 514, 33 Am. Dec. 419.

The people have the right to resume possession of property in the manner directed by the laws and Constitution of the State, whenever the public interest requires it. *Walker v. Gatlin*, 12 Fla. 15; *Heyward v. New York*, 7 N. Y. 325; *Weir v. St. Paul, S. & T. F. R. Co.* 18 Minn. 163. See *Varick v. Smith*, 5 Paige, 150, 3 L. ed. 668.

Land is no more property than a franchise. Both 13 L. R. A.

are subject to the right of eminent domain. *Minot v. Philadelphia, W. & B. R. Co.* 2 Abb. U. S. 336. See *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535; *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 454.

The only restriction upon this right of resumption for public use is that the property cannot be taken without just compensation to the owner, and in the mode prescribed by law. *Whiteman v. Wilmington & S. R. Co. supra*.

The Legislature may interfere with property held by a corporation for one public use and apply it to another, and without compensation where no private interests are involved or invaded. *People v. Kerr*, 27 N. Y. 188.

The Legislature may delegate this power to public officers, or to corporate bodies, municipal or other. It is a rule, however, that such delegation of power must be in express terms, or must arise from a necessary implication. *Re Boston & A. R. Co.* 53 N. Y. 574; *Boston W. P. Co. v. Boston & W. R. Co.* 23 Pick. 380; *Re Buffalo*, 68 N. Y. 167.

All property is held subject to an inherent right in the government to appropriate it to public use when the public good may require it to be done. *Alabama & F. R. Co. v. Kenney*, 30 Ala. 307.

The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it. *Metropolitan City R. Co. v. Chicago W. D. R. Co.* 87 Ill. 317, 324.

The Commonwealth may, by legislative enactment, duly authorize real estate to be taken from its own grantees. *Jackson v. Winn*, 4 Litt. 322; *Young v. McKenzie*, 3 Ga. 31; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 3 L. ed. 50.

plication "are limited to cases of strict necessity."

Buss v. Dyer, 125 Mass. 287.

Whatever is doubtful is decisively certain against the corporation.

Black v. Delaware & R. Canal Co. 24 N. J. Eq. 455, 485; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 662, 24 L. ed. 1036.

Convenience, even great convenience, is not sufficient to raise an implication of a grant.

Nichols v. Luce, 24 Pick. 102, 105.

If the Water Company had power by implication to make its location on the land of the Railroad Company, it must be because it could not by reasonable intentment accomplish the purpose of taking the waters of Farm Pond in any other way.

Springfield v. Connecticut River R. Co. 4 Cush. 63, 73.

An instance of implied authority from the general words of a legislative grant is found in the right of a railroad company to do things outside the location necessary in the construction of its railroad upon the location.

Dodge v. Essex County Comrs. 3 Met. 380.

But that implied authority is restricted to the things which are strictly necessary to be done, and does not arise merely because it is cheaper, more convenient, more fit and more suitable to do them than not to do them.

Estabrooks v. Peterborough & S. R. Co. 12 Cush. 224, 227. See also *Pettingill v. Porter*, 8 Allen, 1, 6; *Proprietors of Locks & Canals v. Lovell*, 7 Gray, 223; *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277.

The question in all these cases is whether it is to be presumed that the legislative attention was specially called to the state of things existing at the time the Act was passed, so that it must be assumed to have intended that the thing should be done which was necessary to exercise the franchise which it gave. The implication must be a necessary one.

Re Buffalo, 68 N. Y. 167; *Philadelphia G. & N. R. Co. v. Pennsylvania S. V. R. Co.* 16 Phila. 686; *People v. Thompson*, 98 N. Y. 6, 11; *New Jersey S. R. Co. v. Long Branch Comrs.* 39 N. J. L. 28; *Re Boston & A. R. Co.* 53 N. Y. 574; *Pennsylvania R. Co's App.* 93 Pa. 150, 159; *Packer v. Sunbury & E. R. Co.* 19 Pa. 211.

The location by the Water Company is invalid, because the Act under which it is assumed to have been made does not provide compensation to the owners of land taken.

Powers v. Bears, 12 Wis. 214, 221; *Connecticut River R. Co. v. Franklin County Comrs.* 127 Mass. 50; *Ash v. Cummings*, 50 N. H. 591.

Messrs. J. G. Abbott and S. A. Phillips, for defendant:

The Legislature has the right to take property already appropriated to public purposes, for other public purposes.

Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 577, 9 L. ed. 836; *Boston W. P. Co. v. Boston & W. R. Corp.* 23 Pick. 360.

The defendant, in acting under its authority, was to be governed by its own discretion as to selecting the lands best situated to carry out the purposes of the grant. This selection was left to the defendant; its sound, reasonable and fair discretion was the only tribunal to

determine what lands were necessary for the purposes of the grant.

Boston W. P. Co. v. Boston & W. R. Corp. supra; *Re Buffalo*, 68 N. Y. 167; *Fall River Iron Works v. Old Colony & F. R. Co.* 5 Allen, 221; *New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co.* 63 N. Y. 326.

The grant to the defendant authorized it to take any lands belonging to the plaintiff which were not necessary for the exercise of its franchise and the operating of its railway, although such land might be very useful, convenient and profitable to the plaintiff in the prosecution of its business.

Boston W. P. Co. v. Boston & W. R. Corp. supra.

The general authority given the defendant to take any lands to carry into execution the grant to it, made it the judge of what lands should be taken, and only required of it the exercise of a sound and reasonable judgment and discretion; and, if it is sought to go behind that judgment and discretion, it can only be done by assuming the burden of proving it to be unreasonable and unjust,—in fact, governed by improper and fraudulent motives.

Fall River Iron Works Co. v. Old Colony & F. R. Co., *Boston W. P. Co. v. Boston & W. R. Corp.*, *New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co.* and *Re Buffalo, supra*.

In this matter the two rights and uses of the plaintiff and defendant can stand together, without any substantial interference with each other, and, when this condition of things exists, it is always holden that both rights should be sustained.

Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506; *East St. Louis C. R. Co. v. East St. Louis U. R. Co.* 108 Ill. 265; *Morris & E. R. Co. v. New Jersey Cent. R. Co.* 31 N. J. L. 205.

Knowlton, J., delivered the opinion of the court:

We will assume in favor of the plaintiff, without deciding, that the land taken by the defendant had been appropriated by the plaintiff to a public use, and that the plaintiff's right to it was in all respects as beneficial, in reference to a subsequent exercise by the Legislature of the right of eminent domain over it, as if it had originally been taken by the Railroad Company under the authority of the Statute. There can be no doubt that the Legislature may take, or authorize a corporation to take, land for a public use, which has previously been appropriated by legislative authority to a different public use. *Boston W. P. Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 577, 9 L. ed. 836; *Cary Library v. Bliss*, 151 Mass. 364, 379, 7 L. R. A. 765. But it will not be deemed to have done so unless its intention so to take such land is plainly manifested in the Statute. *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277; *Re Buffalo*, 68 N. Y. 167; *People v. Thompson*, 98 N. Y. 6; *New Jersey S. R. Co. v. Long Branch Comrs.* 39 N. J. L. 28.

We are therefore brought directly to the question on which the decision of this case must

turn,—whether, by Stat. 1884, chap. 271, the Legislature intended to authorize a taking of land on the border of Farm Pond, which had already been properly procured for a public use by the plaintiff corporation. Section 2 of this chapter provides, among other things, that “the defendant corporation shall have all the rights which belong to the Town of Framingham and the inhabitants thereof . . . to take, use, and hold of the waters of Farm Pond and Sudbury River . . . so much as may be necessary for the purposes specified in section one, . . . and may also take and hold by purchase or otherwise all necessary lands for raising, diverting, flowing, and holding said waters, and securing and preserving the purity of the same, and such other lands in the Town of Framingham as may be necessary to construct and maintain one or more storage and distributing reservoirs, and may do many other specified things; and in general may do any other acts and things necessary, convenient, or proper for carrying out the purposes of this Act.” The Legislature must be presumed to have been familiar with the situation and use of the lands about Farm Pond. At the time of the passage of the Statute referred to the waters of the pond had been taken by the City of Boston for a public use, and the entire shore of the pond had been purchased or taken and was then held for a public use, either by the City of Boston, or by the plaintiff corporation, or by the Boston & Albany Railroad Company, except a small portion, which was owned by the last-mentioned company, and which was not suitable to defendant’s pumping station. Nothing is expressly stated in the Statute in regard to taking property which was then held for a public use, but the right to do this was necessarily involved. The water of the pond could be taken only by diverting it from the City of Boston, which was then drawing it for the use of its inhabitants. No suitable place for a pumping station or a filtering gallery could be taken on the shore of the pond without taking it from a corporation which was then holding it for a public purpose. Doubtless it would have been possible for the defendant to erect its pumping station at a distance from the pond, and to draw the water out through a conduit, but even then it would have been necessary to construct the conduit across land which was held for a public use, and it would have been difficult and expensive so to construct the works, and very difficult, if not impossible, to provide a filtering gallery there. In considering what was the intention of the Legislature in regard to taking the plaintiff’s lands, the use to which it was then being put must not be overlooked. While it was properly procured and rightly held for the accommodation of the plaintiff’s growing business at the station, it was not necessary to the enjoyment of the plaintiff’s franchise, and was not then actually being used at all. The rights intended to be given by the Statute are not the same in reference to this land as in reference to land over which the main tracks of

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the railroad are laid. It may well be held that this Statute does not go far enough to authorize the taking of land without which the plaintiff could not operate its railroad. *Boston W. P. Co. v. Boston & W. R. Corp.* 23 Pick. 360.

But the case last cited is an authority which decides that by mere implication, and without express statement, the Legislature may be held in a given case to have authorized the taking of land held by a corporation for a public use where the taking does not seriously interfere with the enjoyment by the corporation of its franchise. In the present case the judge found that the land taken is not indispensably necessary for the purposes of the plaintiff, and the plaintiff’s conduct in consenting to the erection of the defendant’s works, and in permitting them to remain there a long time without objection, shows the same thing. The judge found at the trial that the place selected by the defendant for its pumping station was the most suitable and proper place for it, although it would not have been impracticable to put it elsewhere. In view of all the circumstances, we are of opinion that the Statute authorized the defendant to take the plaintiff’s land for the public use to which it is now being put. The right to cross the plaintiff’s tracks to gain access to this land was also properly taken. If the land had been conveyed to the defendant by a deed from the plaintiff, the defendant would have had a way of necessity by implication. If a right of way over the location of the railroad to gain access to this land cannot be taken under any other provision of the Statute, it can under the last clause of the section above quoted.

The provision for compensation for the land taken is sufficient.* It is precisely the same as that contained in Pub. Stat., chap. 112, § 97, in reference to land taken for a railroad, except that the selectmen of the town are made the tribunal to determine the sufficiency of the security, instead of the county commissioners. Under the Constitutions of several of the States, and probably under the decisions of the courts in some others, this provision for compensation would not be held sufficient, and a statute of this kind would be unconstitutional; but in this Commonwealth the law is settled differently. *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 2 New Eng. Rep. 818; *Woodbury v. Marblehead Water Co.* 145 Mass. 509, 5 New Eng. Rep. 504; *Bigelow v. Union F. R. Co.* 137 Mass. 478. See also *Cushman v. Smith*, 34 Me. 247; *Pittsburgh v. Scott*, 1 Pa. 309; *Rubottom v. McClure*, 4 Blackf. 505.

Bill dismissed.

*Mass. Stat. 1884, chap. 271, § 11, provides that the owner of land taken thereunder by the said Water Company may, upon application by either party, require the Company to give security to the selectmen of said town for payment of all damages that may be awarded to them; and if, upon petition of the owner, the security appears to the selectmen to have become insufficient, they shall require the giving of further security. [Rep.]

CALIFORNIA SUPREME COURT.

Pio PICO, *Appt.*,

v.

Julius B. COHN, Admr., etc., of B. Cohn,
Deceased, *et al.*, *Repts.*

(.....Cal.....)

Perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a decree, although there is a reasonable certainty that the result of a new trial would be different.

(February 11, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action brought to set aside a decree between the same parties alleged to have been procured by fraud. *Affirmed.*

The facts are stated in the opinion.

Mr. O. P. Evans, with *Messrs. Anderson, Fitzgerald & Anderson, Del Valle & Munday and Smith, Winder & Smith*, for appellant:

Equity may cancel and set aside or restrain judgments and decrees of any court, obtained by a fraud practiced upon the court and the losing party. When a judgment or decree of any court has been obtained by fraud, the fraud is regarded as perpetrated on the court, as well as upon the injured party.

2 Pom. Eq. Jur., cited in *Baker v. O'Riordan*, 65 Cal. 370; Story, Eq. Pl. § 426.

The limitations of the rule are that the fraud must have been practiced in the very act of obtaining the judgment.

Zellerbach v. Allenberg, 67 Cal. 298, citing *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95.

Judgments are impeachable for those frauds only which are extrinsic to the merits of the case.

Duchess of Kingston's Case, 20 How. St. Tr. 355, 554; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 178.

Fraud alleged was extrinsic to the judgment.

United States v. Throckmorton, *supra*.

Whenever one party by any contrivance prevents his adversary from having equality with him before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered.

United States v. Flint, 4 Sawy. 51; *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 840; *Fabritius v. Cock*, 3 Burr. 1771; *Verplanck v. Van Buren*, 76 N. Y. 247; *Ocean Ins. Co. v. Fields*, 2 Story, 72.

The rule that judgments will not be set aside merely because they are founded upon a forged instrument, or upon false, or even perjured, testimony, does not apply where there is shown to be "some peculiarity attending such a case which will justify the interference of the court."

Vaughn v. Johnson, 9 N. J. Eq. 178.

Any fact which clearly shows it to be against conscience to execute a judgment, and of which the injured party might have availed himself at law, but was prevented by fraud or accident, unmixed by any fault or negligence in himself or his agent, will justify an application to a court of equity.

Marine Ins. Co. v. Hodgson, 11 U. S. 7 Cranch, 385, 3 L. ed. 362; *Cairo & F. R. Co. v. Titus*, 27 N. J. Eq. 106; *Moffatt v. United States*, 112 U. S. 32, 18 L. ed. 625; *Dringer v. Jewett*, 8 Cent. Rep. 560, 42 N. J. Eq. 573.

A judgment or award obtained by false testimony, fraudulently given by the party benefited thereby, is voidable.

Jordan v. Volkenning, 72 N. Y. 306. See also *Harris v. Cornell*, 80 Ill. 54, and *Doughty v. Doughty*, 27 N. J. Eq. 315; *Brooks v. O'Hara*, 8 Fed. Rep. 533.

The fraud is not to be presumed; it is to be alleged and at the proper time proved. With-

NOTE.—Perjury as ground for new trial.

Conviction of perjury is necessary before a new trial will be granted on the ground of perjury of a witness. *Holtz v. Schmidt*, 12 Jones & S. 327.

The fact that a witness who swore falsely on a former trial now deposes that he will tell the truth is not sufficient newly discovered evidence to warrant granting a new trial. *Loucheine v. Strouse*, 49 Wis. 623.

An equitable action cannot be maintained to annul a judgment upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence. The fraud which will justify equitable interference in setting aside a judgment or decree must be actual and positive, not merely constructive; it must be fraud occurring in the concoction or procurement of the judgment or decree, which was not known to the party at the time. *Ross v. Wood*, 70 N. Y. 8.

Where issues have been litigated in a former action, they cannot be retried in another between the same parties upon allegations that fraud, perjury, and conspiracy have been committed by the prevailing party and his witnesses. *New York Cent. R. Co. v. Harrold*, 65 How. Pr. 69.

And under our system of practice, where the 13 L. R. A.

court has jurisdiction of both law and equity, with power to relieve from unconscionable judgments on motion to the same extent as was formerly done by the court of chancery, a party who has litigated his case to the fullest extent in a common-law action cannot himself become plaintiff, and under the guise of an equity suit in the same court, and perhaps before the same judge, compel a retrial of the same question. Such a practice is opposed to the general policy of our law. *Interest reipublice ut sit finis litium. Ibid.*

It was decided by the Court of Appeals in the case of *Ross v. Wood*, 70 N. Y. 8, that an equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence. *Bearnes v. Bearnes*, 66 How. Pr. 456.

In *New York Cent. R. Co. v. Harrold*, *supra*, it was held that "where it appears that the same matter has been actually tried, or so in issue that it might have been tried, the party is estopped from applying to a court of equity to set aside the judgment because of fraud, for the reason that the judgment is the highest evidence and cannot be contradicted."

out this, the case is one of mere perjury, and comes within the rule; with it, it does not.

This case presents every element required by the affirmative rule and clearly comes within its provisions.

See *Maine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 335, 3 L. ed. 832; *United States v. Flint*, 4 Sawy. 51; *Steel v. St. Louis Smelt. & Ref. Co.* 106 U. S. 453, 27 L. ed. 228.

The *Throckmorton Case* was decided upon the ground of the negligence of the government officials in failing to make the defense, as they could readily have done on the former trial. The case therefore does not conflict with the cases cited by us.

The case is quite as strong as any that can be imagined; for here the false testimony was given under the immediate and impending influence of the bribe, exerted on the witness at the very time he was testifying. The fraud was "practiced in the very act of obtaining judgment."

Zellerbach v. Allenberg, 67 Cal. 298.

"It was perpetrated on the court as well as on the injured party" (*Baker v. O'Riordan*, 65 Cal. 370; 2 Pom. Eq. Jur. 919); and the court was "misled."

Amador C. & M. Co. v. Mitchell, 59 Cal. 178.

Messrs. Stephen M. White and A. Brunson, for respondent:

The judgment which it is sought to set aside is the result of plaintiff's deliberate act, and he cannot avoid the consequences of his negligence.

Richmond v. Robinson, 24 Gratt. 551; *Ross v. Wood*, 70 N. Y. 8; *Barker v. Elkins*, 1 Johns. Ch. 465, 1 L. ed. 210; *Dodge v. Strong*, 2 Johns. Ch. 228, 1 L. ed. 357, and note c; *Gould v. Loughran*, 19 Neb. 392; *Horn v. Queen*, 4 Neb. 108; *Lansing v. Eddy*, 1 Johns. Ch. 49, 1 L. ed. 55; *Foster v. Wood*, 6 Johns. Ch. 87, 2 L. ed. 63; *Brick v. Burr*, 47 N. J. Eq. 189; *Smith v. Allen*, 63 Ill. 475; *Blackburn v. Bell*, 91 Ill. 442; *Marine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 332, 3 L. ed. 832; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Hendrickson v. Hinckley*, 58 U. S. 17 How. 443, 15 L. ed. 123; *Kibbe v. Benson*, 84 U. S. 147 Wall. 628, 21 L. ed. 742; *Crim v. Handley*, 94 U. S. 658, 24 L. ed. 218; *Brown v. Buena Vista County*, 95 U. S. 159, 24 L. ed. 422; *Knox County v. Harshman*, 138 U. S. 152, 33 L. ed. 586.

The plaintiff must be without "fault or blame," or he cannot recover.

Higgins v. Bullock, 73 Ill. 206.

If the defendant has omitted to file a bill for the discovery of facts known to him and material to his defense, and suffered the case to go to trial without adequate proof of such facts, he cannot afterwards claim an injunction or a new trial from a court of equity; for it is his own folly not to have filed a bill for the discovery and to have procured a stay of the trial until the discovery.

Weir v. Vail, 65 Cal. 468.

This authority is directly applicable here, where the plaintiff knew that Johnson was testifying falsely, and yet never even asked for a continuance.

See also *Bland v. Pope*, 4 J. J. Marsh. 595; *Finley v. Tyler*, 3 T. B. Mon. 400; Hayne, New Trial & App. § 91; *Board of Regents v. Linacott*, 30 Kan. 240.

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The facts stated in the complaint do not warrant the interference of equity.

They do not show the commission of a fraud of a character to justify the court in setting aside its judgment.

Perjured evidence is not sufficient to authorize a court of equity to overturn a judgment.

United States v. Throckmorton, 98 U. S. 66, 25 L. ed. 95; *Greene v. Greene*, 2 Gray, 363; *Hilton v. Guyott*, 42 Fed. Rep. 252; Bigelow, Estoppel, 5th ed. p. 307; *Zellerbach v. Allenberg*, 67 Cal. 298; *Sewel v. Freeston*, 1 Ch. Cas. 65; *United States v. White*, 17 Fed. Rep. 561, 9 Sawy. 125; *Smith v. Lowry*, 1 Johns. Ch. 324, 1 L. ed. 157; *Dringer v. Jewett*, 8 Cent. Rep. 560, 42 N. J. Eq. 573.

A court of equity will not interfere with the judgment of a court of law on the ground that a witness swore corruptly.

Cairo & F. R. Co. v. Titus, 27 N. J. Eq. 106. See also *Vaughn v. Johnson*, 9 N. J. Eq. 178; *Stratton v. Allen*, 16 N. J. Eq. 229; *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432, 1 L. ed. 199; *Williams v. Lockwood*, Clarke, Ch. 172, 7 L. ed. 83; *United States v. Hancock*, 30 Fed. Rep. 858; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Demerit v. Lyford*, 27 N. H. 541; *Gott v. Carr*, 6 Gill & J. 209.

The credibility of testimony given in a case bearing upon the issue is not an extrinsic collateral act, but is a matter involved in the consideration of the merits, and the introduction of false testimony, known and shown to be so, does not affect the validity of the judgment rendered.

1 Herman, Estoppel & Res Adjudicata, 456; Bigelow, Fraud, p. 86, and note.

A new trial cannot be granted to give an opportunity to impeach the integrity and credit of a witness.

Duryee v. Dennison, 5 Johns. 248; *Smith v. Lowry*, 1 Johns. Ch. 320, 1 L. ed. 156.

An allegation that the judgment was obtained by false testimony is not sufficient.

Cottle v. Cole, 20 Iowa, 481; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929.

The mere concealment of facts, by either party to the suit, which might be beneficial to the other, is not such a fraud as will avoid a judgment.

Field v. Flanders, 40 Ill. 474; Wells, Res Adjudicata, p. 393; *United States v. Hancock*, 30 Fed. Rep. 854; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 176.

The failure of a party to introduce evidence known to him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment. It is not a fraud which is extrinsic or collateral to the matter examined in the first suit. *Re Griffith*, 84 Cal. 112.

Equity will not relieve on the ground that a witness was guilty of perjury.

Freem. Judgm. 3d ed. § 503; *Gray v. Barton*, 62 Mich. 186; *Flower v. Lloyd*, L. R. 10 Ch. Div. 327; *Allen v. Currey*, 41 Cal. 321.

Plaintiff is seeking to reopen the case that he may have an opportunity to impeach the witness Johnson. But this will not do.

Berry v. State, 10 Ga. 511; *People v. Anthony*, 56 Cal. 397; *Briswalter v. Palomares*, 66 Cal. 259; *Reed v. Dravis*, 67 Cal. 491; *Hass v. Billings*, 42 Minn. 63.

Conceding, for the sake of argument, that

Johnson was bribed, and testified falsely, as stated in the complaint, no cause of action exists.

Smith v. Lewis, 8 Johns. 157; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Hilton v. Guyott*, 45 Fed. Rep. 252; *Zellerbach v. Allenberg*, 67 Cal. 298; *Peck v. Woodbridge*, 3 Day, 80; *Gelston v. Codwise*, 1 Johns. Ch. 195, 1 L. ed. 110; *Demerit v. Lyford*, 27 N. H. 541; *Gott v. Carr*, 6 Gill & J. 209.

If a party willfully conceals a document, is his act any different in principle from that committed in suppressing oral testimony? Yet, in *Allen v. Currey*, 41 Cal. 321, it was definitely settled that the suppression of the truth is not enough.

See also *Field v. Flanders*, 40 Ill. 474; *Hillsborough v. Nichols*, 46 N. H. 379; *Dixon v. Graham*, 16 Iowa, 810.

No different rule should obtain regarding subornation of perjury.

Subornation of perjury is not a novel offense. The courts have long been annoyed by this crime.

Stearns v. United States, 78 U. S. 6 Wall. 590, 18 L. ed. 844; *Luco v. United States*, 64 U. S. 28 How. 541, 16 L. ed. 550; *United States v. Neleigh*, 66 U. S. 1 Black, 306, 17 L. ed. 146.

Beatty, Ch. J., delivered the opinion of the court:

This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud. The superior court sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is whether the complaint, taken as true, presents a case entitling the plaintiff to the relief demanded or to any relief. It is alleged that in April, 1888, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over \$200,000, and of still greater value now. That one parcel of the land had been sold under decree of foreclosure and the time for redemption was about to expire. That there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about \$62,000 as then estimated. That plaintiff was anxiously endeavoring to raise money to effect such redemption and save his property from sacrifice. That one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan and did loan him the necessary sum, taking for security a grant absolute in terms of the incumbered property. The consideration expressed in the deed was the exact sum at which the liens and incumbrances on the land were estimated,—\$62,000. The value of the land was, as above stated, over \$200,000. Within a month or two after the execution of his deed, plaintiff tendered Cohn \$65,000, and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was, in fact, a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute

sale. Upon a trial of this issue the superior court found for the plaintiff, and decreed a reconveyance upon payment of \$108,000, this being the amount of the sum originally advanced by Cohn, and certain additional sums which he was found to have expended subsequently in the compromise and settlement of other claims against the property. But on motion of the defendants in that action the superior court ordered a new trial unless the plaintiff would consent to a modification of the findings and decree, adding \$35,000 to the amount to be paid defendants upon reconveyance of the land; and, the plaintiff failing to consent to such modification, the order for a new trial was made absolute, and, upon appeal of the plaintiff, was affirmed by this court. 67 Cal. 258.

Thereupon a new trial was had in the superior court, but before a different judge, who found upon the principal issue in favor of the defendants, and decreed against the right of redemption. From that decree, and an order denying his motion for a new trial, the plaintiff again appealed to this court, where the decree and order were affirmed (78 Cal. 384), upon the ground that, the evidence being conflicting, the findings of the lower court could not be disturbed. It is to annul the decree so affirmed that the present action is brought and the fraud by which it was procured is shown by allegations in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over eighty years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security, and not a purchase and conveyance absolute; and shortly after the execution of the deed, so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction, and his statements concerning it, Pico called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance; but, in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time, Johnson was dead; but his testimony, as given on the first trial, had been reduced to writing, and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify; but they had no evidence of such bribery, although they had used the utmost diligence to discover it. Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first

trial. Among their reasons for doing so were the following: Other testimony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former; and counsel for plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness. They would have his admission of other facts inconsistent with the theory of a sale. The court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others. Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion the complaint sets out the substance of all the testimony of Cohn and Pico, and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth the judgment here in question would not have been given. This being shown, it is next alleged that, after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson \$2,000 to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint and show that on the very morning that Johnson gave his testimony Cohn placed \$2,000 in the hands of one Forbes, with directions given in Johnson's presence to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have ex-

hausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. *United States v. Throckmorton*, 98 U. S. 65, 66, 25 L. ed. 95, and authorities cited. In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the Legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not, and could not have been, the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil

and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from *United States v. Throckmorton*, *supra*. The decision in that case has been approved by this court as recently as *Re Griffith*, 84 Cal. 113. The following decisions of this court are also in point: *Allen v. Currey*, 41 Cal. 321; *Amador C. & Min. Co. v. Mitchell*, 59 Cal. 176.

Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of *Fabrilius v. Cock*, 3 Burr. 1771. The cases of *Verplanck v. Van Buren*, 76 N. Y. 247, and *Dringer v. Jewett*, 42 N. J. Eq.

578; 8 Cent. Rep. 560, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point.

We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the Superior Court must be affirmed.

So ordered.

We concur: **McFarlin, J.**; **Sharpstein, J.**; **Paterson, J.**

A rehearing of the case was subsequently granted and on September 10, 1891, the following opinion was handed down:

Per Curiam:

After a full consideration of the argument presented upon the rehearing in this cause, we are satisfied with the former decision rendered in February, and for the reasons there given the judgment appealed from is affirmed.

TEXAS SUPREME COURT.

W. J. FREES, Surviving Partner, etc., *Plff.*
in *Err.*,
v.

George BAKER.

(....Tex....)

The liability of a surety on an unma-

tured obligation is a lawful debt, claim or demand which will make a transfer of goods to him by the debtor, on his assuming the obligation, valid as to other creditors, under a statute giving "creditors, purchasers, or other persons" the right to take sufficient property from their debtor to satisfy bona fide claims.

(May 26, 1891.)

NOTE.—Indemnity of surety.

The authorities are uniform in holding that it is among the indisputable rights of an assignor to make such provision as he can for the payment of his outstanding indebtedness, and hence the instrument of assignment may legally provide for his sureties and indorsers as well as his general creditors. *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Halsey v. Fairbanks*, 4 Mason, 206; *Keteltas v. Wilson*, 36 Barb. 298, 23 How. Pr. 69; *Copeland v. Weld*, 8 Me. 411; *Stevens v. Bell*, 6 Mass. 339; *Canal Bank v. Cox*, 6 Me. 386; *Cunningham v. Freeborn*, 11 Wend. 241, 1 Edw. Ch. 256, 6 L. ed. 130, 3 Paige, 557, 3 L. ed. 273; *Duval v. Raisin*, 7 Mo. 449; *Vaughan v. Evans*, 1 Hill, Eq. 414; *Bump, Fraud. Conv.* 387.

If the principal deposit funds for the indemnity of the surety, there is a sufficient consideration for the contract, and the receiver becomes bailee for the surety. *Keller v. Rhoads*, 39 Pa. 513.

But if the debtor procures a third person subsequently to sign a contract of indemnity to the surety, there is no consideration, even if the surety promise to continue such for an indefinite time. *Rix v. Adams*, 9 Vt. 283.

He is authorized to realize upon any securities pledged, whenever he is in danger of being forced to pay the debt, and before payment. *Bird v. Benton*, 13 N. C. 179; 5 Wait, Act. & Def. 208.

A surety may retain funds in his hands belonging to the principal debtor, upon the latter's insolvency; and an assignee of the principal debtor has, in such case, no better right to such funds than his assignor would have. *Williams v. Helme*, 16 N. C. 151, 18 Am. Dec. 580.

It is entirely competent for an assignor to give a preference to a surety or indorser. *Hendricks v. Walden*, 17 Johns. 438; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 1 L. ed. 380; *Cunningham v. Freeborn*, 11 Wend. 241; *Keteltas v. Wilson*, 36 Barb. 298, 23 L. R. A.

How. Pr. 69; *Lansing v. Woodworth*, 1 Sandf. Ch. 43, 7 L. ed. 231.

But he may not secure debts not in existence, or make provision for the payment of future advances (*Hendricks v. Robinson*, *supra*; *Baruum v. Hempstead*, 7 Paige, 568, 4 L. ed. 278), or future indorsements (*Lansing v. Woodworth*, 1 Sandf. Ch. 43, 7 L. ed. 231). And he may even give a preference to a party holding claims which he has purchased at a discount. *Low v. Graydon*, 50 Barb. 414; *Powers v. Graydon*, 10 Bosw. 630.

Liabilities actually existing, although contingent in their character and not yet matured, may be protected by an assignment. Instances of this are liabilities as indorser, surety, or bail. *Keteltas v. Wilson*, 36 Barb. 298, 23 How. Pr. 69; *Griffin v. Marquardt*, 21 N. Y. 121; *Loeschigk v. Jacobson*, 26 How. Pr. 526, 2 Robt. 645; *Cunningham v. Freeborn*, 11 Wend. 241, 1 Edw. Ch. 256, 6 L. ed. 130, 3 Paige, 557, 3 L. ed. 273; *Brainerd v. Dunning*, 30 N. Y. 211; *Bishop, Insolvent Debtors*, § 187.

And where the debtor has indemnified his surety by a mortgage containing a covenant to pay the debt, the mortgage will inure to the benefit of the creditor, and he may foreclose it. *Loehr v. Colborn*, 92 Ind. 24. And see *Alabama Gold L. Ins. Co. v. Anderson*, 67 Ala. 425; *Re Fickett*, 72 Me. 266.

But a security given to a surety, merely to indemnify him against loss, and not conditioned for the payment of the debt, is not available to the creditor. *Pool v. Doster*, 59 Miss. 253.

Mortgages given by co-sureties, each to the other, as security to indemnify him for any claim beyond his proportion assumed, are not in equity securities for the payment of the principal debt, which inure to the benefit of the creditors upon the principle of subrogation. *Hampton v. Phipps*, 106 U. S. 260, 27 L. ed. 719. See *Seward v. Huntington*, 94 N. Y. 104; 8 Wait, Act. & Def. 446.

ERROR to the District Court for San Saba County to review a judgment in favor of claimant in an attachment suit in which the attachment was laid upon certain property alleged to belong to Stockbridge & Teague, but which was claimed by George Baker. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. West & McGown, Leigh Burleson, and Reeves & Channcy for plaintiffs in error.

Messrs. Hancock, Shelley & Hancock for defendant in error.

Garrett, J., filed the following opinion: This was an action to try the right of property. On December 1, 1885, *Frees & Son*, plaintiffs in this suit, filed a suit in the District Court of Dallas County against *Stockbridge & Teague*, of San Saba County, for the sum of \$820.10, and levied an attachment on the goods in controversy on the 4th day of December, 1885. Defendant in error, *George Baker*, claimed the goods. Plaintiffs tendered issue that the goods were the property of *Stockbridge & Teague*, and, as such, were subject to their writ. The claimant replied that he was a purchaser of said goods in good faith, for a full, fair, and valuable consideration, and was in possession thereof when the attachment was levied; that the consideration was that claimant should assume the payment to plaintiffs of four certain promissory notes executed by *Stockbridge & Teague* to them, on which claimant was surety, for the sum of \$391.91 each, dated July 22, 1885, and due January 22, 1886, April 22, 1886, and on dates afterwards; that he had paid the note due January 22, 1886, and was ready and willing to pay the others as they matured; that claimant was solvent, and worth, in excess of exemptions, \$50,000, while the aggregate amount assumed by him for said goods was about \$1,600 and interest; and that said sale was not made with the intent to defraud the creditors of *Stockbridge & Teague*. To this answer the plaintiffs demurred generally, and pleaded, further, that *Stockbridge & Teague* were insolvent at the time of the sale, which was or might have been known to claimant; that claimant was not surety on any note then due; that, of the four notes alleged to have been assumed, two were secured by a deed of trust on land belonging to *Stockbridge*, and that the claimant had failed to pay any of said notes except the one due January 22, 1886; that, when conveyed, the property was worth \$2,000; that the goods were in fact the property of *Stockbridge & Teague* when they were levied on, and that the conveyance was made to defraud their creditors, they and the claimant acting together with such common intent, and hence the sale was pretended and void. The case was tried without a jury, and on May 21, 1886, judgment was rendered in favor of the claimant. *J. Frees*, one of the plaintiffs, having died after judgment, the writ of error was sued out by *W. J. Frees* as surviving partner. *Stockbridge & Teague* were dealers in musical instruments and supplies at San 13 L. R. A.

Saba, and owed the plaintiff for goods six promissory notes for \$391.91 each bearing date July 22, 1885, and payable 2, 4, 6, 8, 10, and 12 months after date. The first two were unsecured. The others were signed by the claimant as surety; the two last being also secured by a deed of trust on land belonging to *Stockbridge*. *Reeves*, a witness for the plaintiffs and their agent, testified that it was intended that *Baker* should sign the first four notes, but that by mistake he signed the last four, leaving the first two unsecured. There is no other direct evidence on this point, and no explicit finding of the court thereon. Plaintiffs' writ against *Stockbridge & Teague*, in which the attachment was issued and levied on the goods in controversy, was on the two unsecured notes. Some time prior to November, 1885, *Stockbridge* sold out his interest to *Teague*; the latter assuming the debts of the firm. *Teague* paid *Stockbridge* no money, but took the goods to pay the debts. *Reeves* was sent by plaintiffs from Dallas to San Saba to see *Stockbridge* about securing or collecting the first two notes then due. He found *Teague* in possession of the stock of goods sold by plaintiffs to *Stockbridge & Teague*. *Reeves* wanted the notes paid or secured. After an effort during the day to raise money, *Teague* met *Reeves* at his hotel at about 8 o'clock that night, and found that he had prepared a bill of sale for the stock to plaintiffs in consideration of the two unsecured notes, amounting to about \$800. *Teague* declined to take that amount, but offered to let plaintiffs have the goods at invoice price; to pay the two unsecured notes first, the balance to be credited on the notes on which *Baker* was security. This *Reeves* refused to do. *Teague* then went down town, and sold the goods to *Baker*, made him a bill of sale, and delivered to him the keys of the store. The consideration was that *Baker* assumed payment of the four notes on which he was security, amounting to about \$1,600, and released *Stockbridge* from all liability thereon. *Baker* was worth at the time about \$50,000. He paid the note due January 22, 1886. Very little of the stock had been sold at the time of the sale, or when this case was tried. *Baker* testified that he bought the stock of goods in order to protect himself as the surety of *Stockbridge & Teague*. He had notice that *Reeves* was trying to buy the stock of goods for plaintiffs. Plaintiffs' attachment was issued and levied after the sale. On January 1, 1886, the claimant employed *Teague* to take charge of the stock and sell it for him. His agreement was to sell the goods so as to net *Baker* the invoice price, and whatever there was over he was to receive for his services. The invoice price of the stock of goods at the time of the levy was about \$2,000. At the time of sale they were fairly worth about \$1,600. Neither *Stockbridge* nor *Teague* had any other property subject to execution when the sale was made.

Plaintiffs, by their third and fifth assignments of error, complain of the findings of the court on the facts of the case: (1) that *Baker* was surety on four notes; and (2) as to the circumstances attending the sale. The

latter finding is clearly supported by the evidence; and the former is not unsupported. If, as according to the testimony of the witness Reeves, Baker signed the two last notes by mistake, whether or not he would be bound as a surety thereon would be a question of law arising from the facts. This question is not properly before us, either under the pleadings or the evidence. Again, if Baker had the right, as surety, to take a conveyance of a sufficient amount of the goods to protect himself, he could also, for any balance of the sum agreed to be paid therefor, assume a debt of the seller for which he was not before liable, being bound only to see that such balance was so applied. *Ellis v. Valentine*, 65 Tex. 532. If he has not paid all that he assumed, it is the fault of the plaintiffs, who seized the goods under their writ of attachment. They will not be permitted to set aside the sale, and apply the goods to their unsecured notes, and at the same time require its terms to be complied with by demanding payment of the notes which were assumed. "The right of a creditor to receive property from an insolvent debtor in payment of a debt due to him, if the same be openly done, and more property is not taken than is reasonably necessary to pay the debt, although the creditor may know at the time he receives the property that he will thereby prevent other creditors from enforcing their claims, and although the creditor may know that the debtor is prompted to give him the preference through motives of friendship, is recognized. Such reception of property, however, must be bona fide; that is, for the sole purpose of securing the debt, and not with intent to cover up any of the property or its proceeds for the benefit of the debtor to the prejudice of other creditors." *Edrington v. Rogers*, 15 Tex. 188; *Hancock v. Horan*, Id. 507; *Greenlee v. Blum*, 59 Tex. 126. Whether Baker's claim was just or not was determined by the court, and its findings necessarily affirm that it was. They establish conclusively, also, as matters of fact, the good faith of Baker in the purchase of the goods, and that he paid for them a full and fair consideration by assuming the four notes, amounting to twice as much as Reeves had offered.

There is only one question presented by the remaining assignments of error, including the first, which assigns as error the action of the court in overruling the plaintiff's demurrer to claimant's answer, and that is the controlling question in the case. Was Baker, as surety for Stockbridge & Teague on obligations that had not matured at the time of the transfer, such a creditor or other person with a claim as could purchase from an insolvent debtor, in order to protect himself, considered both as to whether a surety or a surety on an obligation that has not matured is such a person or creditor? Would the consideration for the transfer be deemed valuable in law? Finally, was Baker, the surety, a creditor or other person with a demand against Stockbridge & Teague? It will be observed that in the consideration of this question we are not confined to the word "creditor" alone, 18 L. R. A.

as descriptions of the class of persons protected by the Statute; for the language of the Statute is, "creditors, purchasers, or other persons." Rev. Stat. art. 2465. If a creditor or other person having a legal demand against another receives from his debtor property for his claim, bona fide, and no more than is reasonably sufficient to pay the same, he may do so, because he is a "creditor" or "other person" who is protected by the Statute; the principle of law being that, if the debtor transfers the property directly to the person to whom the law intends it should go, the conveyance cannot be fraudulent. And the same may be said of the sales permitted to stand where the debtor has sold his property openly for a fair price, and appropriated the proceeds to the payment of his just obligations; so, also, where the purchaser takes the property, and assumes and at once pays debts of the seller. The sole object of the Statute is to protect lawful debts, claims, or demands; and if Baker's liability on the notes of Stockbridge & Teague amounted to a lawful debt, claim, or demand against them, and the transfer was otherwise in good faith, and in accordance with the principles of law, often announced, authorizing the creditor to receive property from his debtor in satisfaction of his claim, then the sale was valid. A liberal construction is given to the words "creditors and others." Mr. Bump, in his work on *Fraudulent Conveyances*, says: "The character of the claim, if it is just and lawful, is immaterial. It need not be due; for, although the holder cannot maintain an action until it is due, he nevertheless has an interest in the property as a fund out of which the demand ought to be paid." Page 503. And again: "A contingent claim is as fully protected as one that is absolute. A liability as surety is within the Statute, as much as a liability as principal." *Ibid*. It is a general rule that all claims arising from contract are in force from the date of the agreement. It has been held that a surety is the creditor of his co-surety. *Howe v. Ward*, 4 Me. 195. These questions are ably discussed in the opinions of Justice Bronson in the case of *Van Wyck v. Sevard*, 18 Wend. 375. In concluding the discussion of the question whether appellant in that case was entitled to the protection of the Statute as a creditor of William Seward, the learned judge said: "In these and all other cases depending upon contract the person to whom the engagement is made is as much a creditor, within the meaning of the Statute, as though he had a debt on which the right of action already existed. There is no reason why he should not be entitled to the same protection in the one case as in the other. In the language of Chief Justice Mellen in *Howe v. Ward*, 'although he cannot maintain an action on the contract until it has been violated, still he has an interest in the property conveyed, as a fund out of which the debt ought to be paid.'" In *Bonham v. Taylor* (Tex.) 16 S. W. Rep. 555 (decided at the present term of this court), it was held that the sureties on the bond of a city treasurer had the right to protect themselves by injunction restraining

the treasurer from paying over money, which had been raised for city purposes by taxation, to a bank to which the city council had agreed to lend it. Had the sureties on the city treasurer's bond been compelled to await action until their liability accrued, it would have been inequitable and unjust; and so if Baker should be forced to wait until the maturity of the notes on which he was surety for Stockbridge & Teague, and they had made default thereon, the goods to which he, as well as other creditors, had a right to look for the payment of the debts for which he was bound, would in all probability have been absorbed by the plaintiffs in this case to satisfy their unsecured notes. Baker was a creditor of Stockbridge & Teague, such as

entitled him to receive a conveyance of the goods in controversy to indemnify him against ultimate liability on assumption by time of the debts for which he was security. We are of the opinion that the sale was also complete, and not a mortgage or conditional sale, and that the title to the goods vested at once in Baker; yet, if it had been a mortgage or conditional sale, with Baker in possession, he would have still had the right to the possession of the property until the conditions had been complied with or broken.

In either event *the judgment of the court below in his favor was right, and should be affirmed.*

Adopted by Supreme Court, May 26, 1891.

PENNSYLVANIA SUPREME COURT.

ELI W. HOYT *et al.*

v.

Frank HOYT *et al.*, *Appts.*

(....Pa.....)

1. **No trade-mark can be claimed in the shape of a bottle in which extracts are put up for sale.**
2. **No exclusive right can be acquired by adoption in a cap label for a bottle, which was originated by a third person and has been used by him for years.**
3. **Neither the shape of a box in which bottles of extracts are packed for purposes of trade, nor the mechanical arrangement of the bottles therein, is subject to appropriation as a trade-mark.**
4. **Combining a label and bottle cannot infringe a trade-mark if the separate use of each would not have that effect.**

(October 5, 1891.)

A PPEAL by defendants from a decree of the Court of Common Pleas, No. 4, for Philadelphia County enjoining them from infringing plaintiff's trade-mark. *Reversed.*

The facts are stated in the opinion.

Messrs. William Henry Peace and F. Carroll Brewster, for appellants:

It may be seriously questioned whether labels and advertisements as mere labels and advertisements constitute trade-marks.

Leather Cloth Co. v. American Leather Cloth Co. 11 Jur. N. S. 513; *Browne*, Trade-marks, p. 144.

The bottle is not a trade-mark, because it is but the form of the goods.

Moorman v. Hoge, 2 Sawy. 78; *Browne*, Trade-marks, p. 106; *Harrington v. Libby*, 12 Pat. Off. Gaz. 188.

The shape and arrangement of the boxes cannot constitute a trade-mark.

Sawyer v. Meyer, 2 W. N. C. 197; *Browne*, Trade-marks, p. 118.

Plaintiffs' fraud in falsely representing their

cologne to be of German origin bars their right to relief.

Fetridge v. Wells, 4 Abb. Pr. 144; *Hobbs v. Francois*, 19 How. Pr. 587; *Leather Cloth Co. v. American Leather Cloth Co., Limited*, 4 De G. J. & S. 137; *Morgan v. McAdam*, 36 L. J. Ch. 228; *Palmerv. Harris*, 60 Pa. 156; *Kenny v. Gillet*, 70 Md. 574; *Laird v. Wilder*, 9 Bush, 131, 15 Am. Rep. 707; *Connell v. Reed*, 128 Mass. 477; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101; *Pidding v. How*, 8 Sim. 477; *Ginter v. Kinney T. Co.* 12 Fed. Rep. 782; *Flavel v. Harrison*, 10 Hare. 467; *Re Saunson & Co.* *Cox's Manual*, 625 (1878).

For the law on the question of similarity, see—

Spottinwoods v. Clark, 2 Sandf. Ch. 628, 7 L. ed. 733; *Partridge v. Menck*, 2 Sandf. Ch. 622, 7 L. ed. 729.

If it appear that the marks used by the defendants, though resembling the plaintiffs' in some respects, would not, probably, deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question, an injunction will not be granted.

Blackwell v. Crab, 36 L. J. R. Ch. 504; *Sawyer v. Meyer*, 2 W. N. C. 197.

The shape and arrangement of the boxes cannot constitute a trade-mark.

Gilman v. Hunnewell, 122 Mass. 139.

A person cannot have a right in his own name as a trade-mark, as against a person of the same name, unless the latter's form of stamp or label is so similar as to represent that his goods are of the former's manufacture.

Laughman's App. 5 L. R. A. 599, 128 Pa. 1; *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Comstock v. White*, 31 Barb. 301; *Faber v. Faber*, 49 Barb. 357; *Emerson v. Badger*, 101 Mass. 82; *James v. James*, L. R. 13 Eq. 421; *Hardy v. Cutter*, *Sebastian's Digest*, Case, 427 (1873); *Meneely v. Meneely*, 62 N. Y. 427; *Decker v. Decker*, 52 How. Pr. 218.

There is no trade-mark in the size and shape of packages, boxes, bottles, labels or wrappers.

Gillott v. Esterbrook, 47 Barb. 461; *Moorman v. Hoge*, 2 Sawy. 78; *Sawyer v. Meyer*, 2 W. N. C. 197.

NOTE.—For a full discussion of the subject of "Trade-marks," see *Putnam Nail Co. v. Dulany* (Pa.) 11 L. R. A. 524, and cases referred to in *note*. 13 L. R. A.

Messrs. Jones, Carson & Phillips and John G. Johnson, for appellees:

A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.

Perry v. Truefitt, 6 Beav. 66; *Seiro v. Proceende*, L. R. 1 Ch. 192; *Ley v. Walker*, L. R. 10 Ch. Div. 447.

The imitation of the size, shape, style, label, and substantial appearance of the complainant's goods by the defendant is a fraud, and he is entitled to protection.

Williams v. Johnson, 2 Bosw. 1.

Sawyer v. Horn, 1 Fed. Rep. 24, decided that whether the complainant has a trade-mark or not, as he was the first to put up bluing for sale in the peculiarly shaped and labeled boxes adopted by him, and as his goods have become known to purchasers, and are bought as goods of the complainant by reason of their peculiar shade, color and label, no person has the right to use the complainant's form of package, color or label or any imitation thereof in such a manner as to mislead purchasers into buying goods for those of complainant, whether they are better or worse in quality.

A party will be protected from the imitation of the packages peculiarly designed and shaded for the purpose of distinguishing his goods and from the imitation in color, design, style and lettering combined of the labels used to mark such packages when put on the market.

Carbolic Soap Co. v. Thompson, 25 Fed. Rep. 625.

Where a plaintiff has been in the habit of packing his goods in a peculiar and distinctive manner, he will be entitled to restrain another from imitating his packages.

Sebastian, Trade-marks, p. 255. See also *Id.* p. 112.

Where a person uses his own name for the purpose of fraud, if satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered.

Sebastian, Trade-marks, pp. 26, 233; *Dunachie v. Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874; *Churton v. Douglas*, Johns. V. Ch. 174; *Gillis v. Hall*, 8 Phila. 231.

A man may lose the right to use his own name in a particular way where others originally have become known to the public in connection with such particular or special use of the same name.

England v. New York Pub. Co. 8 Daly, 377; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 87 Conn. 278; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 752; *Burgess v. Burgess*, 8 De D. M. & G. 896; *James v. James*, L. R. 13 Eq. Cas. 421; *Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495; *Landreth v. Landreth*, 22 Fed. Rep. 43; *Shaver v. Shaver*, 54 Iowa, 208; *Clayton v. Day*, 76 L. T. 79.

It is a fraudulent act to purchase the right to use the name of a small maker because it

happens to be identical with that of a maker of reputation.

Sebastian, Trade marks, p. 31, citing *Perks v. Hall*, W. N. 1881, p. 111. See also *Devlin v. Devlin*, 69 N. Y. 212; *Croft v. Day*, 7 Beav. 84; *Lee v. Haley*, L. R. 5 Ch. 155; *Rogers Mfg. Co. v. Rogers Mfg. Co.* 16 Phila. 178, 40 Phila. Leg. Int. 294; *Russia Cement Co. v. Le Page*, 6 New Eng. Rep. 577, 147 Mass. 206; *Meneely v. Meneely*, 82 N. Y. 431. *Taylor v. Taylor*, 23 L. J. Ch. 255, is also in point.

Williams, J., delivered the opinion of the court:

The cases in which a court of equity will interfere to protect a trade-mark are divisible into two classes. To the first of these may be referred those cases in which the trade-mark has been registered under a system provided by law for the protection of the owner in its use. To the other belong all those cases in which there has been no registration and in which the true ground for interference is the prevention of fraud. In cases falling within the first class, property in the trade-mark is shown by the certificate of registration. In those belonging to the second, the right asserted is of common-law origin, and is shown by proof of the adoption and use of the trade-mark. Its invasion is a fraud upon the owner and the public, to be restrained on principles of common right. All monopolies are odious and their maintenance in favor even of inventors, is limited in duration. When a statutory term of protection is over, whatever is valuable in the subject of the patent becomes, as does an unpatented invention, a contribution to the public welfare and may be freely used as such. Competition is essential to commerce, and within legitimate lines should always be encouraged. The "survival of the fittest" is a law of trade, no less than of the development of living organisms; and from the struggle which determines who and what is "fittest," come general development and progress. As a general proposition it may be said that one may imitate what is excellent in the process and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products. An inventor who secures a patent for his device is protected in his exclusive right during the period fixed by law. When that period expires, his exclusive right expires with it, and thereafter he stands on no higher ground than any other citizen who may desire to use the thing or combination covered by the patent. The rules applicable to trade-marks are quite different. A trade-mark may increase in value to its owners by use, and the law could not put a time limit on the owner's right to it any more than it could put a limit upon his right to use any other article of property. A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations. It is a sign or mark by which the manufactured articles produced by one per-

son or firm or maker are distinguishable from those produced by rival manufacturers. It must be distinctive and indicate the personal as distinguished from the geographical origin of the article to which it is applied. *Laughman's App.* 128 Pa. 1, 5 L. R. A. 599. Thus Sonman, the name of a large tract of land, cannot be appropriated by one of several owners of land within the tract, to the exclusion of the other owners; nor Lackawanna Valley, by one operator in that valley, to the exclusion of all others. But the trade-mark must relate to, and distinguish, the goods to which it is applied. For this reason, among others, the size or shape or mode of construction of a box, barrel, bottle, or package, in which goods may be put is not a trade-mark. If there is any new and useful combination in the construction of such box or package it should be patented as an invention if the owner wishes to prevent others from using it; but such package cannot be registered as a trade-mark. A sign, device or mark originated and in actual use by another cannot be adopted and registered by anyone who takes a fancy to it, as his trade-mark, and such adoption and registration will not confer a title on him who makes it. It would be an infringement upon the original owner, and from the wrong so done no valid title could grow. A trade-name may, in a general way, be treated as a trade-mark and protected in the same manner. When a business has been conducted by some person or firm under a particular trade-name until the public come to regard the name as affording an assurance of the good quality of the article bearing it, the name is a valuable part of the business assets of the person or firm whose skill and integrity have won confidence for it. A rival who should appropriate the trade-name to his own use without the consent of the owners, and put his goods on the market bearing it, as though they were made by the rightful owner of the trade-name, is guilty of a fraud on the public, and a fraudulent taking from the proprietors which is, both in intent and effect, a larceny. But when such rival puts his goods on the market on their own merits and under his trade-name, his neighbors have no just ground of complaint if he has imitated, adopted, or improved upon their unpatented methods and processes. *Putnam Nail Co. v. Dulaney* (Pa.) 11 L. R. A. 524. It only remains to apply these general principles to the case now before us, so far as they are applicable to the questions raised by the appeal of the defendant below. The plaintiffs claim that the front or face label on their bottles has been registered by them as a trade-mark. It is put on obliquely to the length of the bottle. It bears the name of the liquid in the bottle thus, "Hoyt's German Cologne." It also bears the name and residence of the makers, and a reference to the fact of its registration. They also claim the following unregistered trade-marks: a bottle, having a depression or panel on the back side; a cap label over the cork in the bottle; a peculiar mode of arranging and packing bottles in boxes; in the name of the article sold, viz., "Hoyt's German Cologne."

The defendants have a registered label or trade-mark which goes upon the bottle at right angles with its length, and which contains the name of the liquid, "Hoyt's Egyptian Cologne," with a view of a pyramid and the head of the Sphinx; with the names and residence of the makers, and a reference to its registration. The learned judge of the court below held that F. Hoyt of the defendant firm had a legal right to use his own name in his business, and that he could not be enjoined from using it upon goods produced by himself. The correctness of this holding is not raised by the defendant's appeal. The learned judge also held that the defendant's trade-mark or label was not an infringement upon that of the plaintiffs, whether considered by itself or in connection with the champagne shaped bottles on which it was originally used by the defendants. This also must be regarded as settled for the purposes of this appeal, since the plaintiffs have not appealed, and the defendants cannot, from this ruling. Then, too, the evidence shows very clearly that the bottle with the depression or panel on the back side, which both parties are now using, is a stock bottle to which neither of them has any exclusive right, and which is freely sold by manufacturers to all who apply. This bottle, as we have already seen, is not a trade-mark. It is not registered and it is not capable of registration. It is in common use, open to the purchase and use of all who may fancy its shape, in the same manner as the other stock bottles. The cap label was not originated by the plaintiffs and does not belong to them. It was devised, according to the uncontradicted testimony, by Dr. David Jayne, a Philadelphia chemist and dealer in medicines, and was used by him and his successors for years before and since the plaintiffs assumed to adopt it as their own. Their adoption of his cap label gave them no title to it. The mechanical arrangement of the bottles in boxes is neither an invention nor a trade-mark. If the box is an invention, and others are to be prevented from using it, the plaintiffs should have secured a patent for it. Without letters-patent they have no exclusive property in the shape or construction of a box. Whatever one manufacturer or tradesman may do to increase the safety of his goods in transportation, or to display them advantageously upon shelves, counters, or in show windows, is simply a good example or model for the public which anyone interested may imitate with impunity. The debatable ground presented by this appeal is thus seen to be very narrow. It may be learned to the best advantage by considering the language of the court below and the form of the decree made. The decree did not hold the defendants' label to be an infringement, or deny the defendants the use of their name. On the contrary the learned judge said: "The defendants have also, we think, the right to use the label placed on the sides of their bottles." If they made cologne and sold in bottles such as they used at first, with their labels upon them having the name "Hoyt's Egyptian Cologne," and the pyramid and the head of the Sphinx, and the names and resi-

dence of the makers, they were exercising a clear legal right and could not be enjoined. "But," the decree continues, the "defendants must be enjoined from putting up and offering for sale cologne in the bottles described in the bill, with the labels thereon." This is the decree appealed from. The court held that the defendants' label was no infringement, and was lawfully used on a stock bottle with a champagne bottle shape. But if the same label was used on another stock bottle having a panel on the back side, it became an infringement because of the shape of the bottle on which it was placed, and the use of the label on such a bottle must be prevented by injunction. As both styles of bottle were open to the public, as stock bottles, the label

was as lawful upon one of them as upon the other. The plaintiffs could no more acquire an exclusive right to a stock bottle by priority of use, than they could acquire an exclusive right to Dr. Jayne's cap label by being the first to appropriate it without his knowledge or consent. Adopting the conclusions of the learned judge that the label of the defendants did not infringe upon that of the plaintiffs, and that the defendants had a legal right to use their own names in their business, we cannot sustain this decree.

It is accordingly set aside; and as no ground of equitable relief appears upon the record before us, *the bill is dismissed at the cost of the appellee.*

DELAWARE CHANCERY COURT.

Miriam E. MOORE

v.

Samuel W. DARBY *et al.*

Thomas H. MOORE, Intervenor.

(....Del. Ch....)

A woman's share as tenant in common in the proceeds of lands, the right to the possession of which vested in her after the passage of the Married Woman's Acts, and which have been sold under direction of court for partition, will not, at the request of her husband, be invested for his benefit, but it will be paid to her absolutely.

(September 21, 1890.)

SUIT brought in Kent County for partition of certain real estate. On intervening partition petition by the husband of one of the co-owners to have her share of the proceeds of sale invested for his benefit. *Petition denied.*

The facts are stated in the opinion.

Mr. Nathaniel B. Smithers, Sr., for intervenor.

Messrs. Richard R. Kenney and Edward Ridgely, contra:

The Married Woman's Acts are remedial statutes and should be so construed as to advance the remedy and effect the object intended to be accomplished by the Legislature.

Billings v. Baker, 28 Barb. 343; *Johnes v. Johnes*, 8 Dow. 15.

As the law now stands in our State, the right of the husband to be tenant by the curtesy of his wife's lands is dependent upon the fact not only that the issue should be born alive during coverture, but also that the wife should be seised of the lands at the time of her death.

Any alienation of the lands during the life of the wife must necessarily defeat the right of tenancy by the curtesy in the husband.

Gram v. Lobdale, decided in the Court of Errors and Appeals of this State at the January Term, A. D. 1881 (not yet reported); *Breeding v. Davis*, 77 Va. 689; *Beach v. Miller*, 51 Ill. 206;

Hill v. Chambers, 30 Mich. 422; *Sleight v. Read*, 18 Barb. 159; *Billings v. Baker*, 28 Barb. 343; *Pool v. Blakie*, 53 Ill. 495; *Forbes v. Sweeney*, 8 Neb. 520; *Coverdale v. Gorman*, 4 Houst. (Del.) 624; *Johnes v. Johnes*, 8 Dow. 15; *Stewart v. Ross*, 50 Miss. 776; *Greenwich Nat. Bank v. Hall*, 11 R. I. 124; *Sibley v. Bullock*, 10 Allen, 94; *Porch v. Fries*, 18 N. J. Eq. 205; *Hearle v. Greenbank*, 3 Atk. 695-716.

Saulsbury, Ch., delivered the following opinion:

Miriam E. Moore has filed her petition in this court, praying for partition between her and her two brothers, Samuel W. Darby and John C. Darby, of lands situate in Mispillion and South Murderkill Hundreds, formerly belonging to Samuel Warren, senior. One of these tracts of land contains about 700 acres; one other contains something over 200 acres, and a third tract contains upwards of 180 acres.

Samuel Warren, senior, died in 1848. By his will, admitted to probate November 6, 1848, he devised as follows:

"Fourth. I give and devise to my beloved wife, Miriam, for and during the term of her natural life, without impeachment of waste, all that farm or tract of land with the appurtenances situate in Mispillion Hundred, Kent County, and State of Delaware, being the Mansion Farm on which Solomon Townsend, senior, and Solomon Townsend, junior, lived and died, and now in the tenure of Abner Wooters, and containing six hundred acres more or less; and from and immediately after the death of my said wife, I give and devise the said farm or tract of land with the appurtenances unto Solomon Townsend Warren and John W. Hall and their heirs for and during the natural life of my daughter Mary Darby, now the wife of John M. Darby, upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and sep-

NOTE.—A husband's initiate right of curtesy is not a vested right but may be taken away or impaired by statute. It is done away with by the 13 L. R. A.

Married Woman's Act. See note to *Alexander v. Alexander* (Va.) 1 L. R. A. 125.

arate use, notwithstanding her coverture, free from the debts, management, power, control of her now husband the said John M. Darby or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge, and after the death of my said daughter, I give and devise the farm or tract of land aforesaid with the appurtenances unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid.

"*Fifth.* I give and devise unto Solomon Townsend Warren and John W. Hall and their heirs for and during the natural life of my daughter Mary Darby, now the wife of John M. Darby, the farm or tract of land which I purchased of Dr. Alexander Lowber near Frederica containing five hundred acres more or less with the appurtenances upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and separate use, notwithstanding her coverture, free from the debts, management, power or control of her now husband, the said John M. Darby, or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge. And after the death of my said daughter, I give and devise the farm or tract of land aforesaid unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid."

The tract of land in Mispillion Hundred, as appears from the return of the freeholders, in fact contains about 700 acres of land and the two tracts in South Murderkill Hundred contain, as appears by said report, something over 400 acres. This discrepancy between the will of Samuel Warren, senior, and the report of the freeholders is not accounted for by any proof in the cause, but the discrepancy is immaterial, as there is no doubt that the land mentioned in the will above recited and the land of which partition is sought are the same. Thomas H. Moore has filed his petition, therein stating that he intermarried with the said Miriam E. Moore, the petitioner in the proceedings for partition on or about the fourth day of September, A. D. 1852, and had by her issue born alive and thereby became tenant by the curtesy initiate of the lands of which she was seised for and during said coverture, and that as said tenant by the curtesy initiate in the lands of his said wife, Miriam E., he has been informed and believes that he has an interest and is entitled to be made a party to said proceedings in chancery and he therefore prays that he as her husband may be made a party thereto.

He was made a party by the consent of the solicitors for the plaintiff and defendants respectively.

The freeholders appointed to make partition of the lands have reported that the same cannot be divided without detriment to the parties entitled and that they therefore have appraised the lands as by their commission they were commanded to do. The lands in respect to which partition is prayed, have 13 L. R. A.

been sold, the proceeds of sale paid into court, and the question is now raised by the solicitors for the husband of the petitioner whether her share of the proceeds of sale shall be paid to her absolutely, or, as they claim would be proper, shall be ordered to be invested for her benefit, the interest paid to her for life and the principal held to secure the possible right of the husband therein should he survive the wife.

An estate by the curtesy, says Cruise, quoting Littleton, vol. 1, § 1, of chap. 1, title 5, p. 107, is where a man taketh a wife seised in fee simple or in fee tail general or seised as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England.

And a tenant by the curtesy of England, says Blackstone, book 2, chap. 8, p. 126, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple, or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall on the death of his wife hold the lands for his life as tenant by the curtesy of England. There are four requisites, says Blackstone, necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife.

1. The marriage must be canonical and legal.
2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess which is seisin in law, but an actual possession: and therefore a man shall not be tenant by the curtesy of a remainder or reversion.
3. The issue must be born alive. The husband, he says, by the birth of the child becomes tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

Miriam E. Moore had not the possession nor the right to the possession of these lands or any part of them until the death of her mother, Mrs. Mary Darby. Her mother herself had not the right to their possession in her lifetime, but the right to their possession during her lifetime was in Solomon Townsend Warren and John W. Hall and their heirs during her lifetime. The right to the possession of Miriam E. Moore to any portion of these lands did not accrue until the death of her mother, Mrs. Darby, which occurred, as Mr. Moore states in his petition, on or about the 27th day of January, A. D. 1888. At this period her children Miriam E. Moore, Samuel W. Darby and John C. Darby became entitled to the possession of the lands under the will of their grandfather Samuel Warren, senior.

Before that day and before Miriam E. Moore, and of course before her husband, Thomas H. Moore, could become entitled to any portion of said lands, the Legislature of Delaware had in effect abolished the right of a tenant by the curtesy initiate in this State.

In fact, tenancy by the curtesy of England and tenancy by the curtesy as theretofore existing in Delaware ceased to exist.

But to consider the law in reference to this subject independently of our Acts of Assembly, a man was not entitled to tenancy by the curtesy nor a woman to dower out of a reversion or a remainder expectant upon an estate of freehold; but upon a reversion expectant upon an estate for years both of these rights (of dower and of curtesy) accrue, for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. 1 Sharswood's Bl. bk. 2, chap. 8, p. 126; *Stoughton v. Leigh*, 1 Taunt. 410; *De Gray v. Richardson*, 3 Atk. 470; *Goodlittle v. Neirman*, 3 Wils. 521.

The right the husband acquires by marriage in the lands of the wife is thus stated in vol. 2, p. 131, of Kent's Commentaries, Lacy's edition 1889: "If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life, if he dies before his wife, and in that event she takes the estate again in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife, or her heirs, and in all these cases, the emblements growing upon the land at the termination of the husband's estate go to him or his representatives."

If during her life real estate is converted by operation of law into personal estate the conversion will be treated as her own. *Graham v. Dickinson*, 3 Barb. Ch. 170, 5 L. ed. 861.

The rents, issues and profits of the wife's lands accruing during coverture belong absolutely at common law to the husband. How effectually these common-law rights of the husband had been changed by the Statutes of this State will appear by reference to those Statutes, and here I will remark that these Statutes are remedial in character and must be construed by courts so as to effectuate the intention of the Legislature so far as the same can reasonably and properly be done.

Our first Statute upon this subject was passed March 17, 1865, and provided "that the real estate, mortgages, stocks and silver plate belonging to any married woman at the time of her marriage, or to which she may become entitled at any time during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband by alienation, transfer, assignment or otherwise; or be liable to the debts or contracts of her husband, except where such debts are

judgments recovered against him for her liabilities before marriage: provided, that nothing in this section shall be construed to authorize the wife to sell or otherwise dispose of her real estate, mortgages, stocks or silver plate without her husband's consent, evidenced by writing under his hand and seal, or to authorize her to create any incumbrance upon her real estate, or to dispose of the rents, issues and profits thereof, or the interest upon her mortgages, or dividends, or other income arising from her stocks, without his consent, evidenced in the same manner: and, provided further, that nothing herein contained shall be construed to affect, in any manner, the rights of the husband (if he survive the wife), as tenant by the curtesy in the real estate of his wife."

The Act to secure to married women certain of their own earnings, p. 95, vol. 14, has no relation to the case before the court.

By an Act for the protection of married women, passed April 9, 1873, vol. 14, p. 638, § 1, it was provided "that the real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, or that any female now married may receive by gift, grant, devise or bequest from any person other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor liable for his debts."

This last Act was amended March 17, 1875, by striking out said first section and inserting among other things, in lieu thereof: "Section 1. That the real and personal property of any married woman, which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever, from any person other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts."

These are the portions of our Acts properly known as Married Women's Acts having relation to the question now before me. Regarded as remedial, and construed so as to advance the remedy and effect the object intended to be accomplished by the Legislature, what are their effects in the case before me?

Mrs. Miriam E. Moore was not entitled to the possession of these lands or any portion of them until the 27th day of January, A. D. 1888, the day of the death of Mrs. Darby, and the day on which the estates of Solomon Townsend Warren and John W. Hall, trustees thereof, expired. Thomas H. Moore had not then and has not since had any estate and no interest in said lands. He has not had the legal right to enter upon or into the possession of said lands for any purpose whatever; he is not entitled to the perception of the rents and profits of said lands or any part thereof during the lifetime of his wife; he has no estate by the curtesy initiate therein; he is entitled only to the possibility of entering into the possession of his wife's interest therein and enjoying the possession thereof during his lifetime in case he survives his wife, and in case no partition thereof be made between the tenants in com-

mon thereof, and unless the conversion of the wife's interest therein into money be in fact and in law not an absolute conversion, but a qualified conversion only. Would such a conversion of land into money under these circumstances have the effect of securing to Thomas H. Moore the preservation and enjoyment of the principal sum of money adjudged as the value of the wife's interest in the lands under the proceedings in partition in this cause?

The doctrine of conversion was thus stated by an eminent English equity judge in a leading case upon this subject "Nothing is better settled than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid. Whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." See 1 Pom. Eq. Jur. § 161, and authorities cited.

The principle properly applicable to this case was decided by the superior court at its fall session in 1874 in the case of *State, for the use of Samuel D. Coterdale, versus Randall B. Gorman and others*.

The court decided in that case that under the Act for Married Women, passed in 1865, a wife's interest in a recognizance in the orphan's court on the assignment of the real estate of a deceased father cannot be attached for the debts of her husband, except for such as are properly provided for in it.

In that case the court said: they considered that it would be contrary to the spirit and policy as well as the intention of the Statute of 1865, for the benefit of married women to now hold that a wife's sole and separate interest in the real estate of her deceased father secured by recognizance in the orphan's court may be attached for the debt of her husband except such debts as are specially provided for in it. *Jefferson v. Brady*, 4 Houst. (Del.) 626.

If I understood the argument of the solicitors for Thomas H. Moore, the husband of Miriam E. Moore, it was that the conversion of the interests of Mrs. Moore, and her brothers by a decree of a court of chancery of the real estate belonging to them in common was not a conversion out and out, but a special conversion for the purposes of partition only; and that the share of Mrs. Moore in the amount of the sales of the lands made under the order of the court in this partition cause should not be ordered paid to her absolutely, but that she should be required to give security for her proportion of such sale, so that in case her husband should survive her that amount should be secured so that her husband, in case he should survive her, might have the enjoyment of it during his life as tenant by the curtesy therein.

The position of the counsel for Mr. Moore is not in my opinion tenable. It is not supported by a proper consideration of our Acts of Assembly in reference to the estates of married women, or of the doctrine of conversion as supported by adjudged cases.

Partition of estates held in common is a necessary incident of such estates.

Where such estates cannot in fact be divided between tenants in common the law requires that they shall be valued in money, and that such valuation shall be returned to this court by the freeholders appointed to make partition or valuation. Such valuation being returned to the court, its duty is to decree a sale by a trustee to be appointed for that purpose, the trustee making sale under the authority of his appointment for that purpose. It is the duty of the court to decree the payment to each tenant in common subject only to costs and liens against them respectively.

No decision contrary to the principles here announced has been made by me since I have exercised the duties of chancellor, and none, I presume, have been made to the contrary, by any of my predecessors in office when their attention has been properly called to the provisions of our Acts of Assembly in respect to the rights of married women.

Let a decree be drawn for the payment to Mrs. Moore of her share of the proceeds of sale of the lands held in common by her and her brothers.

MICHIGAN SUPREME COURT.

MICHIGAN MUTUAL LIFE INSURANCE
CO., *Appt.*,
v.

George D. REED.

(.....Mich.....)

**A policy of insurance may be rescinded
by the insured on discovery of misrepresentations**

tations in the application, made without his knowledge by the agent of the insurer, although the latter would be bound by the policy if it were not rescinded.

(February 6, 1891.)

ERROR to the Circuit Court for Lenawee County to review a judgment in favor of

NOTE.—*Fraud in its relations to life insurance.*

If a person is induced, by the false and fraudulent representations of the agent of an insurance company, to take a policy of insurance in the company, and to pay the premium thereon, he may rescind the contract, and, in an action against such agent, recover as damages the amount of the premium so paid. *Hedden v. Griffin*, 136 Mass. 229.

A recent Massachusetts case decides that where a policy of insurance was obtained through fraudulent

scind the contract, and, in an action against such agent, recover as damages the amount of the premium so paid. *Hedden v. Griffin*, 136 Mass. 229.

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defendant in an action brought to recover the amount alleged to be due on a life insurance premium note. *Affirmed.*

The facts are stated in the opinion.

Mr. J. C. Winne, for appellant:

Suppose what defendant claims with regard to the statement of his occupation is true, and that his employment was embraced in the prohibited list, still it was no fraud upon him, but a fraud of the agent upon the Company and should he have died at any time prior to the date of payment of the note, his beneficiary would have been entitled to \$1,000 and likewise if the premiums had been kept up thereafter.

Praditzky v. Supreme Lodge K. of H. 76 Mich. 428; *Temmink v. Metropolitan L. Ins. Co.* 72 Mich. 388; *Baker v. Ohio F. Ins. Co.* 14 West. Rep. 438, 70 Mich. 199; *Dwelling-House Ins. Co. v. Brodie*, 4 L. R. A. 458, 52 Ark. 11; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492; *Kansas Protective Union v. Gardner*, 41 Kan. 897;

Pickels v. Phoenix Ins. Co. 119 Ind. 291; *Continental Ins. Co. v. Pierce*, 89 Kan. 396.

The only possible reasons urged by the defendant, that he may escape the payment of the note, is that the agent misstated his occupation in the application.

If it was true, that an untruthful statement misrepresenting Reed's occupation was intentionally inserted in the application by Vanderburg, the policy was not thereby rendered void.

Peoria F. & M. Ins. Co. v. Hall, 12 Mich. 213; *Aetna L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 253; *North American F. Ins. Co. v. Throop*, 22 Mich. 159; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Kitchen v. Hartford F. Ins. Co.* 57 Mich. 187.

When the agent fills up the application, knowing or having been properly informed by the applicant, of the facts demanded by the questions therein, mistakes in the application,

lent representation of the agent, that fact alone is sufficient to vitiate the policy, and the party to whom such a policy was issued can maintain an action to recover the premium so paid. *Trabandt v. Connecticut Mut. L. Ins. Co.* 131 Mass. 167.

There seems to be no valid reason why the rules applicable to the rescission of contracts for fraud or mistake should not also apply to a rescission sought by the insurer. *Cooke, Life Ins.* §134, citing *Hoare v. Bremridge*, L. R. 14 Eq. 522; *Globe Mut. L. Ins. Co. v. Reals*, 50 How. Pr. 237.

Fraud and false representation defined.

Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired. *Alexander v. Church*, 1 New Eng. Rep. 824, 58 Conn. 561.

A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false. *Cal. Civ. Code*, §§ 2579, 2580.

Effects of fraud.

Fraud avoids a contract *ab initio*, vitiates all contracts whether intended to operate against a party, a stranger, or the public generally. The guilty party cannot allege his own fraud in order to avoid his own act; and he may be liable in damages where real injury is done. The agreement cannot be adopted in part; all must be disaffirmed, or none. *Foreman v. Bigelow*, 4 Cliff. 543, 549; *Feltz v. Walker*, 49 Conn. 98, and cases cited.

Courts of equity have undoubted jurisdiction to compel the surrender and cancellation of deeds where the evidence shows they were obtained by fraud or held for inequitable and unconscionable purposes. *Walker v. Hunter*, 27 Ga. 336; *Hayward v. Dimsdale*, 17 Ves. Jr. 111; *Hamilton v. Cummings*, 1 Johns. Ch. 517, 1 L. ed. 239; *Van Doren v. New York*, 9 Paige, 388, 4 L. ed. 743; *Fonda v. Sage*, 48 N. Y. 187; *McHenry v. Hazard*, 45 N. Y. 580; *Whittingham v. Thornburgh*, 2 Vern. 206; *De Costa v. Scandret*, 2 P. Wms. 170; *Peake v. Highfield*, 1 Russ. 559.

Burden of proof.

It is familiar law that a party alleging fraud should be required to prove it; the burden of proof is with the affirmative. *Hickman v. Trout*, 88 Va. 478; *Heaton v. Shanklin*, 14 West. Rep. 327, 115 Ind. 596; *White v. Trotter*, 14 Smedes & M. 30, 53 Am. 13 L. R. A.

Dec. 112; Satterwhite v. Hicks, Bush. L. 105, 37 Am. Dec. 577; *Matthews v. Crockett*, 82 Va. 394; *Mitshell v. Deeds*, 49 Ill. 416; *Stewart v. Severance*, 43 Mo. 322; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *Jones v. Degge*, 84 Va. 685; *Wallace v. Mattice*, 118 Ind. 59; *Crawford v. Hariow*, 10 West. Rep. 73, 92 Mo. 498; *Bostwick v. Benjamin*, 63 Mich. 239, 15 West. Rep. 923.

It may be further observed that slight proof is necessary to establish proof of fraudulent intent between parties who occupy confidential relations. *Fisher v. Herron*, 22 Neb. 183; *Long v. Milford*, 17 Ohio St. 434, 35 Am. Dec. 638; *Fisher v. Bishop*, 10 Cent. Rep. 707, 108 N. Y. 25.

Fraudulent intent is rarely a matter of proof by direct and positive evidence. To require conclusive testimony in cases of fraud would result in a practical frustration of justice and render all attempts as to its disclosure abortive. The law is satisfied therefore with a reasonable degree of certainty, and this position is abundantly sustained by the adjudged cases. *Southern L. Ins. Co. v. Wilkinson*, 83 Ga. 536; *Conant v. Jackson*, 16 Vt. 335; *O'Donnell v. Segar*, 25 Mich. 367; *Stanfield v. Stiltz*, 93 Ind. 249; *Strong v. Hines*, 35 Miss. 201; *Brower v. Goodyer*, 88 Ind. 572; *Parrott v. Parrott*, 1 Helsk. 681; *Massey v. Young*, 73 Mo. 260; *Graham v. Roder*, 5 Tex. 141; *Smalley v. Hale*, 37 Mo. 102; *Burch v. Smith*, 15 Tex. 219; *Thompson v. Shannon*, 9 Tex. 538.

Liberality in admission of evidence.

In all investigations of questions involved in fraud the courts extend an exceptional liberality to the admission of evidence (*Zerbe v. Miller*, 16 Pa. 488; *Hopkins v. Slevert*, 58 Mo. 201; *Stauffer v. Young*, 39 Pa. 455); and a broad interpretation is to be afforded to all the rules of relevancy. *Smalley v. Hale*, 37 Mo. 102; *Rice*, *Evidence in Civil Cases*, 953.

If desirable to summarize the legal conclusions on this subject, it will be entirely accurate to state that parol evidence is always competent to establish the fraudulent omission or insertion of any material averment in the recitals of a contract, and such evidence is also admissible whenever the obligation has been contracted in *fraudem legis*. The contractual form of the reporative matter is of no consequence. *Waddell v. Glassell*, 13 Ala. 561; *Bottomley v. United States*, 1 Story, 135; *Hunter v. Biley*, 30 Ill. 228; *Townsend v. Cowles*, 31 Ala. 423; *Lunday v. Thomas*, 26 Ga. 638; *Pierce v. Wilson*, 34 Ala. 596; *Hamilton v. Conyers*, 28 Ga. 276; *Stannard v. McCarty*, *Morris* (Iowa) 124; *Bartle v. Vosbury*, 3 Grant, Cas. 277.

as to such facts are the mistakes of the Company, and do not avoid the policy.

Meckler v. Phœnix Ins. Co. 38 Wis. 665.

No misrepresentations can be predicated of a fact of which the insurers were fully cognizant.

Muloille v. Adams, 19 Fed. Rep. 891; *Russell v. Detroit Mut. L. Ins. Co.* 80 Mich. 407; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249; *O'Brien v. Home Ben. Soc.* 117 N. Y. 810; *Schreiber v. German American H. Ins. Co.* 43 Minn. 367; *Deitz v. Providence Washington Ins. Co.* 81 W. Va. 851.

Although the policy contains a condition, providing that if any of the statements specified in the written application are untrue "this policy shall be null and void," and the false material statements were made by the applicant, yet those conditions do not render the policy absolutely void, but voidable only, at the election of the company which may waive the breach of the condition.

Huntley v. Perry, 38 Barb. 509; *Schreiber v. German American H. Ins. Co. supra*; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Union Mut. F. Ins. Co. v. Keyser*, 83 N. H. 813.

The statement with reference to the occupation of Reed, if it was incorrect, was immaterial. A representation is material when its truth or falsity would probably and naturally have induced the insurer either to enter into the contract or refuse to do so.

Barbeau v. Phœnix Ins. Co. 67 N. Y. 595.

It is not the previous or present business of the applicant, but his future calling, that affects the risk; so it certainly could have been no fraud upon Reed, whatsoever his occupation was therein stated to be, for by accepting the policy with a true copy of his written application annexed to the same, printed in plain English, he was thereby told most plainly, forcibly and emphatically what his rights and obligations were.

See *Ætna L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 252; *Van Buren v. St. Joseph Co. Village Fire Ins. Co.* 28 Mich. 899.

It must be presumed that he read the application and was cognizant of the limitations therein expressed.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 984; *Cleaver v. Traders Ins. Co.* 8 West. Rep. 815, 65 Mich. 527; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188.

Therefore Reed was fully informed as to what business he was, by the terms of the policy, precluded from engaging in "without first obtaining the written consent of the Company."

If false representations are made regarding matters of fact and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest is to mislead him, the law will leave him where he has been placed by his own imprudent confidence.

Naughton v. Gerson, 80 U. S. 13 Wall. 379, 20 L. ed. 627; *Rockafellow v. Baker*, 41 Pa. 319; *Hobbs v. Parker*, 81 Me. 143; *Brown v. Leach*, 107 Mass. 864.

Redress has often been refused to a party who claimed to have been induced by fraud to sign a contract or other paper whose contents were misread or misrepresented to him.

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Cooley, Torts, 488, citing *Maine Mut. M. Ins. Co. v. Hodgkins*, 66 Me. 109; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Hawkins v. Hawkins*, 50 Cal. 558; *Taylor v. Atchison*, 54 Ill. 196; *Elliot v. Levings*, 54 Ill. 218.

There must be a false representation; the complaining party must have believed it to be true, and relied upon it and have been deceived thereby.

Masterton v. Beers, 18 Sweeney, 406; *Byard v. Holmes*, 84 N. J. L. 296.

There is no evidence that Reed confided in the truthfulness of Vanderburg's answer on returning the policy, "It is all fixed now." There is no evidence that the application was misread or in any way misrepresented to him. Evidence of fraud should be very clear.

Estes v. Furlong, 59 Ill. 298; *Bumpus v. Bumpus*, 59 Mich. 95; *Bliss v. Collins*, 18 West. Rep. 546, 68 Mich. 542.

Messrs. Watts & Smith for appellee.

McGrath, J., delivered the opinion of the court:

This is assumpsit, brought in justice court, upon a note given by defendant for a portion of the second semi-annual premium on a policy of insurance issued by plaintiff upon the life of defendant. Defendant, with his plea, gave notice that the signature to the note was obtained by fraud, and that the note was without consideration. Defendant was a switchman in the employ of the Lake Shore Road, at Adrian. One Vanderburg, an agent of plaintiff, who resided at Adrian, and had known defendant for some time, solicited the insurance, took the application, delivered the policy, and took some cash and three notes for the first year's premium. The policy was dated November 28, 1888. Two of the notes were paid, and defendant refused to pay the third, which matured about September 1, 1889. The application was filled out by Vanderburg and presented to defendant for signature. Defendant insisted that Vanderburg had been acquainted with him for years, knew all about his occupation, and filled out the application largely from his (Vanderburg's) knowledge of the facts; that no questions were asked as to occupation, and defendant did not read the application before signing it, but relied upon Vanderburg; that defendant was a switchman engaged at the yard, and was upon and about trains as they were being made up; that the policy, with a copy of the application attached, was delivered to him in January, 1889; that some days afterwards, in examining the policy and copy of the application, he discovered that his occupation was given as "assistant yard-master, does no switching, don't go near trains;" that thereupon he called Vanderburg's attention to this misstatement, and told him that he was not a yard-master; that he did switching and did go near trains; that thereupon Vanderburg took the policy for the purpose of sending it to the Company for the purpose of correction; that afterwards Vanderburg returned the policy to defendant, saying that the change had been made, and that it was all right; that, supposing that the application had been changed to conform to the facts, defendant did not examine it for some time, but when he did finally examine it, he found that it read "assistant yard-

master, don't couple cars or do switching;" that upon this discovery defendant saw Vanderburg, accused him of again misrepresenting defendant, and told him that he (defendant) was not protected by the policy, and tendered it back to Vanderburg; that Vanderburg claimed that he had no right to receive it; that several conversations were had with Vanderburg, who finally advised him to send it back to the Company, which he did on or about September 26, 1889. The application contained the usual printed clause declaring "that the above is a fair and true answer to the foregoing questions, and I hereby agree that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers . . . shall violate the policy and forfeit all payments made thereon." The policy provides in terms that "no agent has power to change the terms of this contract," and contains the further provision that "the person whose life is hereby insured shall not engage in blasting, . . . or be regularly employed . . . as a mariner, engineer, fireman, conductor, laborer, in any capacity . . . upon railroad trains."

The plaintiff requested the court to charge the jury as follows: "(1) You are directed to find a verdict for the plaintiff for the amount of principal and interest of note in issue. (2) Even should you find that the agent, Vanderburg, wrote wrongfully the answers in the application for insurance by Reed, which untruthful answers were known to him, Reed, or not, this fact would not relieve the plaintiff from the obligation fixed in the policy; and, in case he should have died during any of the time prior to the time fixed for the payment of the note, plaintiff would be obliged to pay the wife of insured \$1,000, and hence defendant is liable on his note. (3) There is no evidence before you that you can consider that will warrant you to find a verdict for the defendant." The court refused these requests, and instructed the jury as follows: "You are instructed, as a matter of law, that if Mr. Reed, in answering the question as to what his occupation was, said to Mr. Vanderburg that he was engaged in the yard there as a switchman, making up trains, and doing general work about the yards there in connection with trains, and Mr. Vanderburg put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars or do switching, then, I think, gentlemen of the jury, that that would be such a misstatement or fraud practiced upon the insured here as that he would be entitled to have these proceedings rescinded; that is, the policy and notes set aside and held for naught, from the time at least when such rescission should take place upon his part. . . . You will take all these circumstances into consideration; and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it, and the Company was bound by it, then he could not assert the defense which he is seeking to assert here; or if the agent, Mr. Vanderburg, put into this application the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course, Mr. Reed would not have the right to assert that

by way of defense to this note, because, if there was any fraud, then, it would be the fraud of the defendant, and not the fraud of the Company or its agent." The jury brought in a verdict of no cause of action.

We think the court was correct, both in the refusal to give the plaintiff's requests and in the instructions given. The application here contained absolutely no restriction upon the powers of the agent. The applications are usually filed in in the handwriting of the agent, as was done in this case; and agents are nowhere in the blank prohibited from filling in the application. Indeed, on the face of the printed blank, the very first sentence is as follows: "This blank must be filled by the agent;" and again, in a blank left at the head of a printed blank, is the following: "Agents will note here anything specially regarding the policy applied for, and to whom and where it is to be sent." Although these appear in what might be termed the "caption" to the application, and not in the body of the application, yet to a person not familiar with these blanks it would be misleading if it is intended that the application is to be filled out by the applicant. Again, in the body of the application is the following: "N. B. Agents will be particular to see that all questions in the application are fully answered, particularly whether the age and date of birth agree." Again, in the general printed declaration in the application is the following: "It is hereby agreed that the policy shall not be in force unless the premium is actually paid to the Company or its authorized agents." At the bottom of the application are the following printed words: "Approved and recommended by (S. W. Vanderburg, agent;" the name of S. W. Vanderburg being written in in this case. At the head of the filing blank, upon the back of the application, occurs the following: "Agents will not fill up this filing." Vanderburg received the premium in notes and cash for the Company, and must be considered the duly authorized agent of the Company. Had the blank been presented to and read over by the insured before it was filled in, there is nothing contained in it which did not warrant his acting with the agent, just as he claims he did. The application was attached to the policy, and delivered to defendant. The policy contains this provision: "No agent has power to change the terms of the contract;" and also the following: "For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, a copy of the application upon which this policy is based is hereto attached." It must be conceded that the representation in the policy as to the occupation of the insured is untrue, and, if made by the defendant, it would be a good defense to an action upon the policy. The court instructed the jury that, if made by the defendant, it would be no defense to the action upon the note. The jury found that it was not the act of the insured, but of the agent of plaintiff. It has been repeatedly held that, when an application is reduced to writing by an agent of the insured, upon oral statements of the applicant, the conversation between the agent and the applicant at the time of putting it in writing is admissible as bearing on the question of the actual contents of the paper, or

the representations of the insured; and that, when it appears that the insured fairly and correctly informed the agent as to any fact, and the agent unskillfully, carelessly, or fraudulently misrepresented the insured as to that fact, such unskillfulness, carelessness, or fraud is the unskillfulness, carelessness, or fraud of the company, and is no defense to an action on the policy. *Michigan State Ins. Co. v. Lewis*, 80 Mich. 42; *North American F. Ins. Co. v. Throop*, 22 Mich. 146; *Crouse v. Hartford Ins. Co.* 79 Mich. 249, and cases cited.

In *Attna L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 251, *Justice Cooley* says: "The agent of the insurance company assumes to have all the requisite knowledge for preparing the proper papers, and volunteered to make them out. He had all the necessary information for that purpose, and nothing was concealed from him. If the application is not in due form, and if it fails to give all the information called for, it must be either because the agent was too ignorant of his business to be properly intrusted with the agency; or because he was so negligent or reckless that he did not trouble himself to draft them correctly; or, lastly, because he was disposed to take Olmstead's money on fraudulent pretense of giving him indemnity when he knew he was giving none whatever. The general rule, undoubtedly, is that, in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void. . . . The forms and requirements of the different insurers are different, and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper which he de-

clares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

In the present case, upon the discovery of the fraud, defendant had the right to rescind the contract. He was not bound to subject the beneficiary named in the policy to a lawsuit after his death, to determine the validity of the policy, especially as in that event his testimony would be wanting. Again, it is not claimed here that the Company had actual notice of the facts as to defendant's occupation, but that they had constructive notice only: but it must be remembered that a copy of the application was attached to the policy, and delivered to the defendant, in which case, under the express provisions contained in the policy relating to the correction of "unintentional errors or omissions" in the application, it was defendant's duty to call attention to this misrepresentation, otherwise the defendant might have been chargeable with a fraud upon the Company; for while the Company would not be able to avoid a policy by reason of the rule of law that its agent's wrong was the Company's own wrong, of which it could not take advantage, it would be otherwise had the insured conspired with the agent, or had the insured been fully informed as to the representation made, and the contents of the application, and neglected to bring it to the attention of the Company.

The judgment is affirmed, with costs of both courts to defendant.

The other Justices concurred.

ARKANSAS SUPREME COURT.

FONES BROS. HARDWARE CO., *Appl.*,

v.

Jacob ERB *et al.*

(.....Ark.....)

1. Definite plans and specifications must accompany an advertisement for bids for building a public bridge, under a consti-

titutional provision requiring bridge contracts to be given to the lowest bidder; and a statute permitting the commissioners to advertise at the same time for plans, specifications and bids and to adopt one of the offered plans with its specifications and accept the accompanying bid is unconstitutional.

2. The Act of March 18, 1879, forbidding contracts in behalf of a county

NOTE.—In awarding public contracts statutory requirements must be observed.

Where, by the recitals of a municipal charter, its officials are prohibited from contracting for the purpose of furnishing materials and supplies in its behalf, except upon compliance with certain specified rules, the municipality is relieved from liability upon a contract made by a municipal officer in violation of the charter requirement, and the contractor furnishing the city with such materials and supplies is without remedy as against the municipality. *McDonald v. New York*, 68 N. Y. 23.

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It is fundamental that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority. *Hodges v. Buffalo*, 2 Denio, 110; *Donovan v. New York*, 33 N. Y. 233; *Cornell v. Guilford*, 1 Denio, 510; *Lowell F. C. Sav. Bank v. Winchester*, 8 Allen, 100.

In contracting, the board must pursue the course pointed out by the Statute, and cannot legally contract in any other way. This course is clearly pointed out. The board must first adopt plans and specifications of the work required to be done so

for which there is no unexpended appropriation, applies to bridges, and does not unlawfully interfere with the jurisdiction over bridges vested by the Constitution in the county court.

3. An appropriation for preliminary work, estimates, etc., towards securing a public bridge does not authorize a contract on behalf of the county to have such bridge built.

4. In the absence of an adequate remedy at law an injunction will lie at the suit of a taxpayer to restrain the making of an unauthorized contract on behalf of a county for the construction of a bridge.

(July 3, 1891.)

A PPEAL by plaintiff from a judgment of the Chancery Court for Pulaski County in favor of defendants in a suit brought to enjoin the making of a contract for the construction of a bridge. *Reversed.*

The facts are stated in the opinion.

Messrs. J. M. Moore and W. S. McCain, for appellant:

The appropriation of \$8,000 made by the county court, was for preliminary purposes, and did not authorize a contract for the construction of the bridge.

Worthen v. Rootes, 34 Ark. 356; *Lawrence County v. Coffman*, 36 Ark. 641, 646, 647; *Ex parte Turner*, 40 Ark. 549, 550; *Allie v. Jefferson County*, 34 Ark. 307, construing § 1449

that those desiring to contract therefor can understandingly make offers for its performance. In this way only can the advantages of competition be secured to the public (*Dillon v. Anderson*, 43 N. Y. 231), and every avenue of favoritism and fraud be closed. *Mazet v. Pittsburgh*, 137 Pa. 548.

Under the Public Statutes, county commissioners are not bound to accept the lowest bid in answer to published notices for contracts for public works. *Mayo v. Hampden County Comrs.* 2 New Eng. Rep. 50, 141 Mass. 74.

A construction that will sustain, rather than defeat, the action of the local authorities should be put upon their acts where such construction is possible. *New York v. Broadway & S. A. R. Co.* 97 N. Y. 275, 281.

A contracting board, authorized by law to contract for pavements, etc., according to such plans as they may adopt, and, after due notice in the city newspapers, to let the work to the parties who shall offer to do the same at the lowest prices, have no power, after publication of a notice requiring the work to be done in accordance with a certain plan, to award such contract, with specifications which have not been adopted. It is the duty of the board first to adopt plans and specifications of the work required, so that those desiring to contract therefor can understandingly make offers for its performance. *People v. Board of Improvement*, 43 N. Y. 227.

A contractor who furnishes materials and supplies, etc., on a contract made without observance of the preliminaries of due advertisement required by law, cannot recover on the ground that the municipality has had the benefit of them, though it may be otherwise, if the city has collected by legal assessment the funds to pay for such materials. *McDonald v. New York*, 68 N. Y. 23; *Nelson v. New York*, 63 N. Y. 535, reversing 5 Hun, 190.

Where the municipal charter requires the officers of the city to let contracts to the lowest bidder, a contract made in violation of the charter requirements is null and void; and in an action brought to 13 L. R. A.

of *Mansfield's Digest; Bradley v. United States*, 98 U. S. 104, 35 L. ed. 105.

The power to contract is so intimately connected with the power of taxation that it is necessary, in any well-considered policy intended to limit the one, to make corresponding limitations on the other.

See *United States v. New Orleans*, 98 U. S. 395, 25 L. ed. 226; *Ralls County Ct. v. United States*, 105 U. S. 735, 736, 26 L. ed. 1221; *Lilly v. Taylor*, 88 N. C. 489.

The incurring of a debt by a public corporation is, in a certain sense, the first step in taxation, since debts by such corporations are, commonly, only to be paid by taxation.

Cooley, Taxn. 2d ed. 327.

Where the charter of a city made the levying of an assessment a prerequisite to contracting for the improvement of a street, a contract made before the levy was held void.

Goodrich v. Detroit, 12 Mich. 279.

A contract in excess of the appropriation is void and cannot be ratified.

Farmers & M. Nat. Bank v. School Dist. No. 53 (Dak.) June 3, 1889; *Dickinson v. Poughkeepsie*, 75 N. Y. 72; *Bowling Green & M. R. Co. v. Warren County Ct.* 10 Bush, 714.

The Act of 1891, which provides for letting out bridges to bidders, violates the Constitution, art. 19, § 16.

People v. Buffalo County Comrs. 4 Neb. 150; *Boren v. Darke County Comrs.* 21 Ohio St. 322;

recover the value of the work, the city may plead the illegality as a defense; and neither the municipality nor its subordinate officers can make a valid contract for such work, except by complying with the requirements of the law. *Addis v. Pittsburg*, 86 Pa. 379.

Their entire authority to let out the work on contract is conferred by the Statute, and that Statute prescribes how and how only they can make a contract: it must be upon public notice, be open to competition upon proposals, and must be made with the lowest bidder appearing upon such competition. Any other contract is wholly unauthorized, beyond their powers, and therefore void. *Re Eager*, 46 N. Y. 100; *Dillon, Mun. Corp.* § 883, and cases cited.

He who is the lowest bidder upon the estimates on which a contract is let is the lowest bidder under the law, and does not lose his rights because the estimates are erroneous; and that he knew them to be erroneous will not make the bid fraudulent. *Reilly v. New York*, 111 N. Y. 473.

In *Wells v. Burnham*, 20 Wis. 112, it was held that where the work to be done, and the manner and style in which it is required to be done, and the materials to be used, were not specified, the provision of the statute that the contract must be let to the lowest bidder is not complied with and the contract was held to be null and void.

In *People v. Buffalo County Comrs.*, 4 Neb. 150, where the law required the contract to be let, after due advertisement, to the lowest bidder, no plans or specifications were submitted by the commissioners on which bids could be based. Contractors were directed to furnish their own plans and specifications, and submit them under seal with their bids. It was held that without plans and specifications there could be no competitive bidding, and the contract was pronounced invalid. To the same effect, see *Boren v. Darke County Comrs.* 21 Ohio St. 311; *State v. Barlow*, 48 Mo. 17; *Re Eager*, 46 N. Y. 100.

People v. Contracting Board, 33 Barb. 515; *People v. Gleason*, 131 N. Y. 631; *Addie v. Pittsburgh*, 85 Pa. 379.

When the law prescribes the mode which county commissioners must pursue in the exercise of their powers, it excludes all other modes of procedure.

Sioux City & P. R. Co. v. Washington County, 3 Neb. 42; *Woodruff v. Berry*, 40 Ark. 255.

An injunction is the proper remedy of the property owner whose property is about to be taken or damaged for public use without compensation.

Ex parte Martin, 18 Ark. 198; *Organ v. Memphis R. & L. R. Co.* 51 Ark. 235; *Niemeyer v. Little Rock J. R. Co.* 43 Ark. 119; *Mills*, Em. Dom. 130; *Myers v. St. Louis*, 32 Mo. 367; *Lackland v. North Missouri R. Co.* 31 Mo. 181; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Holbert v. St. Louis, K. C. & N. R. Co.* 45 Iowa, 23.

The tax-payer is entitled to an injunction against the making of illegal contracts by public officers.

High, Inj. 1251; *Kitchell v. Union County Comrs.* 123 Ind. 540; *Shinner v. Henderson* (Fla.) 8 L. R. A. 55, 29 Am. & Eng. Corp. Cas. 424; *Taylor v. Pine Bluff*, 34 Ark. 607; *State v. Baxter*, 38 Ark. 462; *Barnes v. Williams*, 53 Ark. 208; *Worthen v. Roots*, 34 Ark. 359; *Benton County Comrs. v. Templeton*, 13 Ind. 266; *Warren County Agr. J. S. Co. v. Barr*, 55 Ind. 80; *Jacksonport v. Watson*, 33 Ark. 704; *Colton v. Hanchett*, 13 Ill. 618.

Messrs. George W. Caruth, U. M. Rose and G. B. Rose, for appellees:

Article 7, § 80, of the Constitution prescribes the jurisdiction of the county quorum; and the Legislature can neither add anything to it nor take anything away from it,—all the courts of this State being courts of limited jurisdiction, fixed by the terms of that instrument.

Miller v. Heard, 6 Ark. 75; *Byrd v. Brown*, 5 Ark. 710; *Cheek v. Claibourne*, 22 Ark. 384; *Ex parte Allie*, 12 Ark. 101; *Vaughn v. Harp*, 49 Ark. 160; *Dillard v. Noel*, 2 Ark. 456; *Laferty v. Day*, 7 Ark. 262; *Martin v. Foreman*, 18 Ark. 251; *Hempstead v. Watkins*, 6 Ark. 318; *Colby v. Lawson*, 5 Ark. 303; *Russell v. Jacoway*, 33 Ark. 192; *Willeford v. State*, 43 Ark. 67; *Wheat v. Smith*, 50 Ark. 271; *Worthen v. Badgett*, 32 Ark. 497.

If the foregoing proposition were not true, then we submit that the law relating to bridges is not involved in the section of the Act limiting contracts that are made by the county court.

Mansf. Dig. §§ 497, 503; Act of 1891; *Kinsey v. Pulaski County*, 2 Dill. 258.

As there has been an appropriation for the bridge, which was partly unexpended, the contract is valid.

Acts of 1875, 53; Acts of 1879, 115; Mansf. Dig. 1451; *Cook v. Hamilton County Comrs.* 6 McLean, 113; *State v. Board of Public Works*, 36 Ohio St. 409; Endlich, Interpretation of Statutes, 353.

In the case of important public works no injunction should issue unless a plain case for relief is made.

Ex parte Martin, 18 Ark. 212; *McElroy v.* 18 L. R. A.

Kansas City, 21 Fed. Rep. 261; 1 High, Inj. § 34.

No ground for an injunction was presented, as the complaint showed that the damage was simply a question of dollars and cents.

Ex parte Foster, 11 Ark. 304; *Ellsworth v. Hale*, 33 Ark. 638.

Hemingway, J., delivered the opinion of the court:

This appeal presents for determination three questions: *First*. When a board of commissioners for building a bridge across a stream more than 400 feet wide have advertised for and received bids with competitive plans and specifications, can it adopt a plan and specification thus received, and accept the accompanying bid? *Second*. Can such board make a contract for building a bridge before any appropriation therefor has been made, or when there is an unexpended appropriation "for preliminary work, estimates, etc., towards securing such bridge?" *Third*. If such board is about to make such a contract, will a court of equity, at the suit of a taxpayer of the county, interfere by injunction?

1. If the first question could be determined by the provisions of the Act of February 19, 1891, our response would be that the board was authorized to adopt a plan and specification submitted in response to such notice, and to accept the accompanying bid. But it is insisted for the appellant that this Act is unconstitutional, because it contravenes section 10, art. 19, of the Constitution of the State, which is in the following words: "All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, or for providing for the care and keeping of paupers, where there are no almshouses, shall be given to the lowest responsible bidder under such regulations as may be provided by law." The point made is that the Act does not admit of competitive bidding in awarding contracts, but provides a plan by which the lowest bidder cannot be known, or the giving of contracts confined to such bidders. The constitutional provision was designed to secure economy in the line of public improvements to which it relates. Extravagance therein might arise either from the inattention or incompetency of the contracting officer, and his consequent failure to obtain favorable offers for contracts; or it might arise from the corruption or favoritism of such officer, and his consequent refusal to accept favorable offers when made. To prevent extravagance from the first source, the plan of public letting is adopted, the public are informed of contracts to be let, and its self-interest and rivalry are appealed to for proper offers upon them; to prevent extravagance from the latter source, all discretion is withheld from the contracting officer; he is bound to give the contract to the lowest bidder, and cannot let it out for individual gain or as a reward to another. The method prescribed is well understood, clearly defined, and of distinctive character, specially adapting it to a conservation of public interests. It embodies three vital principles,—an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids; and any statutory regulation of the matter which excludes or

ignores either principle destroys the distinctive character of the system, and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder. And it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting. This is recognized as so essential that in some cases, where all the forms were preserved, but the contracts to be let were according to plans protected by a patent and the subject of a monopoly, it was held that such contracts could not be made because the monopoly prevented competition. 1; Dillon, Mun. Corp. § 487, and cases cited.

When a contract to build a bridge is to be let, there are two kinds of competition that may arise: *first*, that between persons desiring to build different kinds of bridges; and, *second*, that between those desiring to build the same kind. And as was said by Judge Christianity, in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind,—bidding for the same particular thing, to be done according to the same specifications. For, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other for the purpose of determining the lowest bid within the requirement of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices, which it was the purpose of this provision to prevent. *Atty-Gen. v. Detroit*, 26 Mich. 263.

As the competition contemplated is that between those desiring to do the same particular thing according to the same specifications, it is obviously essential that an opportunity should be given all persons to enter into competition for the specific thing which is the subject of the letting; and such opportunity cannot be afforded, unless the specific thing to be let has been determined upon and made known.

The Constitution contains no express provisions with regard to plans and specifications, but the requirement of an award to the lowest bidder implies the further requirement that such information shall be put within the reach of bidders (as will enable them to understand the offering and bid intelligently, and enable the representatives of the county to know who is the lowest bidder. *Detroit v. Hosmer*, 79 Mich. 384.

There can be no intelligent bidding for a contract unless all bidders may know what the contract is; and this cannot be known unless the plan of the work to be contracted for, and the specifications according to which it is to be done, have been adopted; for they, with the price to be agreed upon, go to make up the contract.

In the case of *Boren v. Darke County Comrs.*, 21 Ohio St. 311, the Supreme Court of Ohio held, under a Statute embodying the provisions of our Constitution, that a bid could not be entertained which contemplated work or material not included in the plans and specifications according to which the contract was offered. This ruling was placed upon two grounds: *first*, that it could not be known who

was the lowest bidder; and, *second*, that the contract thus bid for had not been submitted to competition.

In the case of *People v. Buffalo County Comrs.*, 4 Neb. 150, the Supreme Court of Nebraska, considering the question upon a similar provision, ruled that, from the necessity of the case, plans and specifications must be adopted in advance of the offering as a basis upon which bids are to be made, and that where county commissioners advertised for plans and specifications with accompanying bids, they could not adopt plans and specifications and accept a bid thus received, because no opportunity had been given for competitive bidding, and no basis had been fixed on which to make bids.

In the case of *Bigler v. New York*, 5 Abb. N. C. 51, an action was brought upon a contract with the city to recover the price of lumber furnished; and the recovery was resisted on the ground that the contract was invalid because it had not been let to the lowest bidder. The advertisement was for bids to furnish nine different kinds of timber during the term of one year, specifying each kind of timber, but not specifying the quality of either or the aggregate. The court said, in regard to the proposal for bids: "We find in this contract that there were no plans and specifications as required by the provisions of the Dock Law; that the contract was general in every particular: that there was no way in which there could be competitive bidding, for the reason that we find no amount of timber is specified. Certain qualities of timber are specified, but there are no quantities—no amount of any kind—specified, so that there could be a comparison of bids. If the contract system is to prevail, it is necessary the contract should be in such a form that there shall be what is called 'competitive bidding.'" Illustrating the opportunities afforded for favoritism and fraud where contracts are offered upon indefinite plans and specifications, the court, continuing, says: "He [the favored bidder] puts a high price upon that of which they want a good deal, and a very low price upon that of which they want very little; and another man bids conscientiously, supposing they want an equal quantity of each character, and puts reasonable prices to each class of lumber, and he averages his prices accordingly. How are you going to compare those bids? If you foot up so many pieces at so much per thousand, you will find that the one will be lower than the other; when it comes to be filled, the first will be found to be infinitely higher than the other,—a fact which would be known to the officers of the department, in consequence of their knowing how the work will be carried on, and what proportion of timber of the various kinds would be furnished." The court concludes that without specifications as to quality and quantity of the various things to be furnished there could be neither competitive bidding nor comparison of bids. *Id.* p. 70.

An Act of the New York Assembly provided that every bidder for canal work should accompany his bid with a bond conditioned that, if the contract should be awarded him, he would within ten days enter into a contract for the performance of the work, upon the terms

prescribed by the contracting board. The supreme court held that the terms of such contracts should be prescribed by the board before the bidding, and could not be afterwards. *People v. Contracting Board*, 38 Barb. 510.

The charter of the City of St. Paul provided that contracts for paving the streets should be let to the lowest bidder upon notice of the time and place of letting. A notice called for proposals for two contracts for paving different parts of a street. A bid was offered, and accepted, for paving the entire street under one contract. In a suit upon the contract made in pursuance thereof, the Supreme Court of Minnesota said: "No bids were asked for such a contract as that made with the plaintiff, and, the contract let not being the same that was advertised, the acts of the city or ward officers in making it were void, and created no liability on part of the defendant." *Nash v. St. Paul*, 11 Minn. 174 (Gil. 110). We are constrained to believe that the rule announced in that case is the rule fixed by our Constitution, and that the contracts made must be the same as those advertised for letting. When it is determined to build a bridge within a given time, and the location, plans, and specifications have been adopted, all the terms of the contract are fixed except the price to be paid; the obligation to build a bridge according to the terms thus fixed is the thing to be offered to competition; and until it is formulated by the defining of those terms so that they, in connection with the bid to be thereafter accepted, will comprise a complete contract, there is nothing to be let, and nothing to which competition can be directed. It is idle to talk of competition where the minds of bidders are not directed to the thing offered. When the subject of competition is undefined and uncertain, and left to be moulded by the various competitors, it will assume as many forms as they have conceptions, and each will bid upon the thing of his own creation;—a thing upon which no other can bid. But the absence of competition is not the only difficulty; for when all bids are upon different things, or the same thing differently fashioned, there is no basis on which to compare them, or by which it can be determined with certainty which is the lowest bid, and such determination must rest in the discretion of the contracting board. But since the Constitution was designed to withhold all discretion in such matters, and thereby remove all opportunities for fraud or favoritism, any system which devolves such discretion is in violation of its provisions. It demands, in the letting of contracts, a basis upon which bids can be compared with mathematical precision, and which leaves nothing to official discretion after the bids are received; and no Act which provides regulations for letting without this basis can stand. If different plans and specifications were adopted, and bids invited at the same time for contracts according to each, whether the board could compare the bids upon different plans submitted, and accept the lowest bid upon the plan then selected,—is a question not raised or considered. See *Atty-Gen. v. Detroit*, 26 Mich. 263. We only decide that no contracting officer or tribunal has any authority to make a contract for building a bridge unless the same contract, in every material respect, had been

submitted to public bidding, and that this requires that it should be submitted with reference to definite plans and specifications. Such being the meaning and effect of the constitutional provision, is the Act of the Legislature void in so far as it provides that the board of commissioners shall advertise at the same time for plans, specifications, and bids, and afterwards adopt plans and specifications and accept a bid thus obtained? Upon an examination of the Statutes, it will be seen that, when the Act under consideration was passed, the laws in relation to bridges as well as county buildings authorized the advertisement of proposals only after the adoption of plans and specifications; a simultaneous advertisement for all was first brought into the Statute by the Act under consideration. See *Mansf. Dig.* §§ 499, 1098. This Act preserves the form of a public letting; but for what, or upon what basis, are bids invited? The commissioners are not required to advertise for bids upon a basis fixed by them, but each bidder is invited to define a basis for his own bid. It is plain that no two bids will be made upon the same basis, unless by accident, and that there can be no competition among bidders; and, when the bids are received, there is no standard by which to measure them, and therefore no means by which it can be absolutely known which is the lowest. In this respect, we think, the effect of the Act would be to nullify the Constitution, and it cannot be sustained.

Construing the complaint according to the established rules of construction in this State, we think it is sufficiently alleged that the board of commissioners advertised for bids on a contract, the terms of which had not been defined by the adoption of plans and specifications, and that, as the thing to be let was not defined, bidders could not compete with each other in the letting. According to those allegations, which are admitted to be true by demurrer, there was nothing to submit to the competition of bidders, no letting to the lowest bidder was possible, and the steps taken would not authorize the county court to make a contract, or order one to be made, and its action in that regard would be without jurisdiction and void.

We have not overlooked the allegation that the board had adopted what it denominated "general specifications;" but it appears from the advertisement of the board, which is exhibited with the complaint, that the board invited proposals and competitive plans and specifications at the same time, stating that all plans must comply with the general specifications furnished by the county. It thus appears that the specifications adopted were general, and not definite. "General specifications" were not sufficient, but it was essential that such definite and detailed specifications accompany the offering as would disclose the thing to be undertaken with circumstantial fullness and precision. The building of a bridge according to "general specifications" might be carried forward with such variety of detail and circumstances as to affect very materially its proper cost; and every bidder should know, not only the general plan, but every particular of detail and circumstance which could affect the cost of the work or the advantage of the contract. This is necessary, not only to active and intel-

ligent competition among bidders, but also to a certain and proper comparison of bids. An advertisement for bids for building a bridge 500 feet long, 30 feet wide, and of a stated capacity of burden, would contain "general specifications,"—if the words are not so contradictory as to make the term meaningless,—if, in response to this notice, bids with definite plans and specifications were returned. A. might offer to build a pontoon bridge at one price, B. a suspension bridge at another price, and C. a bridge on piers at another, and each bid might "comply with the general specifications;" yet there could have been no competition among bidders, and there would be no basis by which to determine with safety who was the lowest bidder. This supposes an extreme case; but the same conditions must arise, modified only in degree, wherever the plans and specifications adopted are so general as to admit of any substantial variety of detail in their absence. As there is nothing else in the Act of 1891 inhibited by the Constitution, its remaining provisions may stand, and must be held to be the law. *Cooley, Const. Lim.* §§ 210, 211; *State v. Marsh*, 37 Ark. 356.

2. Upon the second question stated, the appellant relies on a section of the Act of March 18, 1879 (*Mansf. Dig.* § 1451), which is as follows: "No county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended." It is contended that this Act has no application to contracts for bridges. According to its terms, it applies to any and all contracts that can be made by the county court or an agent of the county; and it is a part of the Act which provides for levying taxes and appropriating revenues for building bridges. We think its language and connection both imply that it was intended to regulate such contracts. It was urged in the argument that the Constitution conferred the jurisdiction of bridges on the county court, and that, if this Act was intended to apply to contracts for bridges, it would be void as interfering with the constitutional jurisdiction of that court. We hardly think that much reliance was placed on this ground, and a little consideration discloses its weakness. If the Act is void for this reason in its application to contracts for bridges, it is void in all respects, for the jurisdiction of the county court is co-extensive with the matters to which such contracts could relate. But the Constitution does not confer on the county court unlimited power in regard to bridges; it only vests in that court the exclusive jurisdiction to administer the law on that subject, and so long as this is permitted there is no room for complaint. Moreover, the clause which prescribes that such contracts shall be given to the lowest bidder provides that they shall be made under such regulations as may be provided by law (*Const.* § 16, art. 19); and the validity of a statutory regulation similar to, but more restrictive than, the one under consideration was affirmed by this court in the case of *Lawrence County v. Coffman*, 86 Ark. 641. We think the Act applicable in making contracts for bridges, and, further, that a contract to build a bridge is not

authorized by an appropriation for "preliminary work, estimates, etc., towards securing such bridge." It is the policy of the Act to require the concurring judgment of the levying court, and of the county judge, that a bridge should be built before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment, and the county judge may afterwards signify his by letting the contract. But we do not think the appropriation relied on signifies the favorable judgment of the levying court. It is more reasonable to conclude that it was made with a view to reaching a decision than as the announcement of one reached. Under the Statute then in force, an examination of sites, and a procurement of plans and specifications, were preliminaries to making a contract, and they were no doubt intended in the designation of the appropriation. Soundings and surveys would be necessary to determine whether it would be practicable to build at any desirable location, and plans and specifications would be needed in estimating the probable cost of the work. We think, from the designation of the appropriation, that it was intended to defray the cost of obtaining that information, and it might lead to an appropriation for building the bridge, or to a determination to abandon it. While we think a contract cannot be made before there has been an appropriation for it, we do not think that, when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriate any sum for the work, that signifies their judgment that the work should be done, and the county judge may then proceed to contract for it without further consulting them; the only limitation upon his power being found in other directions.

3. The ground of complaint in this case was not that the contract would be inexpedient or unjust, or that it would involve an extravagant outlay, but that it was about to be made without authority. So made, it would be void, and could not properly create a charge upon the taxable property of the county. If the contract should be made, and the bridge built, its cost would either be paid by taxation, or the contractor would sustain a heavy loss. Such a contingency would necessarily occasion injurious embarrassment, confusion, and contention to the county, the taxpayers, and the contractor, which would have been avoided by suit before the complications arose. We cannot say that the appellants could have obtained adequate relief by certiorari; for the want of jurisdiction arises from matter *dehors* the record. The remedy by appeal is inadequate; for the law does not give the taxpayer his day in court, or provide that he may appeal without it. Since the remedy at law is not adequate and complete, we are of opinion that injunction is the proper remedy. *Worthen v. Roots*, 84 Ark. 356; *High, Inj.* § 1251, and cases cited.

If the views herein expressed are correct, it follows that the chancellor erred in sustaining the demurrer to the complaint.

The judgment will be reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings.

PENNSYLVANIA SUPREME COURT.

Catharine SNIDER

v.

Jacob H. BAER, Exr., etc., of Anna Shaffer,
Deceased, Appt.

(.....Pa.....)

1. A direction by a testator in his will that his wife "shall have and hold the property" where he resides will carry to her the fee.
2. A fee which has been given by a will cannot be cut down to a life estate by a subsequent clause directing that the legatee shall have "the sole control of the property" during his lifetime.
3. A direction in a will that testator's real estate shall be sold whenever his widow shall direct and the proceeds paid over to her, and that she shall have power to dispose of the same by bequeath or as she directs, is an absolute gift of the money to her.

(October 5, 1901.)

APPEAL by defendant from a judgment of the Court of Common Pleas for York County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Horace Keesey and V. K. Keesey, for appellant:

The devising clause, "also, I direct that my beloved wife Anna shall have and hold the property in Bottstown, where I now reside," gives a fee, and the next clause does not mean to lessen or restrict the estate previously devised, but rather was placed there to show she was given the sole control during her lifetime. It is rather difficult to conceive how a testator could evince an intention to give greater powers than are by this will granted to his widow. See *Roberts v. Unger*, 2 Pearson, 241.

To doubt is to solve the question and make a fee.

Shirey v. Postlethwaite, 72 Pa. 42; *Martin v. McDevitt*, 10 Phila. 19, 80 Phila. Leg. Int. 92; *Rockell v. Eddinger*, 81* Pa. 523.

Even if it be a gift for life, it is without any limitation over and without the intervention of a trustee. There is a line of decisions in this State which hold such a bequest is absolute.

Merkel's App. 109 Pa. 238; *Smith's App.* 23 Pa. 9; *Diehl's App.* 36 Pa. 120; *Silkknitter's App.* 45 Pa. 365; *Grove's Estate*, 58 Pa. 432.

It is never to be presumed that a testator intends to die intestate of any portion of his estate, and where he states, in an introductory clause, that he intends to dispose of his estate, that intention is stated and nothing less than a clear omission makes an intestacy of any part of the estate.

Schriver v. Meyer, 19 Pa. 87; *Merkel's App. supra*.

A general devise with power to dispose of the corpus of the estate carries a fee.

Second Reformed Presby. Church v. Disbrow, 52 Pa. 219; *Post v. Dillon*, 8 Phila. 31; *Rolosen*

NOTE.—See note to *Powers v. Jeudevine* (Vt.) 7 L. R. A. 517.

13 L. R. A.

v. Collum, 23 Pittsb. L. J. 155; *Smith v. Fulkison*, 25 Pa. 109.

A devise for life with an absolute power of disposal carries a fee.

Morris v. Phaler, 1 Watts, 889; *Musselman's Estate*, 39 Pa. 469; *Grove's Estate*, 58 Pa. 429.

Mr. Robert F. Gibson, for appellee:

Whoever claims against the Laws of Descent must show a written title, which the court, with satisfaction, decides to be sufficient.

Lipman's App. 30 Pa. 184.

The question in expounding a will is not what the testator meant, but what is the meaning of his words.

Clayton v. Clayton, 8 Binn. 484; *Hancock's App.* 3 Cent. Rep. 527, 112 Pa. 541.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba flenda est.

A will must be so construed as to render every part of it effective. The restricting clause cannot be ignored.

Mutter's Estate, 38 Pa. 321; 1 Jarman, Wills, 415, 416.

There is no residuary clause, but its omission, even though accidental, cannot be supplied.

Carman's App. 2 Pennyp. 336.

The rule established by the Act of April 8, 1833, is that, if the intention of the testator to the contrary appears in the will, the Act does not apply.

Shirey v. Postlethwaite, 72 Pa. 42; *Rockell v. Eddinger*, 81* Pa. 525.

Only in doubtful cases the law leans in favor of the first taker as the principal object of the testator's bounty.

Smith's App. 23 Pa. 9; *Recalt v. Ulrich*, Id. 388.

There is a line of decisions in which it was held that a life estate is not enlarged by even an absolute power of disposal.

Fisher v. Herbell, 7 Watts & S. 63; *Musselman's Estate*, 39 Pa. 469; *Palethorp v. Bergner*, 52 Pa. 149; *Hoffner v. Wynkoop*, 97 Pa. 132; *Forsythe v. Forsythe*, 108 Pa. 131; *Hinkle's App.* 8 Cent. Rep. 863, 116 Pa. 497, and cases cited.

Paxson, Ch. J., delivered the opinion of the court:

We agree with the court below that this is a close case. Its solution must mainly depend upon the proper construction of the will of Michael B. Shaffer, deceased. The testator, after expressing his desire "to settle my worldly affairs," thus disposes of the real estate in controversy: "Also, I direct that my beloved wife, Anna, shall have and hold the property in Bottstown where I now reside, said Anna to have the sole control of the same during her lifetime, and at the discretion of my beloved wife, Anna, she shall order my executor to sell the real estate at public sale, or at private sale, all my real estate to the best advantage of my wife. And I hereby empower my executor to make deeds of conveyances for the same as fully as I could have done in my lifetime, and the money realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna,

shall have power to dispose of the same by bequeath, or as she directs. . . . Also I direct that my wife, Anna, shall have and hold all my personal property for her own."

The learned judge below held that the widow of the testator took but a life estate in the land, with a power to compel a sale thereof, and to appoint the proceeds; and that the testator intended to die intestate in case his widow failed to exercise these powers.

From the case stated it appears that the widow never did exercise these powers; the real estate in controversy remained unsold at the time of her death. This contest is between the heir-at-law of the testator and the executor of his wife. The court below entered judgment upon the case stated in favor of the heir-at-law.

A careful consideration of the case leads us to a different conclusion. The testator evidently intended to dispose of his entire estate. He was childless; his wife was the sole object of his bounty; there is no other person named or referred to in the will. The first sentence of the will, in the paragraph above quoted, carried the fee. He says his wife "shall have and hold the property in Bottstown where I now reside," while this language in a deed would not carry the fee it is otherwise in a will. Having thus given the fee, what was there to cut it down to a life estate? Admittedly nothing except the next sentence, in which the testator says: "Said Anna, to have the sole control of the same during her lifetime," etc. But this was mere surplusage. After giving a fee it cannot be cut down to a life estate by the unnecessary provision that she should have the control of it during her life. The testator may have thought that in some way which he did not understand, his executor might interfere with his widow's enjoyment of the property, and the clause in question may have been inserted to prevent this. In either view of the case the language is without legal effect, and might well have been omitted. He then orders the executor to sell the property whenever the widow shall direct, and then follows this significant sentence: "And the moneys realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna, shall have the power to dispose of the same by bequeath or as she directs." The learned judge below construed this as merely a power of appointment of the proceeds of the sale. Whereas it is an absolute gift of the money, and the superadded power of appointment is the merest surplusage. It detracts nothing from a fee for a testator to say that his devisee shall have the sole control of the property during her lifetime, and an absolute gift of money is not qualified by a superfluous authority to bequeath it.

We have here a childless testator who gives the sole interest in the land to his wife. We think the case comes within the 9th section of the Act of April 8, 1833, which declares: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of in-

heritance or of perpetuity, unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate."

The will of Michael Shaffer contains no devise over, nor do we find any express limitation of the estate to his wife for life only. I have not discussed the authorities. It is sufficient to refer to *Morris v. Phaler*, 1 Watts, 389; *Musselman's Estate*, 39 Pa. 469; *Second Reform Presby. Church v. Disbrow*, 52 Pa. 219; *Grove's Estate*, 58 Pa. 429.

The judgment is reversed, and judgment is now entered in favor of the defendant in the case stated.

Jane E. WENGERD'S APPEAL.

(... Pa.)

The respective legacies vest at the death of the testator under a will converting the estate into money and directing the distribution of one third of it in equal shares among the children of testator's son, and in case of the death of any child before the payment to him of his share, such share to be divided between the survivors, and no share is devoted by the death of a legatee before actually receiving it.

(October 5, 1891.)

APPPEAL by Jane E. Wengerd from a decree of the Orphans' Court of Cumberland County disallowing her claim upon the estate of John Wengerd, Sr., deceased, for a legacy given by Wengerd to claimant's husband and by him willed to her. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. J. E. Barnitz and F. E. Belts-hoover*, for appellant:

The law always and justly favors the first taker as the first object of the testator's bounty and will not permit any other intent to prevail unless it cannot be avoided.

King v. Frick, 135 Pa. 575; *Mickley's App.* 92 Pa. 514; *Green's Estate*, 140 Pa. 253; *Gill's Estate*, 45 Phila. Leg. Int. 237; *Little's App.* 9 Cent. Rep. 309, 117 Pa. 14; *Muller's Estate*, 19 W. N. C. 320.

It has been uniformly held in this State from *Corbin v. Wilson*, 2 Ashm. 178, through all the cases where the question has ever been considered down to the present, that "a bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will."

See *Coggin's App.* 124 Pa. 10; 3 Jarman. Wills, p. 672; *Rammell v. Gilson*, 15 L. J. N. S. Ch. 35; *Hutcheon v. Mannington*, 1 Ves. Jr. 362; *Martin v. Martin*, L. R. 2 Eq. Cas. 403; *Minors v. Battison*, L. R. 1 App. Cas. 428; *Girdlestone v. Creed*, 10 Hare, 487.

The rights of the legatee could not be defeated by the accidental circumstances of the case.

Law v. Thompson, 4 Russ. 92.

Mr. J. W. Wetzel for appellee.

Paxson, Ch. J., delivered the opinion of the court:

The contention in this case arises over the

NOTE.—See notes to *Gray v. Woodward* (N. Y.) 7 L. R. A. 397; *Gale v. Nickerson* (Mass.) 9 L. R. A. 200.

following clause in the will of John Wengerd, deceased:

"I direct my executors, hereinafter named, to sell at public or private sale, my house and lot on the east side of Penn Street, known as the pastorage; and for the purpose of enabling them to do so, I hereby authorize them to make, execute, acknowledge and deliver the necessary deed or deeds to grant and convey the same to the purchaser or purchasers thereof, and the proceeds of the said sale, together with the proceeds of all bonds, notes and cash on hand, with the proceeds of my personal property, I direct my said executors, after paying the legacy hereinbefore mentioned, my just debts and funeral expenses, and the expenses of administration, to divide into three equal shares, which I hereby bequeath as follows: viz.: to Mary Gettle one third; to Elizabeth Kozer one third; and to John Wengerd, Harry Wengerd and Catharine Wengerd, children of my son David Wengerd, deceased, the remaining one third to be equally divided, between them share and share alike, and in case of the death of any of the children of my son David, before the payment to them of their said share, then to be divided between the survivors."

John Wengerd, one of the grandsons above named of the testator, died about eleven months after the death of the latter. He had received \$200 of his share before his death. He left a will in which he made his widow, Jane E. Wengerd, the appellant, his sole legatee and executrix. She now claims, under her husband's will, the balance due him under the will of his grandfather. The court below rejected her claim, hence this appeal.

The question is, When did the legacy to John Wengerd vest, if it vested at all? And if it vested at the death of the testator, was it devested by the accident of John's death before the full and final distribution of his grandfather's estate? That the executors regarded his interest as vested, is clear from the fact that they paid him \$200 on account of it. And it is equally clear, had the distribution been made, as it might well have been, prior to John's death, he would have been entitled to the share. The testator had no debts; with the exception of a house and lot, his estate not otherwise disposed of consisted of cash securities and money which could readily have been distributed almost immediately after his death. The account was not filed until two years after the testator died, and then in obedience to a citation. We do not think the executors can defeat the rights of a legatee by delaying distribution.

In considering the nice question whether a legacy is vested or contingent regard must always be had to the position of the parties. In construing a will where the bequest is ambiguous the inclinations of the courts are always towards vesting the legacies. *Coggin's App.* 124 Pa. 10. The presumption that a legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild, than where the gift is to a stranger, or to a collateral relative, as in *Haverstick's App.* 13 L. R. A.

103 Pa. 394. It would be straining a point to hold that this testator intended that his grandchild should be deprived of his share, though he should die leaving a child or children, by the mere accident of his death the day before the money was distributed. This would enable an executor, under some circumstances, absolutely to defeat the will of his testator, by withholding or refusing distribution for a certain period. We cannot assume that this testator intended to lodge such a power in the hands of the executor of his will.

The doctrine of this State from the time of *Corbin v. Wilson*, 2 Ashm. 178, has uniformly been that a bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will. "If any immediate legacy is given without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word 'payable' can only have reference to the death of the testator." Jarman, Willa, 809; and the same learned author says in vol. 3 of the same work, p. 612: "Executory gifts over in the event of legatees dying before receiving their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it."

In *Rammell v. Gillow*, 15 L. J. N. S. Ch. 35, where the will directed that the fund should go in equal shares to testator's children when they should attain twenty-one years of age, but in the event of the decease of any of said children before they should have received or become possessors of their share, said share was to go to their children, it was held that those who had attained the age of twenty-one took vested interests even though they died before receiving the money. In *Hutcheon v. Mannington*, 1 Ves. Jr. 362, there was a gift over, if the legatee should die before he may have received it, and Lord Thurlow said: "I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. Suppose we have given real estate in the manner you specify; it is clear that it will neither depend on the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence, for it might be the very next day, or that very evening, and therefore the court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, there is always considered here as done which is ordered to be done, and the court cannot measure the time."

In this case it is an immeasurable purpose. I can do nothing with it, and it must be considered as vested from the death of the testator." *Martin v. Martin*, L. R. 2 Eq. Cas. 408; *Minors v. Battison*, L. R. 1 App. Cas. 428, and many other English cases, hold the same doctrine. The only case cited in op-

position to this line of authority is *Haverstick's App.*, *supra*, which, while it gives color to the appellee's contention, differs in some respects from the case in hand. There the appellant claimed as the heir of his deceased wife. The clause in the will was: "Should any of them die before the distribution of my estate, without heirs, then the part allotted to such shall be divided equally among

the others named." The court held that the words "heirs" meant "children," and that the appellant was not entitled as heir to the legacy. The whole contention was over this point.

The decree is reversed at the costs of the appellee, and it is ordered that the record be remitted with instructions to make distribution in accordance with this opinion.

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FÉ R. CO., *Plff. in Err.*,

v.
Samuel A. TEMPLE.

(.....Kan.....)

***A contract between a railroad company and a shipper of stock stipulated**

*Head note by GREEN, C.

NOTE.—*Contracts of carrier may provide for reasonable exemptions.*

In the United States, a condition commonly inserted by common carriers in their contracts relates to the time and manner of presenting claims for damages; and the courts have been liberal in sustaining such regulations. *Lawson, Carriers*, 144.

The carrier is bound to perform the service upon being paid therefor, and it is a dangerous policy to allow it to exonerate itself, even from its full liability at common law, by an artifice, to the injury of those who are, in the ordinary course of business, compelled to employ its services. *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, and cases cited; *Blossom v. Dodd*, 43 N. Y. 264; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Orndorff v. Adams Exp. Co.* 3 Bush, 194; *Jones v. Voorhees*, 10 Ohio, 145.

And in a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. *Wolf v. Western U. Teleg. Co.* 62 Pa. 83.

The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition before he could maintain an action. Exactly the same doctrine was asserted in *Young v. Western U. Teleg. Co.* 2 Jones & S. 390.

Early adjudications, notably that of *Gould v. Hill*, 2 Hill, 623, and *Jones v. Voorhees*, *supra*, were in contravention of the established English rule, and held that a common carrier could not limit his liability by recitals in the contract of carriage which would absolve him from the results of negligence, however gross. This doctrine, however, must be regarded as having been expressly repudiated. *Dorr v. New Jersey S. Nav. Co.* 4 Sandf. 136, 8 N. Y. Legal Obs. 345, 11 N. Y. 485; *Parsons v. Monteath*, 13 Barb. 353; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 494; *Austin v. Manchester, S. & L. R. Co.* 11 Eng. L. & Eq. 506; *Carr v. Lancashire & Y. R. Co.* 7 Exch. 707, 14 Eng. L. & Eq. 340.

The weight of modern adjudication favors the proposition that as between the carrier and consignor an express contract is valid which by its terms and stipulations limits the responsibility of 13 L. R. A.

that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such

the carrier. *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67; *Falkenau v. Fargo*, 55 N. Y. 642; *Walker v. York & N. M. R. Co.* 3 Car. & K. 279; *Slim v. Great Northern R. Co.* 26 Eng. L. & Eq. 297, 14 C. B. 647; *Kimball v. Rutland & B. R. Co.* 28 Vt. 256; *Wallace v. Matthews*, 39 Ga. 617; *Reno v. Hogan*, 12 B. Mon. 63; *Roberts v. Riley*, 15 La. Ann. 103; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725.

Restrictions upon the right to limit liability.

It is a well-recognized principle, however, that these exemptions from liability must include such only as are just and equitable in contemplation of law. *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 498; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, 10 Am. Rep. 366.

And it is a rule of extended application that the carrier cannot, by special contractual form, so abridge his liability as to relieve him virtually from any responsibility, even from his own gross carelessness or that of his employé. So tenaciously have the courts enforced this principle that it may well be regarded at the present time as forming an exception to an otherwise universal rule, which permits a reasonable limitation from liability. The cases supporting the averment, and which refuse to limit the liability for negligence and carelessness, are as follows: *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67; *Goldrey v. Pennsylvania R. Co.* 30 Pa. 242; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Farnham v. Camden & A. R. Co.* 55 Pa. 63; *Leing v. Colder*, 8 Pa. 479; *Empire Transp. Co. v. Wamsutta Oil Co.* 63 Pa. 14, 3 Am. Rep. 515; *Knowlton v. Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 308; *Graham v. Davis*, 4 Ohio St. 362; *Welsh v. Pittsburgh, Ft. W. & C. R. Co.* 10 Ohio St. 75; *Jones v. Voorhees*, 10 Ohio, 145; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Medfield School Dist. v. Boston, H. & E. R. Co.* 102 Mass. 552; *Adams Exp. Co. v. Stettaners*, 61 Ill. 134, 14 Am. Rep. 57; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228; *Nashville & C. R. Co. v. Jackson*, 6 Helsk. 271; *Ketchum v. American M. U. Exp. Co.* 52 Mo. 390; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 302; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Steele v. Townsend*, 37 Ala. 247; *Berry v. Cooper*, 28 Ga. 543; *Swindler v. Hilliard*, 2 Rich. L. 236; *Flinn v. Philadelphia & B. R. Co.* 1 Houst. (Del.) 469; *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524.

agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal, and before they had mingled with other stock, or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car, and ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company.—*Held*, that there had been a substantial compliance with the contract upon the part of the shipper.

(July 9, 1891.)

ERROR to the District Court for Finney County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to live-stock while in defendant's possession for transportation. *Affirmed*.

The facts sufficiently appear in the commissioner's opinion.

Messrs. George R. Peck, A. A. Hurd and J. G. Egan, for plaintiff in error:

The oral notice was not a sufficient compliance with the condition.

Goggin v. Kansas Pac. R. Co. 12 Kan. 416.

Where a shipper fails to comply with a condition in the contract of carriage requiring such a written notice, he is not entitled to recover.

Sprague v. Missouri Pac. R. Co. 84 Kan. 347. See also *Massengale v. Western U. Teleg. Co.* 17 Mo. App. 257; *Weir v. The Express Co.* 5 Phila. 355; *Cole v. Western U. Teleg. Co.* 33 Minn. 227; *Hirschberg v. Dinmore*, 12 Daly, 429; *Young v. Western U. Teleg. Co.* 2 Jones & S. 390; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566.

Mr. Milton Brown, for defendant in error:

The proof shows a substantial compliance with the purposes of the contract. It gave an opportunity to the Company for an inspection of the stock before they were mingled with other animals, or an ascertainment of the damages, otherwise rendered impracticable. The conduct of the Company, its agents and employes, amounts to a waiver of any delay in giving the notice.

Rice v. Kansas Pac. R. Co. 63 Mo. 314.

The law as given by the lower court in this case is supported by the third volume of the American and English Encyclopedia of Law, at page 15.

Upon the doctrine of negligence enunciated by the trial judge, see—

Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645.

Green, C., filed the following opinion:

This was an action for damages, commenced in the District Court of Finney County by Samuel A. Temple, against the Atchison, Topeka & Santa Fe Railroad Company. The plaintiff alleged that on the 21st day of March, 1887, he shipped over the defendant's railroad from Kansas City to Pierceville, Kan., a bay mare and three mules; that a written contract for the transportation of the stock was made, a copy of which was attached to his petition; that the

Railroad Company broke the contract by negligently and violently striking the car in which the stock was being transported against another car, and thus throwing the animals together upon the floor of the car, and injuring them; resulting in the death of the mare and the crippling of the mules; that the condition of the stock was made known to the agent of the Railroad Company at Pierceville while they were in the car at the station; that the agents inspected the stock, and consented and requested that the mare and mules be removed from the car, and, after such removal, and before they had been intermingled with other stock, inspected the injured animals; that before bringing suit, and after the death of the mare, written notice was given to the defendant, through its agent, of the plaintiff's claim for damages. The contract of shipping contained the following condition: "And for the consideration before mentioned said party of the second part further agrees that as a condition precedent to his right to recover any damages for loss or injury to said stock he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." The defendant filed a general denial, and for a further defense alleged that the plaintiff had not complied with the condition precedent in the contract for transportation requiring written notice of the claim for damages. The defendant filed a demurrer to the plaintiff's evidence, which was overruled. No evidence was introduced upon the part of the defendant. The jury returned a verdict for the plaintiff for the sum of \$345. A motion for a new trial was overruled, and judgment was rendered on the verdict. The plaintiff in error brings the record here for review, and the principal assignment of error is that there was not such a substantial compliance with the condition precedent, as to a written notice of a claim for damages, under the contract, as to entitle the plaintiff to recover.

Complaint is made that the court refused certain instructions asked for by the defendant in error, to the effect that, if the plaintiff did not give a written notice of his claim for damages to some officer of the railroad company, or its nearest station agent, before the stock was removed from the place of destination or place of delivery, and before they were mingled with other stock, then their verdict should be for the defendant. Further, that if they should find from the evidence that the plaintiff did not serve upon the defendant a written demand for damages for injury or loss of the mare in question until April 7, 1887, after the death of the mare, and her removal from the place of destination or delivery, or after the animals had mingled with other stock, then their verdict should be for the defendant. We think the instructions requested were properly refused. Upon this branch of the case the court instructed the jury as follows: "You are instructed that

the Railroad Company has a right to limit their responsibilities to the owners in the carrying of stock or goods by a special contract, so long as the limitation does not affect their liability on account of negligence or misconduct. Plaintiff further alleges that the animals were removed from the car in which the injury was sustained by the advice and with the knowledge and the consent of the employes of the defendant prior to the time that written notice was given of any claim of damage because of said injuries. Should you find from the testimony that the animals were so removed, and that the mare died from the injuries so received, and that the mules were injured so as to be depreciated in value, and that the death of the mare and the injuries to the mules were caused by the carelessness and negligence of the agents and servants of the defendant Company, and that the Company had a good, fair, and reasonable opportunity to examine and inspect all of such stock, and to know of its condition after it was removed without unreasonable inconvenience, you will then find that the service of the notice of application for damages was made in due time, and that the Company is not absolved from liability because of the fact that the written notice introduced in the testimony was not served upon the station agent or other employé of the Company named in said contract prior to the removal of the stock from the car at the place of destination. The purpose of such notice is that the Company may have a fair and reasonable opportunity of examination and inspection of the condition of the live-stock transported under its management before it shall be placed beyond its reach or beyond the possibility of certain identification."

The court stated the law correctly. The plaintiff in error seems to rely upon the cases of *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416, and *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 352. In the former case no written notice was given for more than a year after the cattle were injured, and in the latter case no notice was given before suit was commenced. In the case before us written notice was given within a few days after the stock arrived at

Pierceville, and before the mules were taken from the place of destination. While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still the construction upon such stipulations must be reasonable, and adapted to the circumstances of each case. 3 Am. & Eng. Encyclop. Law, 15. This court said, in the case of *Goggin v. Kansas Pac. R. Co.*, *supra*: "Of course it is not understood that by the phrase 'before or at the time the stock is unloaded,' it must be the identical moment, but so immediately that the object sought by the notice can be attained. Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen, and actually should not be discovered till the time for giving the notice had expired." *Rice v. Kansas Pac. R. Co.* 63 Mo. 814. *Oxley v. St. Louis, K. C. & N. R. Co.* 65 Mo. 629.

It is claimed that the court erred in permitting a witness for the plaintiff to testify to a conversation had with some employé of the Railroad Company at Argentine, where it seems the stock was injured. In this conversation the employé told him how the accident had occurred; that there had been a jam, and the stock had been injured. The evidence may not have been competent, but we fail to see how the Railroad Company was prejudiced. It was established that the car and stock were in good condition at Kansas City. When next seen at Argentine the mare and mules were injured, and the car damaged. There was no controversy about there having been an accident, and the statement of the employé of the Railroad Company was immaterial error. We need not notice the other errors, as they are of the same nature.

It is recommended that the judgment of the District Court be affirmed.

Per Curiam:

It is so ordered.

All the Justices concur.

TENNESSEE SUPREME COURT.

LITTLE ROCK & MEMPHIS R. CO.,

Plff. in Err.,

v.

WILSON.

(.....Tenn.....)

The duty to keep a "person upon the locomotive always upon the lookout ahead" imposed upon every railroad company by Mill. & V. Code, § 1298, in default of which it is by section 1299 made responsible for all damages from accident or collision, is absolute and renders the company liable for all accidents happening while it is running a train with the locomotive at the rear, whether it has a lookout upon the front car or not.

(May 21, 1891.)

13 L. R. A.

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's failure to comply with statutory requirements as to lookouts. *Affirmed.*

The facts are stated in the opinion.

Mr. W. G. Weatherford for plaintiff in error.

Mr. John H. Watkins for defendant in error.

Snodgrass, J., delivered the opinion of the court:

The defendant in error recovered judgment against the Little Rock & Memphis Railroad Company for \$1,500, damages for injuries

sustained while drunk and asleep on its track in Fulton Street, Memphis, Tenn. The accident occurred at a point about thirty yards north of Market Street, during the night of October 10, 1889, and while the employes of the Company were, by means of an engine in the rear of a train of nine cars, pushing the train into the Company's yard south of Market Street. The front car of this train ran over Wilson, causing the loss of one arm and partial loss of the other. By consent of parties, a jury was waived, and the case tried by *Hon. W. D. Beard*, sitting as special judge in place of *Judge Estes*, who was incompetent. His finding of law and facts and judgment thereon were reduced to writing, and so given on demand of parties. They are, in substance and effect, that the Railroad Company was guilty of negligence, which proximately caused the injury, in failing to keep a lookout at some place on the front car of the train, or on the ground, either in front of the car, or on the side and so near the road that he could command a view of the road-bed in front of the moving train; that a lookout so placed could have discovered Wilson in time to have prevented the accident, notwithstanding Wilson's negligence in being there, and so the Company was responsible for failure to take this precaution, which he held evidenced a lack of reasonable care and prudence. The plaintiff's negligence was considered in mitigation of damages, and recovery only to amount stated was allowed. The Railroad Company appealed, and assigned errors.

It is not necessary to state them in detail, because the determination of one question settles them all, so far as they relate to the judgments on the verdicts. But there is a preliminary one proper to be noticed. It is that the court erred in sustaining a demurrer to the second plea, because the declaration showed the accident within the limits of the City of Memphis and therefore the Statute to prevent accidents on railroads (Mill. & V. Code, § 1298) does not apply. This is an erroneous assumption. We have held in a case at this term the contrary of this proposition. We repeat the holding here, but content ourselves by a reference to that case, without repetition of its assignment. *Katzenburger v. Lano* (Tenn.) *ante*, 185.

The material question, as indicated, as determining all others involved in the assignment of errors, is whether the Statute applies to a train in which the engine is in the rear; the argument upon this being that the Statute provides that the lookout shall be upon the locomotive ahead, and only contemplates the placing of a lookout ahead when the locomotive is leading, instead of following, the train; and this appears to have been the view of the circuit judge, because he did not predicate the liability of the defendant upon the failure to observe the statutory precautions, but upon the due observance of common-law duty to exercise reasonable care and prudence.

There is, of course, a manifest difference in the situation, as respects the view taken of the law to be applied. If the Railroad

Company was liable for failure to observe statutory precautions at all, the burden of proof is on it to show that it did observe them (Code, § 1300), and, if it fails to show this, it is liable (§ 1299), notwithstanding the negligence of the injured party, which can only go in mitigation. If, however, it was not a case in which the statutory precautions were required to be observed because of the situation or order of arrangement of the train, then defendant's negligence would have to be shown, and plaintiff's might be considered in bar of the action, as at common law,—about the only difference which our Statute occasions,—for we have repeatedly held that its precautions suggested were only those indicated by the wisdom and prudent requirement of the common law, in cases where the Statute is now applicable. In those cases, however, where it is not applicable, the *onus* of proof remains as it was, and the effect of contributory negligence continues the same as it was at common law. But it is obvious, as has been often held, that, if the court applied the right rule of law, it is immaterial upon what consideration it was done. If, then, in fact, the Statute applied, the ruling of the circuit judge was right, to the effect that the plaintiff's negligence did not bar the action, and we must therefore determine that question.

The argument that the Statute does not apply, because the engine was in the rear of the train instead of in front, and that consequently a lookout ahead on the locomotive is dispensed with, proceeds upon the erroneous assumption that, if the Railroad Company, for convenience or otherwise, takes the engine from the front end of the train, and uses it in the rear, or at some other place in the train, a lookout is dispensed with in front. This is manifest when we look to the object of the Statute. It contemplates an engine in front, with perfect head-light, a bell to be rung, and machinery for blowing the whistle, reversing the engine, and taking the precautions indicated in the special and general terms of the Statutes, including, of course, a place for the lookout to be and an engineer, fireman, and some other person always there as a lookout. Now, in case the engine had been in front, and its head-light or machinery for alarm or stopping taken away from it, or the lookout taken off of it, it would not be denied that the Company was liable; but because the Company had taken not one, but all, of these things away, the argument is that it escapes statutory liability. Thus stated, it seems perfectly manifest that the proposition is erroneous. Putting it in other words, it is that, although the Railroad Company could not take away any one of these and avoid liability, it could take them all away, and do so. That the whole includes all of its parts is a proposition not more axiomatic than that all the parts are necessary to make up the whole. If, therefore, observance of the Statute as a whole consists in keeping an engineer, fireman, or other person upon the locomotive, always upon the lookout ahead, in order that objects appearing on the track may be discovered, and the other precautions taken for which the Statute pro-

vides, it follows that all these things are necessary to be severally done, in order that the whole requirement be complied with. The lookout must be kept ahead, on the locomotive, and the locomotive must, of course, be kept there for him to be upon, or he cannot be upon it, and kept in the place required. The keeping of the locomotive there is therefore one of the parts of the observance, like all others absolutely essential to constitute the whole observance. And the same is true as to other things not specifically mentioned as included within the purpose of the Statute, and which, by construction, have been held essential; as a head-light for night use on running trains. So of those things mentioned in the Statute, and properly belonging to the engine, and parts of its machinery, as the whistle and bell. These must be ahead or in front of the train, because it is not contemplated that collisions will occur in the rear; nor would the Statute be met by having a light and a lookout in front, while the engine is in the rear. The Statute intends, not a lookout as a formal matter, but a lookout on the locomotive in front, and the machinery and appliances on it at hand and in immediate control, so that, as soon as an object appears, the observance of it, and the attempts to avoid collision, may be prompt and immediate; for in the majority of cases they must be so, if they serve any purpose. To have a lookout, with a lantern in front, watching in a dim light for an obstruction, which could only be seen a few yards off, and then signaling an engineer in the rear, to ring a bell or blow a whistle far away from the object, and take such precaution as could be then and there done to avoid an accident, would be practically to provide for accidents instead of against them. The man with the lantern could see, at best, but a short distance. The engineer must take some little time to observe his signal. Then, when he does so, if he rings the bell or causes the whistle to be sounded, he is at a

greater distance from the object, and these alarms may not, therefore, be so well heard or understood or apprehended. In this case the engine was 270 feet from the front of the train. The Statute, in making the engineer or fireman or some other person on the locomotive represent a lookout, manifestly contemplates looking, alarming, and acting as practically contemporaneous. It is no more contemplated that the engine, therefore, would be in the rear, than that the lookout should. Both must be in front, if the Statute is complied with.

It may be argued that this is inconvenient; that a railroad company must sometimes back its trains on its tracks. This may be entirely true, but it proves nothing. The Company can do all its running that way, if it prefers. The Statute does not prohibit it absolutely and at all events. The Statute merely makes it liable for any injury inflicted while doing so. If for reasons of convenience or economy, the company prefers to take the risk, it may do so; but it cannot complain that it suffers the legal consequences of the risk thus taken. Of course, it can reduce the risk to a minimum, by keeping someone in front of the train, and warning off or actually removing obstructions. If it prevents injury, it prevents loss; but this it must do if it avoids the consequence of disregarding the Statute. Nothing else will answer. In the present case the Company elected to attempt the running of the train in a street without observing the statutory precautions, but in the observance of others which it deemed sufficient. These, however, proved insufficient, and plaintiff's injury was the result of that election and this judgment. His recovery was the legal consequence. It was made small by properly considering his contributory negligence, and there is nothing, in its amount or otherwise, of which the defendant can complain.

Let the judgment be affirmed, with costs.

PENNSYLVANIA SUPREME COURT.

Amelia Ann FEARN, Admx., etc., of
John Fearn, Deceased, *Appt.*,

v.

WEST JERSEY FERRY CO.

(.....Pa.....)

1. A deposition taken in an action by deponent's wife, to which he was made a formal party, brought to recover damages for

personal injuries to her, alleged to have resulted from a carrier's negligence, is not admissible in an action against the same defendant, prosecuted by the wife as administratrix of deponent to recover damages for injuries to him, alleged to have been received at the same time and place and through the same cause as those sued for in the first action.

2. The mere existence, during the storm which caused it, of snow on the deck of

NOTE.—"Deposition" defined.

"Deposition" is a generic expression, embracing all written evidence verified by oath, and thus includes "affidavits;" but, in legal language, a deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and is generally taken without the cognizance of him against whom it is to be used. Yet the terms may be convertible, as in the rules of law of the 13 L. R. A.

supreme court. *Stimpson v. Brooks*, 8 Blatchf. 456, 457; *Anderson*, Law Dict. title, *Deposition*.

When rejected as evidence.

Depositions, except to perpetuate testimony, cannot be read unless taken in reference to an issue made up at the time they were taken. *Morrow v. Hatfield*, 6 Humph. 108. See, *contra*, *Blackburn v. Morton*, 18 Ark. 384.

Where a deposition was taken in another case, and there was a stipulation that it should be used

a ferry-boat raises no presumption of negligence on the part of the ferry company which will establish its liability to respond in damages to a passenger who receives injuries by falling on the slippery deck.

3. Where the cause of the accident by which a passenger was injured is known as well to the passenger as to the carrier, the presumption of negligence which arises from the mere fact of the injury of a passenger while on the carrier's vehicle has no application, but the passenger must affirmatively show negligence.

(October 5, 1891.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank P. Prichard and J. Davis Duffield, for appellant:

The deposition of John Fearn was taken in a case in which he was a party, and read in evidence, and the parties are technically and in fact the same, and for the same cause of action; and it is certainly a "question" in "issue" and was admissible.

Act of March 28, 1814, § 1; *Purd. Dig.* 729, pl. 84; Act of May 28, 1887, § 9, *Pub. Laws*, 161.

At common law, it is generally deemed sufficient for the admissibility of depositions taken in one suit and offered in another that the matters in issue were the same in both causes, and the parties against whom the deposition

was offered had full power to cross-examine the witness. Complete materiality, or identity of all the parties, is not necessary.

1 *Greenl. Ev.* § 558; *Haupt v. Henninger*, 87 Pa. 188. See *Kohler v. Henry*, 4 Phila. 61; *Hobart v. McCoy*, 3 Pa. 419; *Galbraith v. Zimmerman*, 100 Pa. 374; *Fulton v. Sellers*, 4 Brewst. 42.

Statutes providing for the perpetuation of evidence are in furtherance of justice and a clear administration of the law, and should receive a liberal construction.

Pratt v. Patterson, 81 Pa. 114.

If a deposition be evidence for any purpose, as against a general objection it is admissible.

Batdorf v. Farmers Nat. Bank, 61 Pa. 179; *Peters v. Horbach*, 4 Pa. 184.

Under the term "parties" are comprehended all persons standing in relation of privies in blood, privies in estate, and privies in law.

Jackson v. Lawson, 15 Johns. 544.

A privy is a person so connected with another in an estate, a right or liability as to be affected as he is affected.

Anderson, *Law Dict.* title *Privy*.

Evidently a man and wife joining in a former suit to her use under the Act (not in her right) are both privies "in estate" and "in law;" and the husband is besides actually a party and liable for costs.

See 1 *Greenl. Ev.* § 558; *Magill v. Kauffman*, 4 Serg. & R. 316; *Clark v. Sanderson*, 3 Binn. 192; *Kohler v. Henry*, *supra*; *Ottinger v. Ottinger*, 17 Serg. & R. 142; *Cooper v. Smith*, 8 Watts, 536.

The requirement in actions of ejectment that titles should be the same in one action as those litigated in the other, in order that the deposi-

tion on the trial, "with the same force and effect, and subject to the same exceptions and objections in all respects, as if taken in this case," the court held the effect of the stipulation was to place the deposition upon the same footing as if it had been taken in the action, and said that a party who appears at the time of a deposition, and examines the witness without objecting to his competency, cannot afterwards interpose the objection. *Brooks v. Crosby*, 22 Cal. 50.

When depositions were read on a former trial by consent, it was held that upon a second trial ordered on appeal, the consent not being limited, plaintiff was entitled to read them. *Vattier v. Hinde*, 32 U. S. 7 Pet. 252, 8 L. ed. 675, affirming 1 *McLean*, 110; *Edmondson v. Barrell*, 2 Cranch. C. C. 228, 232.

A deposition taken in another and different cause is not competent evidence against one not a party to the suit in which it was taken, to prove any fact, except it may be proper for the purpose of showing notice of the pendency of the proceeding in which it was used. *Cookson v. Richardson*, 60 Ill. 187.

The deposition of a plaintiff, taken in the lifetime of a deceased party, cannot be read after the death of that party when the suit is against the administrator of the deceased (*Beaty v. McCorkle*, 11 Heisk. 568); and it is error to permit the reading, over objection, of the deposition of one who was a party to the suit in his own right, and also as administrator of a deceased party, where the deponent's testimony was in regard to statements and transactions with his intestate. *Taylor v. Mayhew*, 11 Heisk. 596; *Weeks*, *Depositions*, § 474.

Depositions taken in a former case between the same parties cannot be read in a case pending, 13 L. R. A.

unless some peculiar reasons exist making their introduction necessary, as that the witnesses cannot themselves be called. *O'Harra v. Hunt*, 19 Ohio, 460.

Both the state and federal courts are substantially unanimous in holding that a deposition taken in a former suit is incompetent as evidence in a subsequent trial against one not a party to the first proceeding, and who was denied the legal right to file cross-interrogatories at the time of its issuance, or to cross-examine a hostile witness when on the stand. *Rutherford v. Geddes*, 71 U. S. 4 Wall. 220, 18 L. ed. 343; *Tappan v. Beardale*, 77 U. S. 10 Wall. 427, 19 L. ed. 974.

A party is one who appears on the record as a plaintiff or defendant. *Woods v. De Figanlere*, 16 Abb. Pr. 1, 1 Robt. 607, 25 How. Pr. 522.

Code provisions on the subject.

The California Code provisions allow depositions once taken to be read in evidence, as the language of the following section (2084) indicates: "When a deposition has once been taken it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties, upon the same subject, and is then deemed the evidence of the party reading it. Depositions taken in another court between the same parties and in regard to the same subject matter may be read in evidence upon parol proof of the existence of such former action." *Ayers v. Chisum* (N. M.), 1 West. Coast Rep. 520.

So the deposition is admissible, notwithstanding the complaint has been amended subsequent to the taking thereof, provided the subject matter remains the same. *Anthony v. Savage*, 3 Utah, 277. See also N. Y. Code Civ. Proc. § 870 *et seq.*

tion be admissible, is founded upon a very good reason.

Sample v. Coulson, 9 Watts & S. 68.

No such reason exists in actions for negligence.

Norris v. Monen, 3 Watts, 465; *Hocker v. Jamison*, 2 Watts & S. 488; *Wright v. Cumpsty*, 41 Pa. 102; *Bath v. Bathersea*, 5 Mod. 10; *Goodrich v. Hanson*, 38 Ill. 498.

Depositions taken in a former suit between the same parties, involving the same question or subject matter, are admissible when the question arises again for judicial determination.

Wads v. King, 19 Ill. 801; *Harger v. Thomas*, 44 Pa. 180; *Melen v. Andrews*, 1 Mood. & M. 386; *State v. Johnson*, 12 Nev. 121; *O'Brian v. Com.* 6 Bush, 571; *Com. v. Richards*, 18 Pick. 484; *United States v. Macomb*, 5 McLean, 286; *Kendrick v. State*, 10 Humph. 479; *State v. McO'Brien*, 24 Mo. 402; *State v. Baker*, Id. 437; *State v. Harman*, 27 Mo. 120.

Nowhere is "matter in question," or "subject matter," construed as meaning "cause of action," although the latter is included in the former as the less in the greater; and of course where the cause of action is the same, at common law even, "what a witness swore to on a former trial may be given in evidence in case of his death."

Miles v. O'Hara, 4 Binn. 111; *Lightner v. Wike*, 4 Serg. & R. 208; *Chess v. Chess*, 17 Serg. & R. 410.

It is generally deemed sufficient if the matters in issue are the same in both cases, and the party against whom the deposition was offered had full power to cross-examine the witness.

1 Greenl. Ev. §§ 164, 553; *Starkie. Ev.* 10th ed. p. 61; *Mathews v. Colburn*, 1 Strobb. L. 259; *Pyke v. Crouch*, 1 Ld. Raym. 730; *Buller, Nisi Prius*, 7th ed. 232a; *Williams v. Cheney*, 3 Gray, 220; *Long v. Davis*, 18 Ala. 802; *Kritzer v. Smith*, 21 Mo. 301; 1 Greenl. Ev. §§ 123, 125; *Parry v. Parry*, 180 Pa. 104; *Hallett v. O'Brien*, 1 Ala. 585; *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. 13 How. 307, 14 L. ed. 157; *Louisville & N. R. Co. v. Atkins*, 2 Lea, 248; *Ross v. Cobb*, 9 Yerg. 463; *Yale v. Comstock*, 112 Mass. 267.

The touchstone of admissibility of depositions is the power or right to cross-examine on that "question" in the issue (fact or facts), identical in both cases.

Heth v. Young, 11 B. Mon. 278; *Wertz v. May*, 21 Pa. 279; *Gilbert, Ev.* 62; *Cornell v. Green*, 10 Serg. & R. 17; *Wolf v. Wyeth*, 11 Serg. & R. 149; *Hepler v. Mt. Carmel Sav. Bank*, 97 Pa. 422; *Warren v. Nichols*, 6 Met. 261; *Taylor, Ev.* 8th ed. § 709; *Orr v. Hadley*, 36 N. H. 575; *Jackson v. Bailey*, 2 Johns. 17; *Cox v. Pearce*, 7 Johns. 298; *Fitch v. Hyde*, Kirby, 258; *Ray v. Bush*, 1 Root, 81; *Gardner v. Moult*, 10 Ad. & El. 464; *Sills v. Brown*, 9 Car. & P. 601; *Rex v. Eriswell*, 3 T. R. 707, 712, 721; *Cazenove v. Vaughan*, 1 Maule & S. 4.

This is the case of a passenger against a carrier, who has undertaken to carry him safely, and is bound to use such precautions as "human care and foresight" can suggest for his safety [*Sir James Mansfield in Christie v. Griggs*, 2 Campb. 79], and provide such appli-

ances as will contribute to and promote his safety.

In the case of an injury to a passenger there is a presumption of negligence on the part of the carrier.

Erie & W. V. R. Co. v. Smith, 125 Pa. 259; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 851; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 286; *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A. 820, 124 Pa. 462; *Spear v. Philadelphia, W. & B. R. Co.* 11 Cent. Rep. 643, 119 Pa. 61; *Philadelphia & R. R. Co. v. Hughes*, 11 Cent. Rep. 822, 119 Pa. 802.

A passenger is only required to make out a prima facie case as against the carriers.

Pennsylvania R. Co. v. Fuller, 3 Pennyp. 176; *Sullivan v. Philadelphia & R. R. Co.* 30 Pa. 284.

An injury upon a railroad while the passenger injured was in the exercise of ordinary care is prima facie evidence of the company's liability.

New Jersey R. & T. Co. v. Pollard, 89 U. S. 22 Wall. 341, 22 L. ed. 877; *Pawling v. Hopkins*, 132 Pa. 617.

Frequently householders, after sweeping off the snow on their pavements, put ashes on the ice found underneath. This is an exhibition of ordinary care or precaution, and shows the common-sense judgment of the community as to what ordinary or reasonable care is when there is ice or snow on the pavement, and there is no reason why it should not be law as to carriers. If the ice caused the plaintiff to fall, it is proper for the jury to consider whether, under all the circumstances proven, it was allowed to remain an unreasonable length of time.

Seymour v. Chicago, B. & Q. R. Co. 3 Biss. 43; *Devire v. Rasley*, 131 Mass. 169; *Nealie v. Second & Third Streets Pass. R. Co.* 4 Cent. Rep. 899, 113 Pa. 300; *Mahoney v. Metropolitan R. Co.* 104 Mass. 78; *Dixon v. Brooklyn City & N. R. Co.* 1 Cent. Rep. 293, 100 N. Y. 170; *Weston v. New York Elec. R. Co.* 73 N. Y. 595; *Shepherd v. Midland R. Co.* 20 Week. Rep. 705; *Davis v. London & B. R. Co.* 2 Fost. & F. 588; *Langmore v. Great Western R. Co.* 19 C. B. N. S. 183; *McLean v. Burbank*, 11 Minn. 277.

Carrier must provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requirements; and for the slightest fault or negligence, in that regard, the carrier is liable.

Pennsylvania R. Co. v. Roy, 102 U. S. 451, 26 L. ed. 141.

Messrs. A. H. Wintersteen and George Tucker Bispham, for appellee:

In order for notes of prior testimony to be admissible in a subsequent proceeding three conditions must co-exist: (1) an opportunity to cross-examine in the earlier suit; (2) the same parties in interest in both suits; (3) the issues in the two suits must involve the same subject matter.

Haupt v. Henninger, 37 Pa. 138, 140; *Harger v. Thomas*, 44 Pa. 128, 180; *Miles v. O'Hara*, 4 Binn. 108, 111; *Norris v. Monen*, 3 Watts, 465; *Sample v. Coulson*, 9 Watts & S. 62; 1 Wharton, Ev. § 177.

The appellant seeks to avail herself of the

rule of a presumption of negligence in case of accident to a passenger. But where the cause of the accident is known, the plaintiff must always show a duty of the defendant to the plaintiff violated before any presumption of negligence whatever arises.

Harley v. Philadelphia Traction Co. 182 Pa. 58; *Hayman v. Pennsylvania R. Co.* 10 Cent. Rep. 835, 118 Pa. 508.

The only negligence that can exist in these cases is in allowing the snow and ice to accumulate and remain an unreasonable time in a dangerous condition.

Neslie v. Second & Third Streets Pass. R. Co. 113 Pa. 800, 804; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; Wood, Railway Law, p. 1166; Wharton, Neg. § 821.

What is required of the company is not the warranty of the safety of everybody from everything, but such diligence as a good business man in such matters is accustomed to use.

Stanton v. Springfield, 12 Allen, 566; *Mauch Chunk v. Kline*, 100 Pa. 119; *McLaughlin v. Corry*, 77 Pa. 118; *Denhardt v. Philadelphia*, 16 Phila. 47; *Hanson v. Warren*, 22 W. N. C. 188.

McCollum, J., delivered the opinion of the court:

The questions which confront us in this case are, first, whether the deposition of John Fearn was admissible, and second, whether there was error in the refusal to take off the nonsuit. The deposition was taken in a suit in the circuit court of the United States in which Mary Ann Fearn was the plaintiff and the West Jersey Ferry Company was the defendant. In that action the plaintiff claimed damages for personal injuries caused by the alleged negligence of the defendant Company. In this case the administratrix of John Fearn claims that he received an injury through the negligence of the same Company, which caused his death. It is contended by the appellant that the injuries for which these suits were brought were received at the same time and place, and were attributable to the same cause, to wit: the neglect of the defendant Company to keep its boat in a reasonably safe condition for the ingress and egress of its passengers. Assuming that the claim of the appellant is correct, it does not follow that a deposition taken in one action is admissible as evidence in the other. The actions are not between the same parties, although we have the same defendant in each. The fact that the plaintiff in the first action was the wife of the plaintiff in this action, or that she is now his widow and administratrix, can make no difference in the rule which allows testimony taken in one action to be given in evidence on the trial of another which involves the same subject matter and is between the same parties or their privies. The joinder of the husband in the former suit was merely formal, and it did not give him control of, or an interest in, it. It was the wife's claim that was litigated, the judgment was obtained in her right, and it was exclusively hers. Identity of subject matter in whole or in part, and identity of parties in interest, must unite to render a deposition in one case

admissible in another. This is the doctrine of our cases, of the Act of 1814, and of the Act of 1887, which contains the last legislative deliverance on this subject. *Haupt v. Henninger*, 37 Pa. 188; *Harger v. Thomas*, 44 Pa. 128; Act of March 28, 1814 (Purd. Dig. 10th ed. 625); Act of May 23, 1887 (Pub. Laws, 158).

The appellant's offer was not within this rule and the deposition was properly rejected.

In considering the question raised by the second specification of error it must be borne in mind that there is no evidence in the case which suggests any defect in the construction of the boat, and that the sole complaint is that its deck was slippery. This condition and its cause are adequately described in the appellant's testimony. It appears that it commenced snowing about the time Fearn left the Pennsylvania Station for the ferry and that it was snowing when he entered the boat. As a result of the brief storm, then in progress, the deck was covered with a thin coating of snow, and in crossing it to reach the cabin he slipped and fell. Nearly five years after this occurrence, alleging that he was injured by his fall and that it was caused by the negligence of the defendant Company, he brought this action. After his death his administratrix was substituted as plaintiff and on the trial the evidence of his widow and son was relied on to sustain the charge of negligence. This developed the situation at the time of the accident, the commencement and progress of the snow storm and the condition of the boat as affected by it, substantially as we have stated. Assuming, as the appellant contends, that the cause of the accident was the slippery condition of the deck, it is obvious that this condition was produced by the snow falling upon it. It is not pretended that it was the duty or within the power of the Company to prevent the snow falling on the deck of its boat, but it is claimed that its obligation to its passengers required it to immediately remove the snow and restore the condition which existed before the storm. It is well known that rain or snow falling upon the sidewalks of a town or city, the steps and platforms of railway cars, and the decks of ferry-boats will render them slippery and consequently more difficult to walk upon. But it is not practicable to absolutely prevent this condition while the rain or snow is falling, and the mere existence of it during the storm which causes it raises no presumption of negligence on the part of the municipality, the railway or ferry company. In our case it commenced snowing but a few minutes before the accident and was snowing at the time of it. There was no accumulation of ice or snow on the deck formed or left there from a prior rain or snow fall. There was not a spark of evidence from which an inference could be drawn that there was any ice on the deck where Fearn crossed it. Where the snow was displaced by his fall the deck had a slippery appearance caused by the moisture from the snow upon it. It is shown by the testimony and the photographs produced by the appellant on the trial that it was the same appearance pre-

sented by the decks of ferry-boats of like construction, in a rain storm, or when wet from any cause. It was therefore incumbent upon the appellant to prove an omission or violation of a duty which the company owed to him. The cause of the accident was known as well to the appellant as to the Company. In such case the presumption of negligence arising from the mere fact that a passenger was injured while on the appellant's boat has no application. *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 185; *Hayman v. Pennsylvania R. Co.* 118 Pa. 508, 10 Cent. Rep. 835. and *Farley v. Philadelphia Traction Co.* 132 Pa. 58. As the appellant failed to show any omission or violation of duty by the Company in connection with the cause of the accident, we think the nonsuit was properly ordered. We find nothing in *Neslie v. Second & Third Streets Pass. R. Co.*, 113 Pa. 300, 4 Cent. Rep. 699, which is in conflict with this conclusion. In that case there was ice on the step of the car, caused by a storm the day before, and the ice "had been suffered to remain on the step from the previous day," and it was held that, "whether it remained there for such time and in such form as to establish the negligence of the defendant" was a question for the jury. Here there was only a slippery condition of the deck caused by a storm in progress when the accident occurred.

Judgment affirmed.

W. F. HALLSTEAD, Guardian of Mary E. Clapp *et al.*,

v.

Levi CURTIS *et al.*, *Appls.*

2 Cases.

(.....Pa.....)

1. To hold the owners of an insolvent bank individually liable as partners

NOTE.—*Banking a legitimate object of co-partnership.*

The objects of a co-partnership may embrace all kinds of legitimate and lawful enterprises. *Chester v. Dickerson*, 54 N. Y. 1, 45 How⁹ Pr. 323, 13 Am. Rep. 550.

And it need not be confined to dealings in personal property, but may embrace operations in real estate. *Ludlow v. Cooper*, 4 Ohio St. 1; *Buffum v. Buffum*, 49 Me. 108; *Cowles v. Garrett*, 30 Ala. 341.

But the business must be a lawful one, and not contemplate a fraud or a violation of law or a moral duty. *Bartle v. Nutt*, 20 U. S. 4 Pet. 184, 7 L. ed. 825; *Gordon v. Howden*, 12 Clark & F. 237.

The partnership relation; how proved.

The actual existence of a partnership may be disclosed by evidence which establishes (1) a distinct agreement for a partnership in so many words; or (2) an agreement to share profit and loss; or (3) an agreement to share profits; or (4) such a state of things as is sufficient to establish a quasi partnership. 1 Lindley, Partn. § 91, 141-147.

Evidence of general reputation that one is a partner in a firm is incompetent to charge him as such, and while a formidable array of authorities sustains this proposition, there is some serious dissent, which is entitled to consideration. Our first state-
13 L. R. A.

for its debts plaintiff must show that it was a partnership enterprise of which defendants were members; and until a prima facie case of partnership is made out the burden cannot be placed on defendants of showing that it was incorporated or was a limited partnership, to relieve themselves from liability.

2. Evidence tending to show the organization of a bank under a legal character, the holding of stock in it and the receipt of dividends thereon is sufficient to make a question for the jury whether the bank was not a corporation rather than a partnership concern.

3. If the absence of the books and papers of an insolvent bank affords a presumption as to its character against either party to a suit to hold members of the concern individually liable as partners for its debts, it must be against plaintiff where the documents are in possession of his witness in another State, beyond the reach of process, while defendants are simply small stockholders without means of reaching them or compelling their production.

(October 5, 1891.)

A PPEAL by defendants from a judgment of the Court of Common Pleas for Bradford County in favor of plaintiff in an action brought to hold defendants individually liable as partners for the debts of an insolvent banking concern. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. D. A. Overton and M. F. Elliott*, for appellant, Levi Curtis:

To constitute a partnership as between the parties there must be a contract making them such.

Story, Partn. § 2, p. 2.

Persons can only become partners as to each other, or become liable as partners to third persons either by contracting the legal relation of partners *inter se* or by holding themselves out to the world as such.

Collyer, Partn. § 6; *Hedge's App.* 63 Pa. 278-279; *Thompson v. Toledo First Nat. Bank*, 111 U. S. 529, 28 L. ed. 507; *Denithorne v. Hook*, 3 Cent. Rep. 124, 112 Pa. 240.

ment, however, is supported by the following authorities: *Hunt v. Jucks*, 1 Hayw. 173, 1 Am. Dec. 555; *Carter v. Douglass*, 2 Ala. 490; *Campbell v. Hastings*, 29 Ark. 512; *Hicks v. Cram*, 17 Vt. 449; *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496; *Halliday v. McDougall*, 20 Wend. 81, 22 Wend. 264; *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 690; *Brown v. Crandall*, 11 Conn. 92; *Stclair v. Wood*, 8 Cal. 98; *Bowen v. Rutherford*, 60 Ill. 41, 14 Am. Rep. 26; *Earl v. Hurd*, 5 Blackf. 248; *Scott v. Blood*, 16 Me. 182; *Godard v. Pratt*, 16 Pick. 412; *Sager v. Tupper*, 33 Mich. 258; *Lockridge v. Wilson*, 7 Mo. 560; *Southwick v. McGovern*, 23 Iowa, 583; *Tumlin v. Goldsmith*, 40 Ga. 221.

Upon the issue as to whether a member of a firm is a dormant partner, evidence of a general reputation is admissible. *Metcalf v. Officer*, 1 McCrary, 825; *Rice, Evidence*, 1156.

The contradiction referred to as to the integrity of this proposition is best evidenced by the decision in *Bowen v. Rutherford*, 60 Ill. 41.

Corporate existence, how shown.

Where a company has been incorporated by a special Act of the Legislature, it is, in general, sufficient to give in evidence the Statute, and to show the actual use of the privileges of an incorporated company under the name designated in the Act, to

Plaintiff having dealt with a *de facto* corporation, as such, cannot now be permitted to show that it was not one *de jure*.

Blanchard v. Kaulf, 44 Cal. 440; *Cochran v. Arnold*, 58 Pa. 399; *Fay v. Noble*, 7 Cush. 188; *Spahr v. Farmers Bank*, 94 Pa. 429.

Where persons supposing in good faith that they are incorporated and stockholders in a valid corporation do business as a corporation for a series of years without the corporate existence being challenged by the State, parties who deal with the company as a corporation cannot hold the stockholders personally liable in case they afterwards discover that the company was not validly incorporated in consequence of some defect or irregularity in the proceedings of the supposed incorporation.

Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197, 6 Am. & Eng. Corp. Cas. 359.

Messrs. E. Overton and H. F. Maynard for appellant, Michael Coleman.

Messrs. E. N. Willard, Everett Warren and Rodney A. Mercur, for appellee:

Individual members cannot set up their own faults or mistakes of organization, or false and fraudulent representations whereby they were induced to become stockholders, as a defense against creditors.

McHose v. Wheeler, 45 Pa. 32.

Even if it were true that the appellant was induced to subscribe for his stock by false and fraudulent representations imputable to the company, yet, as the rights of the creditors have intervened subsequent to the time the appellant became a stockholder, his remedy, if he has any, is a special action on the case for fraud against the individuals by whom the fraud was perpetrated, but it affords no defense to proceedings instituted by a creditor.

2 Lindley, Partn. § 528; Morawetz, Priv. Corp. § 595; Kerr, Fraud, §§ 329, 330; *Henderson v. Royal British Bank*, 7 El. & Bl. 556;

entitle one to maintain an action against the corporation. *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 232; *Cane v. Brigham*, 39 Me. 35; *Merchants Bank of St. Louis v. Harrison*, 39 Mo. 433; *Haynes v. Brown*, 36 N. H. 545. See Ang. & A. Corp. § 635.

The existence of the corporation may be proved by producing the books of the company containing the license issued to the corporation by an officer of the State, under a statute, to enable it to act as such. *Culver v. Third Nat. Bank*, 64 Ill. 523.

It may also be proved by a certified notice of the formation of the corporation, made in pursuance of the statute, sworn to by its president, treasurer, clerk and directors, and recorded, as provided by the Statute, in the registry of deeds. *Chamberlin v. Huguenot Mfg. Co.* 118 Mass. 532.

Negligence not subject to a standard rule.

It is impossible to give the measure of culpable negligence in those occupying fiduciary relations for all cases, as the degree of care required depends upon the subjects to which it is to be applied. First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278.

What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. *Hun v. Cary*, 32 N. Y. 65, 13 L. R. A.

Powis v. Harding, 1 C. B. N. S. 531; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Stone v. City & County Bank* (*Collins v. City & County Bank*), L. R. 3 C. P. Div. 282, 30 Moak, Eng. Rep. 156; *Tennent v. City of Glasgow Bank*, L. R. 4 App. Cas. 615, 33 Moak, Eng. Rep. 395; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317; *Upton v. Hanebrough*, 10 Nat. Bankr. Reg. 369; *Michener v. Payson*, 13 Nat. Bankr. Reg. 49; *Upton v. Englehart*, 3 Dill. 496; *Turner v. Granger's L. & H. Ins. Co.* 65 Ga. 649; *Hamilton v. Granger's L. & H. Ins. Co.* 67 Ga. 145; *Duffield v. Barnum W. & I. Works*, 7 West. Rep. 606, 64 Mich. 293; *Ogilvie v. Knox Ins. Co.* 63 U. S. 23 How. 380, 16 L. ed. 349; *Upton v. Tribblecock*, 91 U. S. 45, 23 L. ed. 203.

Partnership may be formed not only by express agreement, but may grow out of transactions or relations in which the word "partnership" is not uttered.

Parsons, Partn. pp. 8, 9; 1 Lindley, Partn. §§ 17, 19, 20; *Cook, Stock & Stockholders*, § 506; *Re Mendenhall*, 9 Nat. Bankr. Reg. 497; *Whipple v. Parker*, 29 Mich. 369; *Foster v. Moulton*, 35 Minn. 458; *National U. Bank of Watertown v. Landon*, 45 N. Y. 412.

The Home Savings Bank of South Waverly although it possesses many of the elements of a joint-stock company, is nearer a partnership.

Re Oliver's Estate, 9 L. R. A. 421, 136 Pa. 58.

But whether it is a joint-stock company or a partnership, the liability of the appellant is practically the same.

Cook, Stock & Stockholders, § 508; *Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 111; *Westcott v. Fargo*, 61 N. Y. 542; *Witherhead v. Allen*, 3 Keyes, 362.

All unincorporated banks are partnerships.

Hess v. Weitz, 4 Serg. & R. 359; *Witmer v. Schlatter*, 2 Rawle, 359; *Ridgely v. Dobson*, 3 Watts & S. 118; *Beaver v. McGrath*, 50 Pa. 479; *Re Fry's Account*, 4 Phila. 133; *Protchett v.*

The relation between bank officials and depositors.

The relation and relative obligations arising between a bank and its depositing customers are in general simply those of debtor and creditor. *Foley v. Hill*, 2 H. L. Cas. 23; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Boyd v. Bank of Cape Fear*, 65 N. C. 13; *Allen v. Fourth Nat. Bank of New York*, 5 Jones & S. 137, 59 N. Y. 12; *Buchanan F. Oil Co. v. Woodman*, 1 Hun, 639, 4 Thomp. & C. 193; 1 Wait, Act. & Def. 502.

The relation between a savings bank and its trustees or directors is that of principal and agent, and that between the trustees and depositors is similar to that of the trustee and *cestui que trust*. If such trustees transcend the limits placed upon their power in the charter of the bank and cause damage to the bank or its depositors, they are liable. *Hun v. Cary*, 32 N. Y. 65.

Each partner is personally responsible for the obligations and liabilities of the partnership, whether on contract or for torts, and his property may be taken on execution or attachment against the firm, although the firm may be solvent. *Parsons*, Partn. 63, 249; *Woolley v. Kelly*, 1 Barn. & C. 38; *Nicholson v. Janeway*, 16 N. J. Eq. 235; *Bryant v. Hawkins*, 47 Mo. 410; *Villa v. Jonte*, 17 La. Ann. 9; 5 Field, Lawyer's Briefs, § 6. See note to *Marshall v. Farmers & M. Sav. Bank* (Va.) 2 L. R. A. 534.

As to the distinction between saving banks and banks of deposit, see note to *Lewis v. Lynn Inst. for Sav.* (Mass.) 1 L. R. A. 785.

Schaefer, 11 Phila. 166; *Schamburg v. Fowler*, 25 Pittsb. L. J. 148; *Thomson's Estate*, 5 W. N. C. 14.

So are unincorporated joint-stock companies. *Kramer v. Arthurs*, 7 Pa. 165; *Hedge's App.* 63 Pa. 273; *Clarke's App.* 107 Pa. 436; *Re Oliver's Estate*, 9 L. R. A. 421, 136 Pa. 43.

The shareholders are therefore each personally liable for all the debts of the bank.

2 Lindley, Partn. §§ 1088, 1421.

Where persons enter into articles of association for banking purposes, and without any charter assume a name, open a stock book, subscribe for shares of stock, and a portion pay small sums thereon, hold meetings, elect directors, publish the names of such directors, enter into and transact business as a bank, they are all liable as partners.

Pettis v. Atkins, 60 Ill. 454; *Hodgson v. Baldwin*, 65 Ill. 532; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Jessup v. Carnegie*, 12 Jones & S. 261; *Shamburg v. Ruggles*, 83 Pa. 148; *Clark v. Fletcher*, 96 Pa. 416; *Shamburg v. Abbott*, 2 Cent. Rep. 302, 112 Pa. 6; *Christy v. Sill*, 131 Pa. 492; *Weiterhauser v. Shaver*, 29 Pittsb. L. J. 213.

A participant in profits directly as such, no matter what may be the arrangement between the parties, is as to third persons a partner.

Gill v. Kuhn, 6 Serg. & R. 339; *Churchman v. Smith*, 6 Whart. 148; *Edwards v. Tracy*, 62 Pa. 380; *Red v. Kremer*, 2 Cent. Rep. 64, 111 Pa. 486; *Caldwell v. Miller*, 127 Pa. 442.

And one who shares in the profits, although his name may not be in the firm, is responsible for all its debts.

Winship v. Bank of United States, 30 U. S. 5 Pet. 560, 8 L. ed. 227.

Two things must be shown to establish the existence of a corporation *de facto*, viz.: *first*, the existence of a charter or some law under which such a corporation with the powers assumed might be created; *second*, a user by the party assuming to be such corporation, of the rights claimed to be conferred by such charter or law.

Methodist Epis. U. Church v. Pickett, 19 N. Y. 482.

One who contracts with others under a corporate name believing that he is contracting with a corporation, when none in fact exists, is not, in a suit against such persons to enforce the contract, estopped to deny that they were a corporation.

Glenn v. Bergamann, 2 West. Rep. 597, 20 Mo. App. 343; *Hurt v. Salisbury*, 55 Mo. 310; *Shible v. Strong*, 128 Pa. 315; *Cook, Stock & Stockholders*, § 233.

Williams, J., delivered the opinion of the court:

The learned judge before whom this case was tried correctly stated the principles that controlled the liability of partners to third persons dealing with them. There is no doubt that where the relation is shown to exist, each partner is liable individually for all the debts of the firm. It is also true, as a general rule, that participation in profits makes one a partner as to persons dealing with the firm, although this rule is not without some well-recognized exceptions. *Edwards v. Tracy*, 62 Pa. 374; *Hart v. Kelley*, 13 L. R. A.

83 Pa. 286. The business of banking is one in which a partnership may lawfully engage; and it is immaterial that the names of the partners do not appear in the firm name. *Shamburg v. Ruggles*, 83 Pa. 148. The liability of the partners depends, not on the name of the partnership, but on the existence of the partnership relation. These rules were correctly stated on the trial. The ground of complaint is the manner of their application to the facts of this case. In his charge to the jury the learned judge drew attention to the evidence showing the organization of the bank, the holding of stock by the defendants, and their receipt of dividends, and then submitted the questions to the jury in the following order: *first*, was the bank indebted to the plaintiff as alleged; *second*, was the bank a partnership, and *third*, were the defendants members of the firm. Having simply stated the second question, he proceeded to consider and discuss the third, and, among other things, said to the jury: "Did they (the defendants) invest their money in this business, and did they stipulate for a share of the profits of the business?" To enable them to understand the significance of their finding upon this question he immediately added: "If they did, they became partners and individually liable for all the debts of the firm, unless they can protect themselves from this liability. If the institution was an incorporated bank, then they would not be individually liable. But if it was incorporated the burden is upon the defendants to show it. And if it was a limited partnership the burden is on the defendants to show it." This instruction was calculated to divert attention from the second question, which was the important one, and fix it on the third. It assumed that there was competent and adequate proof before the jury to establish, *prima facie*, that the bank was a private enterprise owned and conducted by a partnership; and it put the burden of proof on the defendants. It left the jury to infer that until the defendant should assume the burden put upon them and show affirmatively that the bank was incorporated, or was organized as a limited partnership, they should be held liable as partners. But the learned judge went still further. Having put the burden on the defendants of showing the character of the bank, and having explained to the jury what the defendants must show in order to "protect themselves from liability," he proceeded to say: "No evidence has been given before you that it (the bank), was incorporated, and no evidence that it was a limited partnership." This left the jury no alternative: they must find that the defendants invested their money in the bank, with a view to share in the profits of the business, for this was not denied; and this they were told made them partners. They could protect themselves only by showing the incorporation of the bank, or its organization as a limited partnership, and this, they were told, had not been done. The conclusion naturally followed that they were liable as partners. Now the important question in this case, which lay at the threshold of the plaintiff's cause of action, was whether

this bank was a partnership. The plaintiff alleged it, and claimed to recover against the defendants as members of the banking firm. The burden of proving the partnership was on him, and until this proof was given the defendants were not called upon to enter upon their defense. They were not bound to prove the character of the organization of the bank in order to "protect themselves," until they were first put in danger of a verdict against them by proof that the bank was a partnership, and that they were members of the firm. As they did not deny that they were stockholders, the only open question was that of the character of the bank, and this is the question to which the attention of the jury should have been drawn. What was the evidence upon this question? The plaintiff showed the fact that the bank was organized, that it conducted a banking business under the management of a board of directors with a president, vice-president, and cashier, until 1887, when it failed. This was all. No articles of co-partnership, or contract between the founders of the bank, were shown. How the organization was effected, or the business of the bank done, did not appear. There was not even a single act or declaration of any officer, director, stockholder, or clerk, tending to show that the bank had ever been represented, at any time or to any person, as a partnership. There was no proof that the defendants or either of them had ever attempted to exercise any control over the business of the bank or had participated in it in any other way than by the receipt of a few small dividends. On the other hand, it appeared in the evidence that Kirby, the founder of the bank, represented that he had obtained a legal charter for it, while he was engaged in soliciting subscriptions to the stock. The certificates held by the defendants, which were put in evidence by the plaintiff, described the bank as "organized under an Act of the Legislature of Pennsylvania, and as having an authorized capital of \$100,000 divided into shares of \$100 each." This description is certainly appropriate to an incorporated bank, and no inference can be drawn from it favorable to the position of the plaintiff, that it was not such. Moreover the defendants were severally upon the witness stand and testified in the most positive manner that they were not partners with Kirby and others, but stockholders, as they understood and believed the fact to be, in an incorporated bank; and that the stock was sold to them, and bought by them, as and for the lawfully issued stock of a bank doing business under a valid charter. From this evidence the jury would have been justified in finding against the plaintiff; and if their attention had been drawn to it, as its importance required, the result of their deliberations might have been just opposite to what it was. The position of the parties is not without some bearing on this question. The real plaintiff was the wife of one of the sons of the man who organized the bank, presided over its affairs for fourteen years, and conducted it into hopeless bankruptcy. Her husband had been in the employ of the bank for years as a clerk and bookkeeper. He had

the means of knowing, and it is fair to presume did know, the character of the bank and the manner in which it was organized. His brother, who was the assignee both of his father and of the bank, and had actual custody of all the books and papers of both at his place of business in another State, was present at the trial as a witness for the plaintiff. Whether the bank rested on a contract between its founders, or on a charter from the State, he was in a position to know, and to bring the document before the court. With these two witnesses the plaintiff was in a position to show all that the books and papers of the bank, or its founder, contained relating to the organization. The defendants, on the other hand, were simply small stockholders shown to have had no connection with or knowledge of the business of the bank, and no access to its books or papers. How, in a contest between parties so situated, can it be said that the burden of showing the nature and character of the organization of the bank is on the defendants?

The books and papers from which this evidence is to be drawn are in another State, beyond the reach of process, and in the hands of the plaintiff's witness and brother. The defendants have no means of reaching them or compelling their production. Under such circumstances if the absence of exact proof of the nature of the organization affords a basis for a presumption against either party it must be against him who is in a position to produce such proof. It was error therefore to say, on the facts of this case as they were presented in the court below, that the burden of proving a charter, or an organization as a limited partnership, was on the defendant. The burden of proving a partnership as alleged, was on the plaintiff, and until this was shown, the defendants were not called upon to enter upon a defense. It was error also to say that there was no evidence tending to show an incorporation of the bank. There was some evidence and it should have been submitted to the jury in such manner as to draw their attention to the importance of the question. Something has been said in the argument about the unconscionable position of bankers, who first invite the public confidence and, when they have secured it, betray it, and then seek to escape from the legal consequences of their own frauds. We quite agree with all that has been said by way of censure of such conduct, but it is not quite appropriate upon the facts of this case. The defendants took their stock in an organized bank, doing business as a savings bank. They had nothing to do with its current business. They neither invited the plaintiff to make deposits, nor embezzled the money when deposited.

It is not alleged that they aided in bringing about, or profited by, the ruin of the bank. They are, rather, among the sufferers from the ruin wrought, apparently, by the president.

While he squandered the money of depositors he sunk also the money of the stockholders. If the defendants are now liable to the creditors of the bank, it is not for their own fault or fraud, but because of their misfor-

tune in being associated in business with one who has wasted the money of his partners, and that of the customers of the firm, at the same time, and left both remediless.

This is their position if the bank was a partnership. They must in that case bear their own loss and make good, to the extent of their ability, the losses of the depositors. But he who asserts their liability as partners must show it, and the sufficiency of the showing must be determined by the jury under proper instructions.

The judgment is reversed and a venire facias de novo awarded.

Daniel KEHLER, by Next Friend,

v.

William SCHWENK, Surviving Partner,
etc., *Appl.*

(.....Pa.....)

1. The discretion of the master is absolute in selecting which of several styles of apparatus in common use he will use in his business; and he cannot be made to respond in damages to an employé injured while using the apparatus selected, on the ground that some

other style might, under the circumstances, have been safer.

2. The attention of the jurors should not be drawn to the price for which they would be willing to suffer the injury for which they are to assess damages, in laying down the rules which are to guide them in making such assessment.

3. The degree of care and prudence which must be exercised by a child to avoid the charge of negligence is measured by his capacity to see and appreciate danger whether he is under or over fourteen years of age, and in the absence of evidence to the contrary such capacity will be held to be that which is usual to children of his age and experience. Fourteen years is simply the age after which capacity is presumed and the burden of showing lack of it placed on the child.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Northumberland County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Plaintiff was a minor about fourteen years of age. He was employed at defendant's colliery as slate picker. At the time he received

NOTE.—Implements furnished an employé must be reasonably safe.

A master does not guarantee the safety of the implements furnished to his servants, and is not liable for injuries resulting from a defect in the implements furnished which could not be discovered by careful inspection or the application of appropriate tests. *Probst v. Delamater*, 1 Cent. Rep. 507, 100 N. Y. 266.

And in an action by an employé against his employer to recover damages for injuries incurred by reason of defects in the implements furnished, the burden of proof is on the party plaintiff to show defendant's negligence in the exercise of his duty to the employé in the selection of improper implements. *Painton v. Northern Cent. R. Co.* 83 N. Y. 7; *DeGraff v. N. Y. Cent. & H. R. R. Co.* 76 N. Y. 123; *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524.

The employé has a right to assume the suitable character of the machinery for all purposes for which it is furnished to be used. *Stevenson v. Jewett*, 16 Hun. 210; *Swords v. Edgar*, 59 N. Y. 28, 33; *Willy v. Mulledy*, 78 N. Y. 310; *Mehan v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 585.

Even where the knowledge of defects comes to the servant, it is a question for the jury to decide as to whether his negligence amounted to a contribution on his part, and it is only in a very extreme case that the court will decide it to be a matter of law. *McMahon v. Port Henry Iron Co.* 24 Hun. 48; *Sprong v. Boston & A. R. Co.* 58 N. Y. 56; *Laning v. New York Cent. R. Co.* 49 N. Y. 521, 536, 587; *Willy v. Mulledy*, *supra*; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 370; *Kain v. Smith*, 89 N. Y. 375.

It was the duty of the employer to furnish his employés, for use in the prosecution of his business, safe and suitable machinery and to keep the same in good repair. *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206; *Power v. New York, L. E. & W. R. Co.* 32 Hun. 415; *Ryan v. Fowler*, 24 N. Y. 415; *Kirkpatrick v. New York Cent. & H. R. R. Co.* 79 N. Y. 240; *Chapman v. Erie R. Co.* 55 N. Y. 585; *Malone v. Hathaway*, 2 Thomp. & C. 664; *Brickner v. New York Cent. R. Co.* 2 Lans. 517; *Filke v. Boston & A. R. Co.* 53 N. Y. 549; *Kain v. Smith*, 80 N. Y. 458, 13 L. R. A.

By encouraging employés to use the structure and machinery furnished, the master must use proper care and diligence to make such structure and machinery fit for use. *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 553, 21 L. ed. 738; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *O'Connor v. Adams*, 120 Mass. 427; *Reedie v. London & N. W. R. Co.* 7 Exch. 253; *Dynen v. Leach*, 26 L. J. Exch. 221; *Lawler v. Androsoggin R. Co.* 62 Me. 466; *Fifield v. Northern R. Co.* 42 N. H. 225; *Hard v. Vermont & C. R. Co.* 32 Vt. 473; *Swords v. Edgar*, 59 N. Y. 28; *Plank v. New York Cent. & H. R. R. Co.* 60 N. Y. 607; *Patterson v. Pittsburgh & C. R. Co.* 78 Pa. 389; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 175; *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 468; *Wedgwood v. Chicago & N. W. R. Co.* 41 Wis. 478; *LeClair v. First Div. of St. Paul & P. R. Co.* 20 Minn. 9; *Whalen v. Centenary Church of St. Louis*, 62 Mo. 326; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 673; *Malone v. Hawley*, 46 Cal. 409; *Batterson v. Wallace*, 1 Macq. H. L. Cas. 743; *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.

The master is simply bound to exercise reasonable care in selecting appliances for a servant's use. *Wood, Mast. & Serv.* 696; *Hackett v. Middlesex Mfg. Co.* 101 Mass. 101; *Ryan v. Fowler*, 24 N. Y. 410; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Warner v. Erie R. Co.* 39 N. Y. 408; *Faulkner v. Erie R. Co.* 49 Barb. 324; *Malone v. Hathaway*, 64 N. Y. 5; see *note*, 21 Am. Rep. 579; *Tinney v. Boston & A. R. Co.* 62 Barb. 218; *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Chapman v. Erie R. Co.* 55 N. Y. 579; *Laning v. New York Cent. R. Co.* 49 N. Y. 521; *Filke v. Boston & A. R. Co.* 53 N. Y. 550; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 579; *Wonder v. Baltimore & O. R. Co.* 32 Md. 411, 3 Am. Rep. 143; *Keegan v. Western R. Corp.* 8 N. Y. 175; *Story, Ag.* § 45 d, c; *Parsons, Cont.* 528; *Leonard v. Collins*, 70 N. Y. 90; *Allen v. New Gas Co.* 17 Moak, Eng. Rep. 420-424; *Hoffnagle v. New York Cent. & H. R. R. Co.* 55 N. Y. 608.

the injuries complained of he was engaged in driving a mule attached to a car hauling dirt from the breaker. The work required that he should ride on the car to the dump and unhitch the mule while the car was running on an up grade with enough momentum to carry it to the end of the dirt bank, the place where it was to be dumped. The mule was hitched to the car by means of a spreader and chain. The attachment was in front, beneath the car. Plaintiff claimed that the car was not properly constructed; that the attachment should have been at the side of the car, or if in front, it should have been in a more elevated position.

Further facts appear in the opinion.

Messrs. W. B. Faust, W. H. M. Oram, C. M. Clement and S. P. Wolverton, for appellant:

A boy fourteen years of age is competent to drive a mule hauling a dump car. It was therefore not negligence to put this plaintiff at such work. The average boy of fourteen years was fully competent to know the danger.

O'Keefe v. Thorn, 24 W. N. C. 379; *Rickert v. Stephens*, 133 Pa. 538; *Zurn v. Tellow*, 134 Pa. 213.

An infant of the age of fourteen years is presumed to have sufficient capacity to be sensi-

ble of danger and to have the power to avoid it, and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age.

Nagle v. Allegheny R. Co. 88 Pa. 35; *Strawbridge v. Bradford*, 128 Pa. 200; *Gillespie v. McGowan*, 100 Pa. 149; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 527; *Colgan v. West Philadelphia Pass. R. Co.* 4 W. N. C. 401.

It was not a question for the jury to determine as to which of the three kinds of hitches described by the witnesses should have been used at this colliery, nor whether it would have been a safe thing to employ a boy of this age in the use of any other hitch. The undisputed evidence was that boys of this age did this work with the style of hitch in evidence.

See *Faber v. Carlisle Mfg. Co.* 126 Pa. 889; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 625.

Where an employer has furnished his employes with tools and appliances, which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents.

Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276; *Allison Mfg. Co. v. McCormick*, 11 Cent. Rep. 396, 118 Pa. 519; *Drew v. Gaylord Coal*

Burden of proof is with the party alleging want of due care.

The burden is upon the plaintiff to establish negligence of the master and his own care. The presumption is that the master discharged his duty, and this presumption must be fairly overcome by proof of his personal fault or negligence. *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Wright v. New York Cent. R. Co.* 26 N. Y. 562; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573, notes 580, 581; *De Graff v. New York Cent. & H. R. Co.* 76 N. Y. 125; *Davis v. Detroit R. Co.* 20 Mich. 105, 4 Am. Rep. 364.

This presumption is not overcome and an inference of negligence indulged from the existence of a defect in the machine, although a servant may be injured in consequence of that defect. *De Graff v. New York Cent. & H. R. Co.* *supra*; *Wood, Mast & Serv.* §§ 358, 419; *Terry v. New York Cent. R. Co.* 22 Barb. 574; *Curran v. Warren Chem. & Mfg. Co.* 26 N. Y. 153; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Baulec v. New York & H. R. Co.* 59 N. Y. 856; *Hard v. Vermont & C. R. Co.* 32 Vt. 473.

It was for the plaintiff to prove that proper tests had not been applied, the law presuming that ordinary care had been exercised. *Wood, Mast & Serv.* § 419; *Rose v. Boston & A. R. Co.* and *De Graff v. New York Cent. & H. R. Co.* *supra*; *Henry v. Staten Island R. Co.* 81 N. Y. 373; *Wright v. New York Cent. R. Co.* and *Baulec v. New York & H. R. Co.* *supra*; *Hayes v. Forty-Second St. & G. St. Ferry R. Co.* 97 N. Y. 259.

To carry a case to a jury the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. *Johnson v. Hudson River R. Co.* 20 N. Y. 65; *Wilds v. Hudson River R. Co.* 24 N. Y. 480; *Reynolds v. New York Cent. & H. R. Co.* 58 N. Y. 248; *Sammon v. New York & H. R. Co.* 63 N. Y. 251; *Leonard v. Collins*, 70 N. Y. 90; *Hale v. Smith*, 78 N. Y. 480; *Hart v. Hudson River Bridge Co.* 84 N. Y. 56; *Rice-man v. Havemeyer, Id.* 647; *Owen v. New York Cent. R. Co.* 47 N. Y. 670; *Gibson v. Erie R. Co.* 63 N. Y. 449; *Brick v. Rochester, N. Y. & P. R. Co.* 21 N. Y. Week. Dig. 14.

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This duty not an absolute one.

The duty of the master to furnish safe, suitable and sound tools, machinery and appliances for the use of the servant in the performance of the work of the master, and to keep them in repair, is not an absolute one, and is satisfied by the exercise of reasonable care and prudence on the part of the master in the manufacture, selection and repair of such appliances. *Fuller v. Jewett*, 80 N. Y. 46; *Painton v. Northern Cent. R. Co.* 83 N. Y. 7; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 552; *Burke v. Witherbee*, 95 N. Y. 552.

When servant assumes risk.

The rule that a servant assumes the risk by continuing in the employment with knowledge of the defect applies even to a case where the defect was due to improper construction of the machine, or existed when the machine was furnished by the master; but there is a wide difference between its application to such a case and to a case like the present, where the defect was not one originally existing, but was one which resulted from the use of a good and safe machine. *Thomp. Neg.* 1017; *Prenate v. Union Iron Co.* 23 Hun. 523; *Pierce, Railroads*, 374; *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 632; *Malone v. Hathaway*, 64 N. Y. 5; *De Graff v. New York Cent. & H. R. Co.* 76 N. Y. 125; *Wood, Mast & Serv.* 737; *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Wonder v. Baltimore & O. R. Co.* 32 Md. 411; *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99; *Seaver v. Boston & M. R. Co.* 14 Gray, 466.

Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. *Clarke v. Holmes, 7 Hurst.* 8 N. 937. And see *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; 4 Wait, Act. & Def. 417. See notes to *Sherman v. Menomonee River Lumber Co. (Wis.)* 1 L. R. A. 173; *Louisville, N. A. & C. R. Co. v. Buck (Ind.)* 2 L. R. A. 520; *Lindvall v. Woods (Minn.)* 4 L. R. A. 788; *Louisville, N. A. & C. R. Co. v. Corps (Ind.)* 8 L. R. A. 636.

Co. (Pa.) 3 Cent. Rep. 889; District of Columbia v. McEligott, 117 U. S. 621, 29 L. ed. 946; *Lehigh & W. B. Coal Co. v. Hayes*, 5 L. R. A. 441, 128 Pa. 294; *Philadelphia & R. R. Co. v. Hughes*, 11 Cent. Rep. 822, 119 Pa. 303; *Marsden v. Haigh*, 14 W. N. C. 526; *Wanamaker v. Burke*, 2 Cent. Rep. 283, 111 Pa. 423.

Messrs. Voris Auten and C. R. Savidge, for appellee:

This case is ruled by *Rummel v. Dilworth*, 181 Pa. 509.

Mitchell, J., delivered the opinion of the court:

We have had occasion several times recently to lay down the rule that the test of liability of an employer to an employé for injury received in the course of the employment is not danger but negligence. The employer is bound to furnish machinery and appliances that are of ordinary character and reasonable safety, and the former is the conclusive test of the latter. Whatever is according to the general, usual and ordinary course, adopted by those in the same business, is reasonably safe within the meaning of the law. As said by our brother Green in *North-ern Cent. R. Co. v. Husson*, 101 Pa. 1, an employer is not liable "because a particular accident might have been prevented by some special device or precaution not in common use," and by our brother Williams, in *Iron Ship Building Works v. Nuttall*, 119 Pa. 149, 11 Cent. Rep. 662: "It is not enough that some persons regard it as a valuable safeguard. The test is general use." Nor can the jury be permitted to set up their judgment against the general customs of the business. *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618. In the present case it was in undisputed evidence that there were three kinds of hitches to the dumper in common use, each having its own peculiar advantages adapted to different conditions of the dirt bank. Much evidence was given as to whether it would not have been practicable and better, under the conditions of this colliery, to use the side hitch, or the box centre hitch. This question, though made the burden of the contest, was entirely irrelevant. It was exclusively for the determination of the defendants themselves. Where, as in the present case, the evidence shows clearly that several methods are in general use, the choice being a matter of judgment depending on the surrounding conditions, the owner has the absolute discretion to select according to his own judgment. The necessary control of his own business demands that this right shall be strictly maintained. Except to make another man's will for him after his death, there is nothing which a jury is more apt to think it can do better than the owner, especially under the stress of a claim for damages by one who has been injured, than to say how another man's business ought to have been managed, and nothing in which juries should be held more strictly and unflinchingly within their proper province. As already said, there was a large amount of evidence as to the superiority of the side or upper hitch, the admission and discussion of which tended naturally to lead the jury 13 L. R. A.

to suppose that they might find a verdict on their own judgment which was the best, and this was put explicitly before them by the charge that "the proper question for you to determine is as to which of these hitches was the proper hitch for these parties to make use of at this colliery." This was giving the jury an entirely erroneous view of the point of the case and of their province in regard to it. They should have been told that if they found from the evidence that the lower hitch was the one in general use upon dirt banks with an up grade there was no negligence in the use of that hitch by the defendants. The ninth assignment of error must be sustained.

As the case is to go back for another trial, we may also say that the measure of damages quoted in the eighth assignment is somewhat vague, and the expression "you would not be willing to lose your arm for the world, or for the wealth of a Vanderbilt," though followed by the caution that that would be no test of value, was an undesirable form of putting the matter to the jury and tended to inflame damages in a class of cases where juries are prone enough to measure verdicts by sympathy with the injured more than by regard for the strict right of the parties.

The error complained of in the second and fourth assignments is in brief the charge that while the law presumes a boy of fourteen to be capable of appreciating danger and therefore responsible for his own negligence, yet he is not to be held to the same degree of prudence as a man of mature years. It is notable that in the legion of cases upon negligence in our books this particular question has received little attention. But the principles upon which it must be settled are firmly established. All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same, to wit: the average capacity of others in his condition. That this is the rule as to children under fourteen is held in all our cases from *Rauch v. Lloyd*, 31 Pa. 358, to *Sandford v. Heatonville M. & F. Pass. R. Co.* 136 Pa. 84. That it also applies to infants over fourteen follows from the same reasoning, and is expressly ruled in *Oakland R. Co. v. Fielding*, 48 Pa. 320. In that case plaintiff's son, a youth between sixteen and seventeen, while running with a fire engine stepped into a hole in the street, fell and was run over. The judge charged the jury, upon the point of contributory negligence, that they must consider the age, strength, size, and activity of the plaintiff's son, and if it was the habit

of boys of his age and capacity to run with the engines to a fire, and to assist in drawing them, the jury may take the fact into consideration in determining whether or not the plaintiff's son was guilty of negligence or misconduct; the plaintiff's son was bound to exercise the same degree of caution, prudence, and discretion that other boys of his age and capacity ordinarily exercise. If he did this he was exercising ordinary care and prudence, but if not he was guilty of negligence." This was affirmed upon the reasons given by the judge below.

Nagle v. Allegheny R. Co., 88 Pa. 35, much relied on by appellant, is in entire harmony with the foregoing. In that case a boy of fourteen ran across a railroad track without looking, and the court held that this was negligence *per se*, and sustained a nonsuit. "At fourteen," says Paxson, J., "an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

In the present case there was evidence that the unhitching of a dumper of this kind was manifestly dangerous, and on the other hand that it was entirely safe and commonly performed by boys. It is quite clear that the amount of danger depended very largely on the length and weight of the chain, the condition of the track and the speed of the mule. These factors made up a varying standard which was necessarily for the jury to determine, and the judge was right in leaving it to them, and in the rule of law which he gave for their guidance.

The other points were based upon the assumption that the evidence was undisputed, and included a peremptory direction in defendant's favor. The learned judge was right in refusing them for that reason.

Judgment reversed and venire de novo awarded.

Joseph McVEY *et al.*

v.

John H. BRENDEL, *Appt.*

(.....Pa.....)

1. The International Cigar Makers' Union, the object of which is "to promote the mental, moral, and physical welfare of its members," is neither a manufacturer, dealer, nor trader, so as to be entitled to protection in the use of a trade-mark.

2. Equity will not protect a labor union in the use of a nontrade-mark label which it distributes to all its members to be placed upon their work, the object of which is to discriminate between union and nonunion labor and to coerce the latter into joining the union by recommending to the public the goods on which such labels appear because made by union labor,

and denouncing all other goods as the product of "inferior, rat shop, cooley, prison, or filthy tenement-house workmanship."

(October 5, 1891.)

APPEAL by defendant from a decree of the Court of Common Pleas for Lancaster County enjoining him from making use of certain devices or labels upon cigars manufactured in his shop. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. D. G. Eshleman and N. Franklin Hall*, for appellant:

The label in question does not fall within the definition of a trade-mark, and therefore cannot be protected as such.

Unless the person be a trader, that is, unless he or she is engaged in mercantile business of some kind, a title to a trade-mark could not be acquired.

Browne, Trade-marks, §§ 53, 54; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581.

A trade-mark is a word or device adopted and used by the manufacturer or vendor of goods to designate the origin and ownership of his goods.

Burke v. Cassin, 45 Cal. 487. See also *Metcalf v. Brand*, 86 Ky. 331, 343; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 52, 25 L. ed. 994.

If it appears that the device, mark, or symbol was adopted and placed upon the article for the purpose of indicating its class, grade, style, or quality, or for any purpose other than a reference to or indication of its origin or ownership, it cannot be upheld as a trade-mark.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 31 Fed. Rep. 776; *Laughman's App.* 5 L. R. A. 599, 128 Pa. 19.

A trade-mark is the exclusive right to use some name or symbol as applied to a particular manufacture or vendible commodity by the owner.

Hall v. Burrows, 4 DeG. J. & S. 150, 158; *Amoskeag Mfg. Co. v. Trainer*, *Metcalf v. Brand*, and *Burke v. Cassin*, *supra*; High, Inj. 1063.

A right to a trade-mark can be acquired only by him who puts merchandise or a valuable commodity marked or distinguished by his particular mark on the market.

Leather Cloth Co. v. American Leather Cloth Co. 4 DeG. J. & S. 137, 142; *McAndrew v. Bassett*, 4 DeG. J. & S. 380, 386; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 523, 533; *Farina v. Silverlock*, 6 DeG. M. & G. 214; *Ainsworth v. Walmsey*, L. R. 1 Eq. 518, 524; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307, 314; *Hirst v. Denham*, L. R. 14 Eq. 542, 549; Kerr, Inj. 475.

Until the thing is actually on the market, marked by the person intending to acquire title, no property in the mark arises.

Lawson v. Bank of London, 18 C. B. 84; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307, 316.

The jurisdiction of courts of chancery in the protection of trade-marks rests upon property,

NOTE.—See notes to *Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 44; *Cigar Makers Prot. Union No. 98 v. Conhaim* (Minn.) 3 L. R. A. 125; *Laughman v. Piper* (Pa.) 5 L. R. A. 599; *Gato v. El Modelo Cigar* 13 L. R. A.

Mfg. Co. (Fla.) 6 L. R. A. 823; *Weener v. Brayton* (Mass.) 3 L. R. A. 640; *Alft v. Radam* (Tex.) 9 L. R. A. 145; *New York & R. Cement Co. v. Copley Cement Co. (Pa.)* 10 L. R. A. 833.

and fraud in the defendant is not necessary for the exercise of that jurisdiction.

Hall v. Barrows, *supra*; Bispham, Eq. 4th ed. § 456, p. 515; *Schneider v. Williams*, 5 Cent. Rep. 255, 44 N. J. Eq. 391. See also *Allen v. McCarthy*, 87 Minn. 349; *Cigar Makers Prot. Union v. Conhaim*, 3 L. R. A. 125, 40 Minn. 243; *Weener v. Brayton*, 8 L. R. A. 640, 152 Mass. 101.

Mr. M. Brosius, for appellees:

It is not important whether this label is called a trade-mark, a trade label, a trade sign, or trade device. The purpose of it is to identify the origin and manufacture of goods that are sold in the markets of the country, and it is entitled to protection.

Browne, Trade-marks, § 521; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 53, 25 L. ed. 994; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 57 Barb. 526; *Heinz v. Brueckmann*, 184 Pa. 495; *Carson v. Ury*, 89 Fed. Rep. 777; *Colton v. Thomas*, 7 Phila. 257.

Anyone who makes or manufactures goods or commodities for the market without regard to the ownership of the raw material or of the completed commodity has a right to the use of a sign, mark, or symbol to identify his manufacture—to the end that he may have the benefit of any superiority he may have given it, derived either from superior skill or the place or conditions of the manufacture.

Re Sykes, 43 L. T. N. S. 626.

The trade-mark or sign may be used to indicate, not the owner, but some other person who has expended labor on the article.

Sebastian, Trade-marks, 8d ed. p. 4. See *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408; *Brace v. Evans*, 5 C. C. R. 183.

Plaintiffs and the other members of this association on behalf of whom these plaintiffs sue have a property right in this label or trade-mark, and are entitled to apply to the court to interfere by injunction.

Todd v. Brenner, 16 Cigar Makers Off. Jour. 10; *Maher v. Iowa Fruit & P. Co.* Id. 10; *Kammerer v. Stapleton*, Trade-mark Laws and Decisions issued by C. M. I. Union of America, p. 34; *Strasser v. Moonelis*, 11 Cent. Rep. 461, 108 N. Y. 611; *Blueie v. Simon*, 19 Abb. N. C. 88; *People v. Fisher*, 50 Hun. 552; *Meyer v. Hook*, Trade-mark Laws and Decisions, issued by C. M. I. Union of America, p. 26; *Cigar Makers Union v. Bamberger*, Id. 13; *Cigar Makers Union v. Kuttner*, Id. 11; *Cigar Makers Union v. Bernard Link*, Id. 9.

Including the above rulings the label of the Cigar Makers' International Union of America has been protected by injunctions and criminal convictions by the lower courts in the following States, some of the decisions being by lower courts and not reported: Ohio (*Cigar Makers Union v. Miller Bros*); *State v. Lawler*, *Cigar Makers Union v. Bamberger*, *supra*); Maryland (*Cigar Makers Union v. Bernard Link*, *supra*); New York (*Cigar Makers Union v. Simon*; *Cigar Makers Union v. Moonelis*; *People v. Fisher*, 14 Wend. 9); Illinois (*Cigar Makers Union v. Berriman*); Missouri (*Cigar Makers Union v. Ury*; *Cigar Makers Union v. Schenbeck*); Nebraska (*Cigar Makers Union v. Wilson*; *Cigar Makers Union v. Gloss*); Rhode Island (*Cigar Makers Union v. Wolchouse*); Michigan (*Cigar Makers Union v. Kuttner*, 13 L. R. A.

supra; *Cigar Makers Union v. Reinhart*); Minnesota (*Cigar Makers Union v. McCarthy*); Wisconsin (*Cigar Makers Union v. Stapleton*); Connecticut (*Cigar Makers Union v. Weil*); Iowa (*Cigar Makers Union v. Hank*; *Cigar Makers Union v. Iowa Fruit Co.*); Massachusetts (*Cigar Makers Union v. Atlantic Cigar Co.*); California (*Cigar Makers Union v. Poska*; *Cigar Makers Union v. Curtis, Dixon & Co.*; *Cigar Makers Union v. Ryan*); Oregon (*Cigar Makers Union v. Gunst*); Pennsylvania (*Cigar Makers Union v. Brendle*); Texas (*Cigar Makers Union v. Phillipson*); Canada (*Cigar Makers Union v. Brenner*).

Williams, J., delivered the opinion of the court:

The question presented by this appeal is a new one; at least it is new in this State. It involves important consequences to employers and employes, and it touches the rights and obligations of workmen in their relation to each other. The facts upon which the question is presented as found by the learned master are as follows. The Cigar Makers International Union of America is a voluntary, unincorporated association of workmen organized, as its constitution affirms, "for promoting the mental, moral, and physical welfare of its members." It has devised and registered the label which is the subject of this controversy, and claims an exclusive right to control its use. The office of the label is to advise the public that the cigars in the box which bears it were made by members of the union. Every member of the union in the United States and Canada is entitled to have this label upon the cigars made by him. The plaintiffs represent neither the Cigar Makers' International Union, the alleged owner of the label, nor Strasse, the officer whose name appears upon it, but a subordinate local organization known as No. 126, located at Ephrata, Lancaster County, Pa. No. 126 did not devise or register the label and does not claim to own it, but asserts the ownership of the international organization to which it is a tributary and whose jurisdiction it acknowledges. The defendant is a manufacturer whose shop is, as the learned master finds, "a strict union shop" belonging to Union No. 126. His workmen, ten or twelve in number, are members of the union. He as the owner of a union shop, and his men, by virtue of their membership, are entitled to the use of the label on the cigars made by them. He procured a quantity of imitation or counterfeit labels, because, as he alleges, he was refused the genuine when he applied for them, and avowed his purpose to use them. The plaintiffs then filed a bill and asked the court to enjoin the defendant against the use of the imitation labels for any purpose whatever. Upon these facts the master recommended and the court made the decree asked for. The grounds upon which an injunction will issue to restrain the infringement or appropriation of a trade-mark are well settled. They are, first, the protection of property in a trade-mark; and second, the prevention of fraud by an imitator. In either case it issues at the suit and for the protection of the owner of the device or trade-mark infringed. The plaintiffs represent Union No. 126, which has no other

ownership in, or control over, the International Union's label than any others of the hundreds or thousands of subordinate unions scattered over the United States and the Canadas. If it can maintain this bill, then each and every subordinate union can do the same thing, although no one of these devised, registered, or claims to own the trade-mark, and may prevent its use by workmen and in shops which, under the general rules of the international body are entitled to use it. But we are not disposed to impale this case upon what may be thought to be a technical point. On the other hand we will consider whether the International Cigar Makers' Union is a trader, whether the label in question is a trade mark, and whether upon any ground of equitable relief the plaintiffs are entitled to consideration in a court of equity. The first question is disposed of by the learned master upon the pleadings. The organization that devised, registered, and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used. The second question would seem to go with the first. Trade-marks are provided for by the Act of Congress of July 8, 1870. Registration is made under it by furnishing a statement to be recorded in the patent office, showing "the names of the parties applying for the registration, with their residences and places of business; the class of merchandise, and a description of the goods composing the class, by which the trade-mark has been or is intended to be appropriated, together with a description of the trade-mark and facsimiles of it." This provision of the Act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business and its appropriation to a particular "class of merchandise" produced or sold by the parties making the registration. Any device, figure, or inscription which seems to indicate the personal origin of the goods may be adopted as a trade-mark. *Laughman's App.* 128 Pa. 19, 5 L. R. A. 599. Such trade-mark will be protected against fraudulent imitation, whether registered or not. *Hoyt v. Hoyt*, ante, 348, decided at the present term.

Registration affords evidence of ownership. Its object is to secure to the maker or dealer the fruits of his skill, industry, and reputation by a positive legislative provision. *Pratt's Appeal*, 117 Pa. 411, 10 Cent. Rep. 596. But the Act of Congress referred to makes it clear that it is a maker or a dealer only who is entitled to protection, for it declares that the commissioner of patents "shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark." Now if the Cigar Makers' International Union was a business organization engaged in making cigars for sale, it could adopt and use a trade-mark in its business and acquire property in it; but it is not a business organization. It neither makes nor sells cigars but directs its attention to cigar makers, and seeks "to promote the mental, moral, and physical welfare of its members." These are worthy objects. They deserve and should receive the encouragement and support of all right-minded men. It is obvious, however, that they are personal and social objects, not commercial ones. They do not look toward

the production or sale of any class or quality of cigars or tobacco, but towards the personal elevation and comfort of cigar makers. I conclude, therefore, that the Cigar Makers' International Union of America is neither a trader within the meaning of the common law, nor within the purview of the Act of Congress. Not being a trader in any sense, it can have no distinctive trade-mark. Registration under such circumstances is not authorized by the Act of Congress, and if made confers no title, and gives no standing ground in a court of law or equity. I come now to inquire whether the adoption of the label for the purposes set forth in the bill gives to the International Union any ground for equitable relief. We have seen that this label is not a trade-mark, and that the union is not in a business that enables it to adopt or acquire a trade-mark. Still it is urged that as the defendant was about to use an imitation of the label he should be enjoined whether the label is a trade-mark or not. But what is this label? And why should it be protected? It purports to be "issued by the authority of the Cigar Makers' International Union of America" to the person who uses it. The name of the workman who made the cigars does not appear upon it, nor the owner or location of the shop at which they are made. It does not point out the personal or the local origin or ownership of the goods on which it is placed. On the other hand, it issues to every one of the many thousands of workmen who make up the membership of the union, and it certifies, in the name of the union, that the cigars in the box on which it is placed were made "by a first-class workman, a member of the Cigar Makers' International Union." Who this first-class workman was, where he lived, for whom he worked, the label does not tell. He is indorsed as a "first-class workman" because he is "a member" of the union. As to all who are not members, the label proceeds to define the position of the organization that issues it by describing their work as "inferior, rat shop, cooley, prison or filthy tenement-house workmanship." The label then proceeds in these words: "Therefore we recommend these cigars to all smokers throughout the world." The value of this label is in the recommendation and the reasons given for it. The label is thus seen to be something quite different from a trade-mark in its character, its purpose and the manner of its use, viz., a device to distinguish between union and non-union workmen, and to discriminate against the work of the latter. It says to the public in spirit and in effect: "Buy the cigars that bear this label because they were made by a member of this union. Do not buy those not bearing it because they were made by workmen who do not belong to us. Such cigars are the product of 'inferior, rat shop, cooley, prison, or filthy tenement-house workmanship.'" It is the request of a powerful labor organization to "all smokers throughout the world" to take sides with it in its contest with those who are outside of its membership by refusing to buy the work of such persons. It is an attempt to use the public as a means of coercion upon them, compelling them to unite with the union in order to find a market for their goods or their labor. Right here let us distinguish broadly between an ob-

ject and the means employed to reach it. Organization is the privilege, perhaps I might say the duty, of labor: and an organization seeking to promote "the mental, moral, and physical welfare of its members," by securing fair wages, steady work, and the comforts of home for them, occupies a legitimate field of usefulness and is capable of doing great good to its members and to the public. The Cigar Makers' Union is no doubt seeking to do such a work and accomplishing much in that direction. What we are now considering is one of the means it employs to increase its membership and to hurt workmen who do not belong to it. The real question now before us is whether the international organization of workmen shall have the help of a court of equity in making war upon all cigar makers who do not belong to it, and in driving their work out of the market by representing it as coming from "inferior rat shops, from coolies, prisoners, or filthy tenement houses." A "first class workman" is one who does first-class work, whether his name is on the rolls of any given society or not. Filthiness and criminality of character depend on conduct, not on membership of the union. Legitimate competition rests on superiority of workmanship, and business methods, not in the use of vulgar epithets and personal denunciation. When the Cigar Makers' International Union of America stigmatizes those who do not belong to it and seeks to induce the public to discriminate against them and their work by covering them with opprobrious epithets, it is not engaged in "promoting the mental, moral, and physical welfare of its members," but in trying to hurt and destroy those who do not choose to become members. While the courts would aid the former purpose in all ways within their power, they cannot help the latter. We cannot justify the defendant's

conduct. There is no rule of morals or of business upon which he can defend himself in the preparation and use of spurious labels. But it is not every wrong action that a chancellor will enjoin, because the purpose of an injunction is to protect the plaintiff in the exercise and enjoyment of a clear legal right, for an infringement of which the law does not afford an adequate remedy. If, therefore, the right of the plaintiff is doubtful, equity will withhold its aid. The plaintiff in this case has no trade-mark to protect and no right to a decree resting on the law relating to trade-marks. What they have is a label which recommends the purchase of cigars made by union men, and warns against the purchase of all others as inferior and unwholesome because made in "rat shops, or prisons, or by coolies, or tenants of filthy tenement houses." Their right to use such a label may well be doubted, whether the question be treated as one of morals or of law. But the plaintiffs come into a court of equity and seek to enlist the conscience of a chancellor in their behalf. They must come, with clean hands, with a conscientious regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court. They do come in this case with the avowed purpose to do harm to non-union men, to prevent the sale of their work, to cover them with opprobrium; and they ask a court of equity to say that they have a right to do it. We decline to say so.

The decree of the court below is reversed, the injunction dissolved and the bill dismissed.

As we cannot approve the conduct of the defendant, we shall not award him costs, but direct that each party pay the costs it has made, and that the fees of the master be paid in equal parts by the plaintiffs and the defendant.

MARYLAND COURT OF APPEALS.

Skipwith WILMER, Assignee, etc., of the
Druid Mills Manufacturing Co., *Appt.*,

v.
Douglas H. THOMAS *et al.*

(.....Md.....)

The good-will and all trade-marks, not personal in their character, of an insolvent manufacturing company, will pass to a purchaser at a sale of the plant by the

assignee for benefit of creditors, under an assignment transferring all the property of whatever kind owned by the insolvent, and an advertisement of sale describing the property as "old established and valuable cotton duck mills."

(June 17, 1891.)

APPPEAL by the assignee for benefit of creditors of the Druid Mills Manufacturing Company from an order of the Circuit Court for Baltimore City setting aside his report of

NOTE.—Good-will regarded as property.

Good-will is a firm asset. Whether it survives to a partner has not been uniformly decided. After a voluntary dissolution, each partner has a right to use the old firm name, unless otherwise agreed. It is the subject of sale, like other personality. See *Barber v. Connecticut Mut. L. Ins. Co.* 15 Fed. Rep. 312, 315-322; 14 Am. Law Reg. N. S. 1-11, 329-341, 649-650, 713-725; 13 Cent. L. J. 162-165; 19 Cent. L. J. 362-368; 19 Alb. L. J. 502-503; 3 Kent, Com. 64; 1 Pars. Cont. 153; *Musselman's App.* 62 Pa. 81; *Hammond v. Douglas*, 5 Ves. Jr. 539; *Crawshaw v. Collins*, 15 Ves. Jr. 218, 227; *Anderson*, Law Dict. title *Good-will*.

It is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trade. If the restric-

tion as to time is held to be illegal because extended beyond the period of the party carrying on the trade himself, the value of such good-will, considered in these various points of view, is altogether destroyed. *Hitchcock v. Coker*, 6 Ad. & El. 438, 446.

A good-will in business is recognized as property in law, and is protected as such. *Howe v. Searing*, 6 Bosw. 358, 368.

The good-will of a concern (so far as it is local, and arises from an established place of business), while it cannot well be divided, may be sold by assignees. *Allen v. Woonsocket Co.* 11 R. I. 220. See *Crutwell v. Lye*, 17 Ves. Jr. 386; *Meilersh v. Keen*, 27 Beav. 236, 28 Beav. 453; *Turner v. Major*, 3 Giff. 442.

The good-will survives to the remaining partner,

sale of the cotton manufacturing plant of the insolvent. *Reversed.*

The facts are stated in the opinion.

Messrs. Randolph Barton and Skip-wilmer, in propria persona, for appellant.

**Messrs. R. D. Morrison, Howard Mun-
nikhuysen and Nicholas P. Bond,** for
appellees:

The deed conveyed "all its estate and prop-
erty of whatever kind and wherever situated."

The good-will and business, not being ex-
pressly mentioned, did not pass.

Lord Eldon, in *Crutwell v. Lye*, 17 Ves. Jr. 336, said the "good-will" was "nothing more than the probability that the old customers would resort to the old place;" but it has been held that this is too narrow a view, and that "it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

Churton v. Douglas, Johns. V. C. 174, 188; *Menendez v. Holt*, 128 U. S. 522, 32 L. ed. 528.

Judge Story defines it to be "the benefit or advantage, which is acquired by an establish-
ment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or neces-

sities, or even from ancient formalities or prejudices."

Story, Partn. § 99. See *Smith v. Gibbs*, 44 N. H. 348; *Boon v. Moss*, 70 N. Y. 478; *Morgan v. Perhamus*, 86 Ohio St. 522; *Bell v. Ellis*, 33 Cal. 624; *Howe v. Searing*, 19 How. Pr. 26.

Included in the sale of a "good-will" is the right to prevent the vendor from interfering in the enjoyment of the purchase by resuming business in the same locality (*Dwight v. Ham-
ilton*, 118 Mass. 175; *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596; *Williams v. Wilson*, 4 Sandf. Ch. 379, 7 L. ed. 1141; *Churton v. Douglas*, *supra*); and to prevent the vendor from using personal efforts to induce the old customers to leave the vendee. *Ibid.*

Can it be held that a firm, individual, or corporation, which by misfortune is compelled to make an assignment for the benefit of cred-
itors, intends to, or does, give to its assignee the right to make a sale carrying with it these consequences?

Alvey, Ch. J., delivered the opinion of the court:

The only question presented on this appeal is whether the purchasers of the Druid Mills manufacturing property, at the sale thereof by the trustee, under and by virtue of a deed of assignment made by the manufacturing company for the benefit of creditors, will acquire, with the property purchased by them, the right to the good-will and business of the insolvent corporation, including the brand or trade-mark used by the company to mark the goods manufactured by it before the assignment. By the deed of assignment

and a sale of it cannot be compelled by the repre-
sentatives of the deceased partner. It is not part-
nership stock of which the executor may compel a
division, but belongs of right to the survivor.
Howe v. Searing, 10 Abb. Pr. 270, 19 How. Pr. 17.
See *Dougherty v. Van Nostrand*, Hoffm. Ch. 68, 6 L.
ed. 1066.

The good-will of a business may be sold the same
as any other personal property. See *Muselman's*
App. 62 Pa. 51; *Howe v. Searing*, 19 How. Pr. 14;
Dougherty v. Van Nostrand, Hoffm. Ch. 68, 6 L. ed.
1066; *Partridge v. Menck*, 2 Barb. Ch. 101, 5 L. ed.
572; *Pearson v. Pearson*, L. R. 27 Ch. Div. 145.

Or it may be the subject of a contract of sale.
See *Cruess v. Fessler*, 39 Cal. 336; *Holmes v. Holmes*,
37 Conn. 278; *McFarland v. Stewart*, 2 Watts, 111;
Palmer v. Graham, 1 Pars. Eq. 478.

Where a partner sells out all his share in the
business, the presumption is that he meant to
include the good-will. See *Churton v. Douglas*,
Johns. V. C. 174.

Where a trader sells for value his business and
good-will to another, he may be restrained from
soliciting his old customers to deal with him, as if
no sale had been made. See *Hall's App.* 60 Pa. 458;
McCord v. Williams, 96 Pa. 78; *Ginesi v. Cooper*, L.
R. 14 Ch. Div. 603. Disapproved, however, on the
point that he might be restrained from dealing
with his old customers, in *Leggott v. Barrett*, L. R.
15 Ch. Div. 306.

Must pertain to an established business.

While the good-will of a business is property that
may be sold or mortgaged, yet it is property of a
very peculiar and exceptional character. It is
intangible property which, in the nature of things,
can have no existence apart from a business of
some sort that has been established and carried on
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at a particular place; and it cannot be sold by
judicial decree, or otherwise, unless it be in con-
nection with a sale of the business on which it
depends. Story, Partn. § 99; *Robertson v. Quid-
dington*, 28 Beav. 529; 3 Pom. Eq. Jur. § 1355, and
notes; *Smith, Merc. Law*, 188.

Is a fit subject of transfer.

While it has been held that good-will is not a
transferable or partnership asset (*Howe v. Searing*,
19 How. Pr. 14, decided in 1860), the great weight of
modern authority is in favor of the contrary rule.
Williams v. Wilson, 4 Sandf. Ch. 379, 7 L. ed. 1141;
Marten v. Van Schaick, 4 Paige, 479, 3 L. ed. 523;
Case v. Abeel, 1 Paige, 401, 3 L. ed. 693; *Lewis v.*
Langdon, 7 Sim. 421; *Banks v. Gibson*, 11 Jur. N. S.
680; *Johnson v. Helleley*, 34 Beav. 63; *Macdonald v.*
Richardson, 1 Giff. 81; *Dougherty v. Van Nos-
trand*, 1 Hoffm. Ch. 68, 6 L. ed. 1066; *Muselman's*
App. 62 Pa. 81; *McFarland v. Stewart*, 2 Watts, 111;
Holden v. McMakin, 1 Pars. Eq. 270; *Willett v.*
Blanford, 1 Hare, 271; *Wedderburn v. Wedderburn*,
22 Beav. 84; *Sheppard v. Boggs*, 9 Neb. 268; *Bin-
inger v. Clark*, 10 Abb. Pr. N. S. 204; *Mellersh v.*
Keen, 28 Beav. 453; *Bradbury v. Dickens*, 27 Beav.
53; *Austen v. Boys*, 2 DeG. & J. 626; *Turner v.*
Major, 3 Giff. 442.

But a mortgage of the "machinery, type, presses,
cases, furniture, paper, forms and tools" of a news-
paper company, together with the "good-will" of
its business, cannot be foreclosed as to the good-
will after all the tangible property covered by the
mortgage has been alienated, worn out or de-
stroyed, and the corporation has become consoli-
dated with another newspaper corporation. *Met-
ropolitan Nat. Bank v. St. Louis Disp. Co.* 36 Fed
Rep. 722.

dated the 12th of December, 1890, the Druid Mills Manufacturing Company, an insolvent corporation, assigned and conveyed to the appellant, as trustee, "all its estate and property, of whatever kind and wherever situated," in trust for the benefit of creditors, with power to the trustee to sell either at public or private sale, and on such terms as might seem best for the interest of the creditors. The trustee advertised the property for sale at public auction, and in the advertisement he described the property as the old-established and valuable cotton-duck mills, at Woodberry, well known as "Druid Mills," containing about 12,000 spindles and 200 looms, in full operation, and adding, after full description of the particulars of the plant, "that the machinery is of the most modern, and is constructed for the manufacture of all numbers, widths, and weights of cotton duck, awnings, stripes, yarns, twines, etc.,—all the well-known 'Druid Mills' brand." The trustee sold the property to the appellees under this advertisement, and according to the foregoing description; and in his amended report of the sale he states that he "offered at public sale the well-known Druid Mills, as then in full operation and a going concern, with all the real and leasehold property, machinery, and plant, together with the good-will and business of the said Druid Mills Manufacturing Company of Baltimore County, subject to the operation and effect of a certain mortgage described in the advertisement of sale; and that he then and there sold the same to Douglas H. Thomas, Christian Devries, and Charles C. Homer, as a committee, representing the creditors of the said company, at and for the sum of \$120,000, that being the highest bid." These purchasers, upon the report being made, came into court, and, while admitting the facts stated in the trustee's amended report, objected to the ratification of the sale upon two grounds: (1) that the deed of trust or assignment did not assign or transfer to the trustee the right to sell and convey to the purchasers of the Druid Mills property the exclusive right to continue the business, and to the brand or trade-mark of the company; and (2) that the advertisement of sale did not distinctly state that the brand and trade-mark of the company would be offered for sale. Upon these exceptions, an order *pro forma* was passed setting aside the sale as reported, and the trustee has appealed. That the good-will of an established business, as also the brands or the trade-marks used to distinguish and specially denote the product or manufacture of the establishment, are property, and form the subjects of contract and sale, is a principle too well settled to need the citation of authorities for its support. Indeed, it is often the case that a large portion of the intrinsic marketable or assessable value of a manufacturing establishment consists in the good-will maintained by it, and in the brands or trade-marks to which it has acquired an exclusive use, by which to denote the origin and make of its goods when placed upon the market. And so important a contribution to the value of the establish-

ment are these elements or accessories of the business that in the sale or assignment of such manufactory or business establishment, to be continued as formerly, the sale or transfer of such an establishment ordinarily carries with it, by reasonable intentment or implication, the right to such good-will and trade-marks, as incidents to or accessories of the business carried on by the establishment. This would now seem to be settled by a great preponderance of authority, though after a considerable conflict of judicial opinion.

This court, in the case of *Witthans v. Mattfeldt*, 44 Md. 805, has said that, where a trade-mark is used to designate the place and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. And the Supreme Court of the United States, in *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. ed. 769, 770, in speaking of the right to dispose of a trade-mark, in connection with a business establishment, said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by its original designer. Such is the purport of the language of *Lord Cranworth* in the case of *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 528. See also *Ainworth v. Walmsley*, 35 L. J. Ch. 355, and *Hall v. Barrow*, 10 Jur. N. S. 55." And, in addition to the cases thus referred to, see the recent cases of *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997, and *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570.

The trade-mark or brand used by the Druid Mills Manufacturing Company was simply "Druid Mills" imprinted upon their goods, and, while there is no question made as to whether or not such mark or imprint constitutes a legal brand or trade-mark such as will be protected, the questions made by the exceptions are whether that or any other valid brand or trade-mark used by the company to designate and identify its manufacture passed to the trustee by the deed of assignment; and, if it did pass, then, whether, by the terms of the advertisement of sale, the right

to such brand or trade-mark passed to the purchasers of the manufacturing establishment as sold by the trustee.

The deed of assignment transferred to the trustee all the property of the assignor of whatever kind owned by it. This was certainly broad enough to include the property in the good-will of the business, and in the brand or trade-mark of the company. All the property in the business and the plant were assigned, and we can have no doubt but that it was intended that the important accessories of good-will and the brand should pass. It can hardly be supposed that it was intended that the manufacturing establishment should be sold by the trustee without them, as such sale could not be otherwise than greatly to the loss and prejudice of the creditors of the company. It was manifestly the intention and desire of the assigning company that the manufacturing establishment should be sold by the trustee to the best advantage, and to be operated by the purchasers; and the fact that the good-will and trade-mark or brand were not mentioned *eo nomine* in the deed of assignment in no manner excludes the construction that they did pass to the trustee; for, as laid down by Upton in his work on the Law of Trade-marks, p. 53, "there can be no doubt that a contract, by which a manufacturer disposes absolutely of his business, and vests in another the right to manufacture the goods which he has before produced, and which have become known in the market by a distinguishing trade-mark, though it were silent upon the subject of such trade-mark, by necessary implication vests in the purchaser the exclusive right to its use as it was before used." The terms of transfer employed in the assignment before us are not less comprehensive than those employed in Bankrupt or Insolvent Laws, which declare what property of the bankrupt or insolvent shall pass to the assignee; and yet, in cases occurring under those laws, it has been repeatedly held that the right to a trade-mark, not personal in its character, but which denotes simply the place or establishment at which the goods are manufactured, passes to the assignee. As an instance of this, we may refer to the case of *Warren v. Warren Thread Co.*, 134 Mass. 247. The Insolvent Law of Massachusetts provided

that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed." Upon this provision of the Insolvent Law the supreme court of that State held that, as the trade-marks there involved were designs or symbols designating the place or the establishment at which the thread was manufactured, and not implying any peculiar personal skill in the manufacturer designing them, they passed to the assignee of the insolvent. In that case the court said: "Under this Statute, all the plaintiff's property which he could assign passed to his assignee. It includes, *ex vi termini*, his manufacturing establishment, machinery, tools, and fixtures, manufactured goods, and the right to use the trade-mark in connection with the establishment and goods." And, if a trade-mark will pass in such case, there can be no reason why it should not pass in a case such as the present, where the object of the assignment is virtually the same as that provided for by the Insolvent Law, and where the terms of the assignment are equally comprehensive as those declaring the effect of the assignment under that law. There are many cases to the same effect as that just referred to, but to which we need only refer by name. *Hudson v. Osborne*, 39 L. J. Ch. 79; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217. And having determined that the deed of assignment, by legal operation, passed the good-will of the business, with the brand or trade-mark thereof, with the right and power in the trustee to sell the same with the manufacturing establishment, we can perceive no difficulty in holding that, under the advertisement of sale, the trustee sold the good-will and trade-mark of the business to the same full extent as they came to him under the assignment. They formed part, though but incidents, of the property assigned to him; and the purchasers, upon the ratification of the sale, will acquire the exclusive right to such good-will and trade-mark of the business as fully and in like manner as the same were used and enjoyed by the manufacturing company for the assignment. It follows that the *pro forma* order appealed from must be reversed. *Order reversed*, and cause remanded.

TEXAS SUPREME COURT.

George C. ALTGELT, *Appt.*,
v.
CITY OF SAN ANTONIO *et al.*
(.....Tex.....)

1. A city with power to provide for itself a water supply cannot contract to give a water company the exclusive right to furnish such supply for a term of years.

2. A taxpayer cannot maintain a suit to set aside a city's water supply contract although it is void for granting a monopoly, unless he shows injury to himself as a taxpayer,—as, that he is thereby compelled to get water from the grantee or is prevented from getting it on better terms.

3. A city cannot exempt a water-works company from taxation in consideration

NOTE.—*Municipality cannot create a monopoly.*
It is abundantly settled that a municipality, acting under charter rights granted by legislative enactment, cannot create a monopoly, unless the
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power so to do is clearly indicated by the recitals of said charter. *New Orleans C. R. Co. v. Crescent City R. Co.* 12 Fed. Rep. 308, 5 Fed. Rep. 180; *Meadville Fuel Gas Co. v. Meadville Nat. Gas Co.* (Pa.) 8

of the furnishing by it to the city of water at a reduced rate.

4. To restrain the collection of taxes made excessive by an illegal exemption, the tax-payer must show the amount of the excess, or facts from which such amount may be computed.

(June 24, 1890.)

A PPEAL by complainants from a judgment of the District Court for Bexar County in favor of defendants in a suit brought to procure the cancellation of a certain contract and to enjoin the collection of an alleged illegal tax assessment. *Affirmed.*

The facts sufficiently appear in the commissioner's opinion.

Mr. George C. Altgelt, appellant, in propria persona:

The contract granting the exclusive right for twenty-five years to supply said City with water, and the supplemental contract by which the property of the corporation is released from city taxation, are unauthorized by law, and are void as against public policy. Equity will interfere to restrain the performance of such contracts at the suit of one or more taxpayers of the City.

Upon the want of power to establish a monopoly and to barter away administrative powers, see—

City Charter, § 46, p. 250; Laws 1870; Const. art. 1, §§ 17, 26, art. 12; *Brenham v. Brenham Water Co.* 67 Tex. 542; *Waterbury v. Laredo*, 68 Tex. 565; *Wright v. Nagle*, 101 U. S. 796, 25 L. ed. 928; *Minturn v. Larus*, 64 U. S. 23 How. 435, 16 L. ed. 574; *Dillon, Mun. Corp.* §§ 97, 114, 362; *Cooley, Const. Lim.* p. 249; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Jackson County H. R. Co. v. Interstate R. T. Co.* 24 Fed. Rep. 306; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261.

Upon the invalidity of the exemption from taxation, see—

Tex. Const. art. 8, § 2; *Austin v. Austin Gas-Light & Coal Co.* 69 Tex. 180; *Norris v. Waco*, 57 Tex. 641; *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 665, 22 L. ed. 461; *Burroughs, Taxn.* § 53; *Cooley, Taxn.* pp. 152-154; *State v. Indianapolis*, 69 Ind. 375; *Weeks v. Milwaukee*, 10 Wis. 242; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Lancaster v. Clayton*, 86 Ky. 373; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

Upon the plaintiff's right to maintain the suit, see—

Caruthers v. Harnett, 67 Tex. 131; *Sansom v. Mercer*, 68 Tex. 483; *Williams v. Davidson*, 43 Tex. 1; *Crampton v. Zabriske*, 101 U. S.

Cent. Rep. 921; *Jackson County H. R. Co. v. Interstate R. T. R. Co.* 24 Fed. Rep. 306; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." *Dillon, Mun. Corp.* 97.

An Act authorizing a board of town auditors to cause the streets of the town to be lighted with gas and to enter into a contract for that purpose, does not confer a power to make an absolute binding contract for a term of years, but only subject to a termination thereof by a modification or repeal by subsequent legislation of the provision giving the power. *Richmond County Gas-Light Co. v. Middletown*, 50 N. Y. 228.

A taxpayer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract. *Sackett v. New Albany*, 88 Ind. 478, 2 Am. & Eng. Corp. Cas. 86; *Madison v. Smith*, 83 Ind. 502; *Noble v. Vincennes*, 42 Ind. 125; 2 *Dillon, Mun. Corp.* 3d ed. § 922.

While a city has authority to make contracts for a supply of water for the public use. *Vincennes v. Callender*, 86 Ind. 484.

The authority is, in a general sense, a discretionary one, and is by no means without limitation. The authority is so far of a discretionary character as to authorize the corporate officers to determine when the wants of the city demand a supply of water, and with this decision courts cannot interfere. But the power cannot be so exercised as to create a corporate debt beyond that limited by law, nor can it be so exercised as to surrender or suspend legislative power. *Valparaiso v. Gardner*, 97 Ind. 1, 7 Am. & Eng. Corp. Cas. 627.

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Though the use of a street for water mains may not be of common right, yet when the use would assist in the maintenance of a claim of exclusive right to sell water, the courts, in view of the constitutional declaration that monopolies "shall never be allowed," will give no sanction to a contract entered into by the city resulting in a monopoly. The exercise of such a franchise, involving, as it does, a use of the public streets, is subject to control. *Brenham v. Brenham Water Co.* 67 Tex. 545. Compare *Norwich Gas Light Co. v. Norwich City Gas Co.* 25 Conn. 19; *State v. Cincinnati Gas Light & C. Co.* 18 Ohio St. 232; *Memphis v. Memphis Water Co.* 5 Heisk. 495; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.* 27 La. Ann. 138; *Anderson, Law Dict.* title, *Monopoly*.

This question was argued with great skill and thoroughness in *State v. Cincinnati Gas-Light & C. Co.* 18 Ohio St. 232. Where the charter conferred on the gas company power "to manufacture and sell gas, to lay pipes," etc., provided the consent of the city council be obtained for that purpose. Under a power given to the city council "to cause said city, or any part thereof, to be lighted with oil or gas," and to levy a tax for that purpose, it contracted to invest the defendant with the full and exclusive privilege of lighting the city for the term of twenty-five years. It was held that, while there was no doubt that the city might by contract provide for lighting by gas, there was no necessity for making such right exclusive, and that the city had no authority to make the grant.

Judge Brewer holds that, in the absence of express authority in its charter, the City of Kansas had no power to grant to a street railway company the sole right, for the space of twenty-one years, to construct, maintain, and operate its railway over and along the streets of the said city. *Jackson County H. R. Co. v. Interstate R. T. R. Co.* 24 Fed. Rep. 306. See notes to *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 456; *Adams County v. Hunter* (Iowa) 6 L. R. A. 615; *People v. Chicago Gas Trust Co.* (Ill.) 8 L. R. A. 497.

601, 25 L. ed. 1070; *Smith v. Swormstedt*, 57 U. S. 16 How. 302, 14 L. ed. 948; *Davenport v. Kleinschmidt*, 6 Mont. 502; 2 Dillon, Mun. Corp. §§ 914-919, notes; Green's Brice, *Ultra Vires*, p. 597, note; Story, Eq. Pl. §§ 94-96; High, Inj. § 1553; Cooley, Taxn. p. 548; *Austin v. Goggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *The Liberty Bell*, 23 Fed. Rep. 843; *Newmeyer v. Missouri & M. R. Co.* 53 Mo. 81, 14 Am. Rep. 394; *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 40; *Cummings v. St. Louis*, 7 West. Rep. 274, 90 Mo. 259.

Messrs. Denman & Franklin, for appellee:

The City of San Antonio has authority under its charter to enter into a contract with a corporation or an individual to supply it with water for fire protection and other public purposes.

Brenham v. Brenham Water Co. 67 Tex. 542. The contract complained of by appellant in his petition does not create a monopoly and is not void.

7 Bacon, Abr. p. 22; 2 Bl. Com. bk. 4, p. 139; Austin, Jur. p. 586; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 567, 9 L. ed. 831; *New Orleans v. Clark*, 95 U. S. 652, 24 L. ed. 521; Dillon, Mun. Corp. 3d ed. § 691; *State v. Cincinnati Gas-Light & C. Co.* 18 Ohio St. 263; *Boston v. Richardson*, 18 Allen, 146; *New Orleans Gas-Light Co. v. Louisiana Light & H. P. & M. Co.* 115 U. S. 650, 29 L. ed. 516; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *State v. Columbus Gas-Light & C. Co.* 34 Ohio St. 572, 32 Am. Rep. 893; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Memphis v. Memphis Water Co.* 5 Heisk. 495.

In making such contract the city exercises its business and not its legislative powers. An individual may sell his services for a term of years, or may agree to receive a certain commodity exclusively from one person for a term of years, and neither contract will create a monopoly. If this be true, a municipality, whenever it is authorized to act as an individual, has the same power to make such a contract.

See *Greenhood*, Pub. Pol. 676, 677; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 84; *Valparaiso v. Gardner*, 97 Ind. 1; *Indianapolis v. Indianapolis Gas Light & C. Co.* 66 Ind. 396; Dillon, Mun. Corp. 3d ed. §§ 473, 474, note.

The power to contract being in the City, it must be held to have discretion as to the character of contract to be made under the power. In the exercise of that power it could bind itself for twenty-five years, and its action in so doing would not be void.

Memphis v. Dean, 75 U. S. 8 Wall. 64, 19 L. ed. 326; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 419; *Palestine v. Barnes*, 50 Tex. 551; *East St. Louis v. East St. Louis Gas-Light & C. Co.* 98 Ill. 415, 38 Am. Rep. 97.

If the City has exceeded its authority in making a contract running for twenty-five years, that does not vitiate the whole contract, although the courts may refuse to enforce it for the full term. The difference between acts done *ultra vires* that are void, and those that are simply voidable, must be kept in mind.

See *Miners Ditch Co. v. Zellerbach*, 37 Cal.

543, 99 Am. Dec. 879; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *East St. Louis v. East St. Louis Gas-Light & C. Co.* 98 Ill. 415, 38 Am. Rep. 97; *State Board of Agriculture v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, 20 Am. Rep. 506; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

The term complained of in the contract does not "exempt" the property of defendant from taxation in the sense in which the word "exempt" is used in the State Constitution. The effect of the contract is that the water-works company is permitted to pay in water what it might otherwise be required to pay in money. The exemption is not a gift, but full consideration is paid therefor. It is not an exemption, it is a trade.

Home of the Friendless v. Rouse, 75 U. S. 8 Wall. 430, 19 L. ed. 495, citing *New Jersey v. Wilson*, 11 U. S. 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Ct.* 44 U. S. 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 57 U. S. 16 How. 369, 14 L. ed. 977; *Ohio L. Ins. & T. Co. v. Debolt*, 57 U. S. 18 How. 416, 14 L. ed. 997; *Dodge v. Woolsey*, 59 U. S. 18 How. 381, 15 L. ed. 401; *Mechanics & T. Bank v. Thomas*, 59 U. S. 18 How. 384, 15 L. ed. 460; *Mechanics & T. Bank v. Debolt*, 59 U. S. 18 How. 380, 15 L. ed. 458; *McGehee v. Mathis*, 71 U. S. 4 Wall. 143, 18 L. ed. 314; *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 145; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County Suprs.* 93 U. S. 598, 23 L. ed. 814.

Appellant is not entitled, as a municipal taxpayer, to the relief asked by him.

San Antonio v. Stumberg (Tex.) present term; 2 High, Inj. p. 818; Cooley, Taxn. pp. 536, 537, and note.

If the exemption from taxation complained of is illegal, the whole tax levy would not be void.

McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 235; Cooley, Taxn. 537, and note 3.

If the contract complained of is not void but only voidable, appellant cannot ask this court to direct the municipal authorities to avoid it. It is within the discretion of those authorities to either adopt or reject a voidable act of their predecessors, and this discretion is not subject to control by the courts.

2 High, Inj. p. 813; *Waterbury v. Laredo*, 60 Tex. 523.

Hobby, J., filed the following opinion:

The appellant brought this suit in the District Court of Bexar County to vacate a contract set forth at length in his petition, and entered into by the City of San Antonio with the San Antonio Water-Works Company, incorporated under the general laws of this State. The appellant also sought to restrain said City from paying to said Company any of the municipal funds by virtue of said contract, which was alleged to be illegal and unauthorized, and from making any appropriation of public money to satisfy said contract. The defendant's exceptions to the petition were sustained, and, the plaintiff declining to amend, the cause was dismissed, and this appeal is the result. It

will be unnecessary to state all of the grounds upon which the exceptions were predicated, or to set forth the entire petition. So much of the pleadings will be referred to as is thought to be essential to a proper understanding of the question arising out of them.

It appears from the petition that on or about the 3d of October, 1877, the City of San Antonio entered into a contract in writing with what is now known as the "San Antonio Water-Works Company" for the purpose, as stated in the preamble of the contract, "of supplying said City with water for fire protection, sanitary, public, and domestic purposes, said company using the head of the San Antonio River as a source of supply." By the first section of the contract it was provided, in substance, that the company would erect the necessary buildings and machinery, etc., upon land to be set aside by the City for that purpose, to accomplish the object in view. The second section provided for a system of pipage, etc., to be laid from the source of the supply of water, and for the distribution of the water throughout the City, and the location of fire hydrants at such points as the city council might decide to be proper. The third made provisions also for laying pipes, main conductors, aqueducts, etc., to conduct water throughout the City, and for the necessary buildings and machinery. The fourth section stipulated that such additional hydrants should be erected as were required by the city council. The fifth section provided for flushing the gutters on streets, and sprinkling said streets, and for supplying water for the fire department, etc. The sixth section guaranteed that the works should be of the most durable material, etc., and capable of affording a supply to the citizens of the City of a specified number of gallons, etc. The seventh prescribes the time within which the work shall be completed, and provides for the erection of a reservoir. The eighth section regulates the rate at which water will be supplied to private consumers. Such is a synopsis of the obligations entered into by the water-works company. The first section of that part of the contract containing the grants, etc., made by the City, provided for a lease of six acres of land to the company for a reservoir. The second conceded to the company full power to enter upon the streets, squares, alleys, etc., and to take up pavements, etc., to lay pipes and construct culverts, to conduct and distribute the water, etc., giving the company the right of way, free of cost, over all public grounds controlled by the City. The third was as follows: "The said City further obligated itself not to grant to any other body of men or persons, during the continuance of said contract, the right to furnish water for fire hydrants or other public purposes." The sixth section provided, among other things, "that said contract should subsist for a period of twenty-five years from the completion of said works, at the end of which time said City should have the right to buy the works at an appraised value; but, if said City did not buy at the end of twenty-five years, said contract should run until the works are finally

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purchased, and the right to purchase the same should inure to the City every five years thereafter, after giving twelve months' notice."

The water-works, except the reservoir, were to be completed not later than July, 1878. A supplemental contract was entered into between the City and the company in January, 1881, by the terms of which it was stipulated that, for the use of the 100 fire hydrants then established in accordance with the first contract, the City should pay an annual rent of \$50 each, instead of \$100, as originally required. "And, in consideration of said reduction of the rent of said 100 fire hydrants, the said City further remitted and relinquished to the water-works company all city taxes whatever, which might otherwise be assessed and levied upon any of the property of said water-works company, and owned or held by said company for the purpose of operating their works, such property, however, not to exceed in value the sum of \$250,000; so that said water-works company should be discharged from the payment of all city taxes during the continuance of the original contract aforesaid, by the terms thereof." The petitioner further alleged that these contracts were illegal, and against public policy, because they attempted to create a monopoly on the part of said water-works company to supply water to said city, and because they attempted to exempt from taxation by said City the property of said defendant (the water-works company), which otherwise would be liable to taxation as other property within said municipal corporation. He further alleges that, "by exempting the property of said San Antonio Water-Works Company from taxation, the rate of taxation upon property within said City is increased, and continues to be increased; and that thereby petitioner, and all other inhabitants and taxpayers of said City, have been compelled to pay higher taxes than he and they would otherwise be compelled to do; and that such taxation, increased as aforesaid, will continue unless the injunction hereinafter prayed for is granted. Petitioner avers that since the making of said supplemental contract said City of San Antonio has exempted from taxation the property of its said co-defendant to the value of \$250,000, and will continue so to exempt the same unless the relief hereinafter prayed for is granted. Petitioner further shows by the grant or supposed grant of exclusive privileges to said San Antonio Water-Works Company by said City all competition is avoided, and that in consequence thereof excessive and unreasonable rates and prices for water are charged and collected from the inhabitants of said city, including petitioner."

The exceptions of the appellee to the plaintiff's petition, which were sustained by the court, raise the following questions: Was the contract set forth in the petition, and entered into between the City of San Antonio and the water-works company, unauthorized and invalid because it attempted to create a monopoly and an exclusive privilege upon the part of said company to fur-

nish said water, and because the city council could not impair and embarrass the exercise of the power conferred on said City by its charter to provide water for said City? And was it also illegal because it attempts to exempt from taxation by said City the property of said water-works company? If for the above reasons, or either of them, it is determined that the contract was illegal, then the next question is whether this suit can be maintained by plaintiff under the allegations contained in his petition. If under either of them it can be, the judgment should be reversed. In so far as the first question above mentioned is involved, there is no material distinction between this case and that of *Brenham v. Brenham Water Co.*, 67 Tex. 545, where it was decided.

Without attempting to enumerate the different provisions of the contracts respectively entered into by these cities, and the sections of their charters authorizing said cities to enter into contracts to supply the inhabitants and the cities with water, and without citing the statutes which were looked to in the case cited in determining this question, it will be sufficient to say that said charters and contracts are substantially the same, and the statutes referred to are the same, and are now in force. It follows, therefore, that, for the reasons given and elaborated in that case by *Chief Justice Stayton*, the contract in the case under consideration is illegal and unauthorized. But it does not follow, we think, in this case because the contract is, as alleged by plaintiff, unauthorized and illegal, and creates a monopoly, or attempts so to do, and surrenders for the period of twenty-five years the legislative power with which the city is invested, that for these reasons alone the plaintiff can in this suit vacate or set aside said contract. In the case mentioned the suit was by the water-works company to enforce the contract. This was resisted by the City of Brenham upon the ground that it attempted to create a monopoly, and was a surrender of the legislative power in the City with reference to that subject for twenty-five years. In the case under consideration the City is not complaining. On the contrary, the contract is recognized by the City, and, as long as it is so recognized by the City through its properly constituted authorities, it cannot be vacated by plaintiff upon these grounds. The plaintiff does not show by his averments that he, as a taxpayer of the City, is authorized to maintain this action by reason of any injury resulting to him from the contract of October, 1877, entered into by the City of San Antonio. It does not appear from the petition that he is prevented from obtaining water upon any better terms, nor does it appear that he is compelled under the terms of that contract to get water from the defendant water-works company, only we do not mean to say that a taxpayer of a municipal corporation cannot maintain a suit like the present, under proper averments showing injury to him as such taxpayer, resulting from an illegal and unauthorized contract. But the petition does not present such a case with respect to the contract originally entered

into by the City, in October, 1877. It does sufficiently appear, however, from the allegations of the petition, that the release from or exemption by the City of San Antonio of the property of the defendant water-works company during the continuance of the contract, which is alleged to have been done under the supplemental contract of January, 1881, operates to the injury of plaintiff. It is shown that this exemption of said property, valued at \$250,000, resulted in increasing the rate of taxation upon property in the City, and that thereby petitioner, and all other inhabitants and taxpayers of said City, have been, and will continue to be, compelled to pay higher taxes than they would otherwise be required to do. That the City of San Antonio did not have the power to exempt this property from taxation is well settled in the case of *Austin v. Austin Gas Light & C. Co.*, 69 Tex. 187. In the same case it was held that the power to commute taxes was but an incident of the power to exempt, and, as the latter power did not exist, so the incidental power must be denied. This is decisive of the question in this case.

We are of opinion that, under the plaintiff's allegations of injury resulting to him as a taxpayer from the exemption by the City of the property of the water-works company, thereby increasing the rate of taxation on his property, and compelling him to pay higher taxes than he would otherwise be required to do, he is entitled to maintain this suit; and there was error in dismissing it; and for the error in dismissing the suit we think the judgment should be reversed, and the cause remanded.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

A rehearing was subsequently granted and on June 19, 1891, **Gaines, J.**, delivered the opinion of the court:

At the last term of the court at this place the judgment in this case, upon the report and opinion of the commission of appeals, was reversed, and the cause remanded. Both parties having insisted that there was error in the opinion and judgment of the court, and moved that they be set aside, a rehearing was granted. A reconsideration has not changed our opinion upon the main questions in the case, but we now think that we were in error in holding the allegations in the petition sufficient to authorize a judgment for appellant enjoining the collection of taxes assessed against him in excess of what they would have been if the exemption from taxation had not been allowed the water company. The plaintiff nowhere avers the amount of such excess, nor does he allege any other facts or amounts from which the excess may be arrived at by a mathematical calculation. In this respect the petition is not sufficient to support an action to restrain the collection of illegal taxes. In such cases, the amount of the unlawful assessment must be averred. In fact, it is apparent

from the form of the petition and the prayer that the object of the suit was not merely to enjoin the collection of excessive taxes. Except upon this question we stand by the conclusions announced in the former opinion. It held that the suit was maintainable only as an action to restrain the collection of an excessive tax assessment resulting from an

illegal exemption. We hold that it is not good for that purpose, and it follows that the judgment shall be affirmed. It is due to the commission of appeals and to the learned judge who wrote the former opinion to say that this court is responsible for the error in that opinion.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

M. J. P. DEMPSEY, Exr., etc., of Casper
H. Borgess, Deceased,

Isaac PFORZHEIMER *et al.*, Appts.

(.....Mich.....)

1. One who sells another goods on credit during the interval between the making and recording of a mortgage on the latter's stock in favor of a third person under which no possession was taken, and who after the recording of such mortgage takes another mortgage on the stock to secure his claim, under which he takes possession, has a right to the stock which is superior to that of the first mortgagee, under How. Stat., § 6193.

2. The cancellation of an indebtedness and substitution for it of a new contract is not shown by the taking of notes for its amount secured by mortgage, although the notes are payable at different future dates and the mortgage provides for future indebtedness, if an

intention to cancel is not directly shown and there were no subsequent dealings, while the entire indebtedness was to become payable at once on default as to any installment.

(July 28, 1891.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of plaintiff's interest in a stock of jewelry. *Reversed.*

The facts are stated in the opinion.

Messrs. Dickinson, Thurber & Stevenson, for appellants:

The court, in construing section 6193 of Howell's Statutes, has held that it was designed to protect and afforded protection, not only to those who obtained judgment or levy of attachment between the date of the giving and the date of the filing of the chattel mortgage, but that those who became creditors

NOTE.—Chattel mortgage; registration and filing equivalent to delivery.

Under the statutes of several States, registration or filing the mortgage is equivalent to delivery of the property. *Sturgis v. Warren*, 11 Vt. 433; *Morrill v. Sanford*, 49 Me. 536; *Bullock v. Williams*, 16 Pick. 33; *Shurtleff v. Willard*, 19 Pick. 202; *Frank v. Miner*, 50 Ill. 444; *Crooks v. Stuart*, 2 McCrary, 13; *Field v. Baker*, 12 Blatchf. 433; *Morrow v. Reed*, 30 Wis. 81; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160.

The mortgage must either be filed as the law requires, or the mortgagee must take possession of the property. The taking of possession is sufficient. *Morrow v. Reed*, 30 Wis. 81; *Cooper v. Brook*, 41 Mich. 488; *Gill v. Griffith*, 2 Md. Ch. 270; *Waite v. Mathews*, 50 Mich. 392; *Fromme v. Jones*, 13 Iowa, 474; *Gregg v. Sanford*, 24 Ill. 17.

As between the parties themselves, it is not necessary that a chattel mortgage should be filed or recorded. *Beeman v. Lawton*, 37 Me. 543; *Lemay v. Williams*, 32 Ark. 166; *McTaggart v. Rose*, 14 Ind. 230; *Hall v. Snowhill*, 14 N. J. L. 8; *Fuller v. Page*, 26 Ill. 358; *Wilson v. Leslie*, 20 Ohio, 161; *Kilbourne v. Fay*, 29 Ohio St. 264; *Douglass v. Vogeler*, 6 Fed. Rep. 53; *Winsor v. McLellan*, 2 Story, 492; *Coggeshall v. Potter*, 1 Holmes, 75; *Griffin v. Wertz*, 2 Ill. App. 437; *Hudson v. Warner*, 2 Harr. & G. 415; *Hodgson v. Butts*, 7 U. S. 3 Cranch, 133, 2 L. ed. 391; *Merrick v. Avery*, 14 Ark. 370.

But a chattel mortgage which is not recorded within ten days after its execution is void as to a third person, although such person has actual notice of its existence. *Ross v. Menefee*, 125 Ind. 432.

Validity under Recording Acts.

The Registry Acts do not make a chattel mortgage absolutely void for omission to file it, but simply declare it void as to judgment creditors and 13 L. R. A.

subsequent purchasers in good faith. As to other persons it is valid without filing. *Steele v. Benham*, 84 N. Y. 634; *Thompson v. Van Vechten*, 27 N. Y. 568; *Porter v. Parmley*, 62 N. Y. 186; *Hayman v. Jones*, 7 Hun, 238; *Fraser v. Gilbert*, 11 Hun, 634; *Moses v. Walker*, 2 Hilt. 533; *Johnson v. Jeffries*, 30 Mo. 423; *Kohl v. Lynn*, 34 Mich. 360; *Hackett v. Manlove*, 14 Cal. 85; *Gill v. Pinney*, 12 Ohio St. 38.

An attaching creditor having actual knowledge of a prior bona fide chattel mortgage made by his debtor is bound by it, although the record of the mortgage is erroneously indexed. *Kern v. Wilson* (Iowa) May 13, 1891.

A chattel mortgage is valid, though not filed, against the claim of a general creditor which has never been reduced to judgment. *Button v. Rathbone*, 43 Hun, 147.

If made in good faith it will be sustained against a voluntary assignee for the benefit of the creditors of the mortgagor. *Wilson v. Esten*, 1 New Eng. Rep. 18, 14 R. I. 621.

A chattel mortgage not on file or recorded as required by statute is not void as against a wrongdoer. *Johnson v. Jeffries* and *Moses v. Walker*, *supra*.

That a chattel mortgage is not recorded is not a defense that can be made by the administrator or heir of the mortgagor, though his estate is insolvent. *Mayer v. Myers* (Ind.) May 25, 1891.

When personal property is mortgaged without a delivery thereof to the mortgagee, and the mortgage is not recorded, a party who buys the property of the mortgagor and takes possession of it, although he has knowledge of the mortgage, will hold it against the mortgagee. *Crawford v. Harter*, 5 West. Rep. 37, 22 Mo. App. 631.

The rule that an unrecorded chattel mortgage is void as against subsequent good-faith purchasers applies in favor of a creditor who, in ignorance of

whilst the mortgage is not filed are protected as well.

Fearey v. Cummings, 41 Mich. 883.

The contention that the defendants could not establish the invalidity of the Borgess mortgage, except by attachment or execution levy upon the property, and that attack could not be made under the lien created by the chattel mortgage executed to the defendants, is not well founded.

Putnam v. Reynolds, 44 Mich. 114.

The rule in equity, requiring a preceding judgment at law, is purely an equitable one based on the fact that unless there be a debt due the complainant, he has no ground of complaint; that the existence as an unsecured debt can only be made certain by means of a judgment that a court of chancery cannot render this judgment. It follows, therefore, that a prior judgment establishing the plaintiff's claim of indebtedness should not be required in a proceeding in a court possessing power and authority to investigate and determine the validity of the claim.

Bump, Fraud. Conv. p. 521; *Reese River S. Min. Co. v. Atwell*, L. R. 7 Eq. 347.

The prior judgment, where required, serves two purposes. It established the indebtedness, and further enables a direct lien upon specific property to be obtained by the levy of "process," i. e., execution. It follows that where it is not needed to prove the debt, it is not needed at all, provided "process" other than execution or liens otherwise created, will suffice. Process is anything that will create the desired lien—not necessarily judicial process.

See *Fearey v. Cummings*, 41 Mich. 883; *Bump, Fraud. Conv.* 524, citing cases; *Hastings v. Belknap*, 1 Denio, 190; *Frisbey v. Thayer*, 25 Wend. 396; *Coles v. Marquand*, 2 Hill, 447; *Slocum v. Clark*, 2 Hill, 475; *Martin v. Black*, 9 Paige, 641, 4 L. ed. 848; *Hanes v. Tiffany*, 25 Ohio St. 549.

All that the law requires to enable a creditor to assail a mortgage for want of filing, is that he shall in some manner have acquired, or at least asserted, the right to have his debts satisfied out of certain specific property, and this right is denominated a lien. What lien can be more certain, specific and binding than a mortgage by which the debtor gives absolute authority to his creditor to seize and dispose of his property.

See *Brown v. Brabb*, 10 West. Rep. 892, 67 Mich. 17; *Root v. Hart*, 62 Mich. 420.

Messrs. Keena & Lightner, for appellee:

As against all persons, except such as can bring themselves within the terms of the Statute, plaintiff's mortgage was perfectly valid.

Brown v. Brabb, 10 West. Rep. 892, 67 Mich. 17; *Jones, Chat. Mort.* § 251.

Defendants must claim either as "creditors of the mortgagors," or as "subsequent purchasers or mortgagees in good faith."

That they cannot claim as subsequent purchasers or mortgagees in good faith seems apparent from the fact that they took their mortgage with full notice of plaintiff's mortgage.

Kohl v. Lynn, 84 Mich. 860; *American Cigar Co. v. Foster*, 36 Mich. 368, 3 Am. & Eng. Encyclop. Law, p. 208.

As to their being creditors they asserted their

the mortgage, receives a portion of his debtor's stock of goods in payment of his debt. *Button v. Rathbone*, *supra*.

A chattel mortgage registered in the county where made, but not in the county to which the mortgagee consents that the mortgagor may remove the chattels, is void as to a purchaser or mortgagee thereof in the latter county without actual notice of the prior mortgage. *Reed v. Spikes* (Tex. App.) Nov. 12, 1890.

Effect of actual notice.

The general rule is that actual notice of an unrecorded mortgage dispenses with the necessity of filing. *Nat. Bank of the Metropolis v. Sprague*, 21 N. J. Eq. 590; *Steele v. Adams*, 21 Ala. 534; *Boyd v. Beck*, 29 Ala. 708; *Doyle v. Stevens*, 4 Mich. 87; *Kohl v. Lynn*, 84 Mich. 360; *Stowe v. Meserve*, 13 N. H. 46; *Gooding v. Riley*, 50 N. H. 400; *Clark v. Tarbell*, 57 N. H. 328; *Crane v. Chandler*, 5 Colo. 21; *Shuler v. Boutwell*, 18 Hun, 171; *Benjamin v. Elmira J. & C. R. Co.* 64 N. Y. 676; *Wright v. Bircher*, 5 Mo. App. 322; *Coble v. Nonemaker*, 73 Pa. 501; *Paine v. Mason*, 7 Ohio St. 198; *Campbell v. Leonard*, 11 Iowa, 489; *Gregory v. Thomas*, 20 Wend. 17; *Lewis v. Palmer*, 28 N. Y. 272.

Renewal of mortgage; rules in different States.

The object of refiling a chattel mortgage is merely to extend and continue in operation the effect of the first filing as to the amount remaining unpaid for another year. *Dillingham v. Bolt*, 37 N. Y. 200; *Marsden v. Cornell*, 62 N. Y. 219.

The statement must be made by the mortgagee; it cannot be made by the mortgagor or third persons. So the filing of a new mortgage in place of the old one is not sufficient. *Osborn v. Alexander*, 40 Hun, 328.

If the property remains in the hands of the mortgagor, the mortgagee must refile his mortgage within the year, although default has been made in the payment. *Ely v. Carnley*, 19 N. Y. 496; *Steele v. Benham*, 84 N. Y. 634; *Porter v. Parmley*, 52 N. Y. 187; *Marsden v. Cornell*, 62 N. Y. 219.

The Michigan statute requires the first renewal affidavit of a chattel mortgage to be made within thirty days next preceding the expiration of the year from the filing of the mortgage. *Burrill v. Wilcox Lumber Co.* 9 West. Rep. 115, 65 Mich. 571.

In Wisconsin, filing an affidavit more than thirty days before the expiration of two years from the filing of a chattel mortgage is not sufficient to keep the mortgage valid, under the statute requiring such affidavit to be filed within thirty days before such expiration. *Rice v. Kahn*, 70 Wis. 323.

In Ohio, a chattel mortgage not reverified and refilled within thirty days before the expiration of one year after the original filing, is void against creditors and bona fide purchasers and mortgagees. *Cooper v. Koppes*, 13 West. Rep. 465, 45 Ohio St. 625.

Refiling the mortgage four days after one year creates no lien against a levy in favor of an execution creditor made thereafter. *Ibid*.

On a failure to refile a chattel mortgage, as required by law, before the expiration of the year, the mortgage ceases to be valid against subsequent bona fide purchasers or creditors, and cannot be revived by any act of the parties so as to give it priority over other liens. *Herder v. Walther*, 29 N. Y. S. R. 410.

A chattel mortgage which was filed, but has not been renewed, is invalid as against bona fide purchasers or creditors. *Gibson v. Ferris*, 30 N. Y. S. R. 663.

In Kansas, a subsequent mortgagee who becomes such before the expiration of the year from the first filing of a prior chattel mortgage cannot take advantage of an omission to renew the latter within

claim to the property under their mortgage. The benefit of the Statute can be invoked only by creditors who have a lien, by process, upon the property in question. The defendants were confessedly not such creditors.

People's Sav. Bank v. Bates, 120 U. S. 560, 30 L. ed. 756; *Thompson v. Van Vechten*, 27 N. Y. 568; *Jones, Chat. Mort.* 2d ed. § 245; *Stewart v. Beale*, 7 Hun, 405, 68 N. Y. 629; *Jones v. Graham*, 77 N. Y. 628; *Ransom v. Schmela*, 18 Neb. 78; *Cameron v. Marvin*, 26 Kan. 612; *Smith v. Clarendon*, 25 N. Y. S. R. 221; *Root v. Potter*, 59 Mich. 498; *Trowbridge v. Bullard*, 81 Mich. 451.

When defendants made this contract of December 30, 1887, with Harris & Karpp, and took the notes referred to, defendants' rights under their former contract with Harris & Karpp were surrendered.

Bigelow, Fraud. p. 484; *Bump, Fraud. Conv.* pp. 457, 459; *Baker v. Gilman*, 52 Barb. 26.

The defendants, with knowledge of plaintiff's mortgage, elected their remedy and must abide by their election. They cannot sell the property under their mortgage (which they obtained by canceling the prior indebtedness of Harris & Karpp), and also claim as creditors without notice.

6 Am. & Eng. Encyclop. Law, p. 247, and notes; *Dunks v. Fuller*, 32 Mich. 244; *Button v. Trader*, 75 Mich. 298.

the year. *Farmers & M. Bank v. Bank of Glen Elder* (Kan.) May 9, 1891.

Priority of lien.

A chattel mortgage, being first in date and first of record, is not affected by a parol agreement prior thereto, as to the order of priority of such mortgage and others which are made subsequent to it. *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354.

Under the Oregon statutes, in cases of successive chattel mortgages upon the same property, the one first filed is entitled to priority. *Pittock v. Jordan*, 19 Or. 7.

In Nebraska, the lien of a chattel mortgage continues between the parties so long as the debt subsists, although the mortgage is not filed or refiled, as required by the Nebraska statute. *Sandford v. Mumford* (Neb.) May 6, 1891.

Novation.

The validity of a chattel mortgage is not affected by the fact that it is given in place of old mortgages not recorded within the time required by statute, where such mortgages were executed to secure an existing indebtedness. *Johnson v. Stellwagen*, 10 West. Rep. 848, 67 Mich. 10.

A mortgagee occupies the position of mortgagee for a valuable consideration where the mortgage is taken for the surrender of a prior mortgage and accrued interest thereon. *Constant v. Rochester University*, 2 L. R. A. 784, 111 N. Y. 604.

A mortgagee who releases his mortgages and accepts a later mortgage covering also debts not secured by the first, supposing there were no other liens on the property, is not entitled to a reinstatement of the released mortgages, in the absence of any proof that he released them in reliance upon the mortgagor's representations. *McKeen v. Haseltine* (Minn.) July 1, 1891.

Novation is a substitution of a new obligation for an old one. See note to *Spycher v. Werner* (Wis.) 5 L. R. A. 414.

There must be a substitution of the new obligation for the old. See note to *Pope v. Vajen* (Ind.) 13 L. R. A.

Morse, J., delivered the opinion of the court:

On the 22d day of October, 1886, William H. Harris and Charles T. Karpp, in partnership in the general jewelry business in Detroit, and both residents of that city, borrowed \$2,000 of Casper H. Borgess. To assure the payment of the same, they executed to him, under the firm name of Harris & Karpp, a chattel mortgage for that amount. Said mortgage was taken by said Borgess in good faith to secure such indebtedness, but it was not filed in the city clerk's office until December 26, 1887, at 9:08 o'clock A. M. This mortgage covered all the goods "now contained or hereafter to be contained" in the jewelry store; also the fixtures and safe therein; and was payable on or before October, 1889. On December 30, 1887, Harris & Karpp executed a mortgage to the defendants in this suit to secure a previous indebtedness incurred in the purchase of merchandise between the date of the execution and the filing of the Borgess mortgage; and said merchandise was sold by defendants in ignorance of the existence of the indebtedness to Borgess or the execution of the mortgage to him. The two mortgages embraced substantially the same property. The mortgage to defendants recited that it was to secure an indebtedness of \$2,525.53, which was the amount of the merchandise sold as above. It also contained the following recital in addition: "And whereas,

6 L. R. A. 688; *Cutting Packing Co. v. Packers Exchange* (Cal.) 10 L. R. A. 360.

Mortgage of stock of goods.

A mortgage of all the goods, etc., in and about a certain building is valid as to all articles that can be identified. *Pond v. Baker*, 1 New Eng. Rep. 400, 58 Vt. 293.

A schedule annexed to the mortgage is a part of it, and where it refers to after-acquired property such property is included, and the lien of the mortgage thereon is superior to the lien of an execution subsequently levied upon the goods purchased after date of the mortgage. *Page v. Kendig* (N. J.) 6 Cent. Rep. 323.

In such case the lien attaches as soon as the property is acquired by the mortgagor. *Ludlum v. Rothechild*, 41 Minn. 218.

While a mortgage on a stock of merchandise may not be enforceable as to goods not in store at the time of the mortgage, such a mortgage having been enforced by the lower court without defense, this court cannot assume that the stock had been replenished, but must assume that the lien existed and was properly enforced. *Hoffman v. Brunga*, 83 Ky. 401.

A stipulation in a chattel mortgage that renewals to the stock should be deemed covered by a mortgage does not render the mortgage invalid on its face, but is ineffectual of itself to vest in the mortgagee a lien upon such after-acquired property. *Fisher v. Syfers*, 7 West. Rep. 918, 109 Ind. 514.

A contract of sale cannot be extended by implication, or be considered as creating a lien or mortgage upon goods bought by the purchaser after the date of the contract. *Edwards v. Symons*, 8 West. Rep. 784, 65 Mich. 349.

Where one in possession mortgages goods under circumstances which indicate him to be the absolute owner, to a third person who has knowledge of the rights of the true owner, the latter is not estopped to set up his claim against the mortgagee. *Bray v. Flickinger*, 69 Iowa, 167.

the said parties of the first part [Harris & Karpp] expect to buy from the parties of the second part [the defendants] from time to time, during the continuance of this mortgage, goods on time, and on such terms of credit as may be agreed upon; and whereas, the indebtedness of the said parties of the first part to said parties of the second part is therefore liable to change in amount and time of payment; and whereas, the said parties of the first part have agreed that the payment of the existing indebtedness of said parties of the first part to said parties of the second part, and also the payment of the other indebtedness for goods to be purchased by said parties of the first part from said parties of the second part, shall be secured in the manner hereinafter mentioned." The \$2,528.58 was to be paid according to five promissory notes of even date with the mortgage, as follows: \$500 in 60 days, \$500 in 90 days, \$500 in 4 months, \$528.58 in 6 months, and \$500 on demand. This mortgage was filed the same day it was executed, at 8:30 o'clock P. M. Subsequently defendants, by Henry T. Thurber, their attorney and agent, took possession of said stock, being the same described in both mortgages. Plaintiff's testator, by James T. Keena, at the time of the sale, demanded said stock under his mortgage. Defendants refused to deliver the same, and sold the same under their mortgage, expressly denying the validity of testator's mortgage, and in disregard of said mortgage. There was upon the property so sold by defendants, at the time of such sale, a chattel mortgage held by Eugene Deimel for \$600, which was a prior lien to the defendants, and they sold such property under their chattel mortgage subject to the payment of the Deimel mortgage. The defendants were, at and during the time the merchandise aforesaid was sold to Harris & Karpp, merchants in New York City, selling jewelry, etc., at wholesale, and Harris & Karpp were conducting business of selling jewelry, etc., in Detroit, Mich., during such time, at retail. Such merchandise was sold in the usual course of business, and upon usual terms of sale. Plaintiff's testator thereupon brought this action of trover against defendants for the conversion of said stock, which at the time of the seizure and sale by defendants was worth \$3,200. The defendants composed the copartnership of Pforzheimer, Keller & Co. No part of the principal or interest secured by the mortgage of plaintiff's testator has been paid. The original plaintiff having died, the cause was revived in favor of his executor. Defendants' plea was the general issue. The case was tried before Hon. George Gartner, one of the Wayne circuit judges, without a jury, who made a finding of law upon the facts, which were stipulated, that the plaintiff was entitled to recover against the defendants the sum of \$2,520. It is plain, under the rulings of this court, that the Borgess mortgage was void for want of filing, as against the original indebtedness of Harris & Karpp to defendants, incurred while the mortgage was in existence and not filed, and for goods sold by defendants in the usual course of business, in ignorance of the existence of such mortgage. *Fearey v. Cummings*, 41 Mich. 388; *Root v. Hart*, 62 Mich. 420; *Waite v. Mathews*, 50 Mich. 392, 394; *Wallen v. Roseman*, 45 Mich. 333; *Johnson* 13 L. R. A.

v. Stellinghen, 67 Mich. 10, 14, 16, 10 West. Rep. 848; *Brown v. Brabb*, 67 Mich. 17, 10 West. Rep. 892; *Talcott v. Crippen*, 52 Mich. 633; *Crippen v. Jacobson*, 56 Mich. 386; *Outler v. Steele*, 85 Mich. 627.

If the defendants before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of law a lien upon it, or had they obtained judgment upon their claim, and issued execution and levied on it, there can be no doubt but such lien or levy would have been good as against the Borgess mortgage. But it is claimed on behalf of plaintiff that, because defendants took a mortgage to secure the indebtedness to them, after the Borgess mortgage was put on file, and therefore had notice of it, they cannot now claim the benefit of the rule adopted by this court as shown above, and that they have no standing under the Statute upon which the rule is founded. It is contended that, to avail themselves of the Statute, the defendants, at the time of seizing the goods in question, must have the standing either as "creditors of the mortgagors" or as "subsequent purchasers or mortgagees in good faith;"* that they cannot claim as subsequent mortgagees in good faith, because they took their mortgage with full notice of the Borgess mortgage, which had then been on record for four days; and that the benefit of the Statute cannot be invoked in favor of creditors, except by those who have a lien by process of law upon the property in question; and it is argued that a mortgage lien will not avail, except, perhaps, in equity. We are cited to *People's Sav. Bank v. Bates*, 120 U. S. 560, 30 L. ed. 756, and other cases, in support of this contention; but we can see no difference between a lien obtained by process and one gotten by consent of the owner through a chattel mortgage. If the defendants were entitled, as they undoubtedly were, to obtain a lien upon this property by legal process, and to hold it to the amount of such lien against the mortgage of Borgess, because the debt they were seeking to collect was made while this mortgage was withheld from record, we can see no reason in principle why they cannot hold the property under a lien obtained by chattel mortgage to secure the same indebtedness. A review of the cases in our own court upon this subject may not be unprofitable. The contention of plaintiff that, in order to take advantage of the non-filing of the Borgess mortgage, the defendants must first have a lien upon the property by process, is based upon language used in *Thompson v. Van Vechten*, 27 N. Y. 568, and that case has often been referred to in our decisions on this subject, and is considered a leading case. It was said "that the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property, for creditors cannot interfere with the property

*How. Stat. Mich., § 6193, provides that "every mortgage or conveyance intended to operate as a mortgage on goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk," etc.

of their debtors without process." *Thompson v. Van Vechten*, *supra*.

The gist of the reason is that the creditor has no business with the debtor's property until he has obtained possession of it by some legal process that gives him a lien upon it. This is not because of any right that the mortgagor, who has kept his mortgage from record, has against the other creditors, but because such creditors have no right to touch the debtor's property without his consent, without legal process; and when the debtor has turned out his property to a creditor in payment of his debt, or in pledge for its payment, or, as in this case, a chattel mortgage which authorizes him to take possession of it, it seems to me that the reason of the rule is satisfied, and that he has a right to defend against a prior mortgage which is void as against him. And I think some of our decisions decidedly tend in this direction, and that none of them militate against it.

In *Fearey v. Cummings*, 41 Mich. 383, *Mr. Justice Graves* uses this language: "Still no one as a creditor at large can question the mortgage. He can only do that by means of some process or proceeding against the property." Is not the taking into possession of mortgaged property under the mortgage, for the purposes of foreclosing, a "proceeding" against the property?

In *Putnam v. Reynolds*, 44 Mich. 114, the court refused to foreclose such a mortgage, declaring it void as to the mortgagor's creditors because it was kept from the record. The assignee for the benefit of creditors, who had no knowledge of this mortgage at the time the mortgagor made the assignment, defended against the mortgage. The complainant insisted that the assignee had no standing because his rights were no greater than the assignor's, and the mortgage was valid as against the mortgagor. *Mr. Justice Cooley*, in speaking of this claim, said: "The assignee is not a purchaser for value, and not a creditor, and even creditors, it is said, cannot attack the mortgage indirectly, through a seizure of the property by attachment or other suitable process. This is doubtless true where the invalidity of the mortgage arises from some fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned. It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control. But we do not think the question fairly arises in this case." Here we have a pretty good index to the opinion of this learned jurist. It would seem that he doubted the necessity of any lien upon the property by the attacking or defending creditor in a case like the present.

In *Root v. Potter*, 59 Mich. 504, *Chief Justice Campbell* says: "It has always been held in this State that general creditors, having no judgment or lien on the debtor's property, cannot attack conveyances or other dealings for fraud,"—citing *Tyler v. Peatt*, 30 Mich. 63; *Maynard v. Hoskins*, 9 Mich. 485; *Grincold v. Fuller*, 33 Mich. 268.

In the present case, the defendants cannot be said to be general creditors. They are credi-

tors having a lien on the property, and lawfully in possession under such lien. An examination of the cases above cited by *Chief Justice Campbell* will show that they have no bearing upon the question at issue here.

In *Troubridge v. Bullard*, 81 Mich. 451, *Mr. Justice Long* says: "It has many times been held by this court that general creditors having no judgment or lien upon the debtor's property cannot attack conveyances or other dealings for fraud,"—citing a number of Michigan cases, in addition to those cited in *Root v. Potter*, *supra*, to wit: *McKibben v. Barton*, 1 Mich. 213; *Stoddard v. McLane*, 56 Mich. 11; *Scott v. Chambers*, 62 Mich. 532; *Krolik v. Root*, 63 Mich. 562, 6 West. Rep. 384.

The main case is relied upon by plaintiffs in this case, but it does not touch the question here involved. The first case cited is of no importance to the issue here.

In *Stoddard v. McLane* an execution had been levied on personalty, and the aid of equity was invoked to set aside fraudulent conveyances of the property levied upon. Held, that a lien obtained by the levy of execution on personalty did not in general require the aid of equity for its enforcement, and that there was a remedy at law.

In *Scott v. Chambers*, 62 Mich. 532, *Chief Justice Campbell* uses this language: "It is the settled law of this State that creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings, and, so far as these bonds are concerned, they could only be reached by judgment creditors."

This is the strongest language anywhere used in our Reports in favor of plaintiff's contention, but the case was one where a creditor was proceeding in equity against a receiver of an assignor for the benefit of creditors (who stood in the place of an assignee who failed to qualify under the assignment), for neglect, and making him, with the assignor and others, parties defendant, for the purpose of reaching and bringing under the assignment certain lands and other property, including two United States bonds issued in 1832 and 1885, to the wife of the assignor. It was held that the creditor had no right to implead the receiver without leave of the court, and no right to file the bill against the other parties, as that right belonged to the receiver alone. The property sought to be reached was in the name and possession of other parties than the debtor, and the language of the court was applicable to that case; but there is no reason why it should control this, where the property is lawfully in the hands of the defendants under a mortgage lien, reduced to possession for the purposes of foreclosure, and where the party assailed has a right to a standing in court to defend his right to possession, and to attack the alleged prior lien of the plaintiff.

In *Krolik v. Root*, the language of *Justice Sherwood* is: "The complainants in this case never obtained a lien upon the property in question, or any part thereof, so far as appears upon this record. They are not in a situation to attack the validity of the defendant's last mortgage, without such lien obtained in some manner."

In *Crippen v. Jacobson*, 56 Mich. 386, it was

held that garnishee proceedings would reach assets covered by an unrecorded mortgage made before the debt was incurred for which the mortgagee is garnished, and the following language is used by *Justice Campbell*: "The law does not require previous proceeds to exhaust other remedies. The Garnishee Law is unconditional upon this subject, and garnishee proceedings will reach the assets if they exist. When the debt is not incurred on the credit of an apparently clear title, which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage, without taking some step which puts the creditor on a different legal footing than that of a quiescent party. But when a chattel mortgage exists, and is concealed, it is, under the Statute, void, for the reason that it produces a false appearance of solvency, when, in fact, the person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security, and those who deal with such a debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void, at all events, against creditors who deal with a debtor so situated. Such creditors are directly within the policy of the Statute."

In view of this language, it seems absurd to hold that such a creditor, having possession of the debtor's property under a chattel mortgage, cannot defend against a chattel mortgage absolutely void as to him, unless he goes further, and attaches the property, or takes some legal process other than the enforcement of his mortgage lien, under the power of sale in the mortgage to get a lien upon it.

In *Root v. Harl*, 62 Mich. 420, Harl & Stevens, merchants doing business at Muir, Mich., as copartners, had made an assignment. Chauncey Rumsey held a mortgage upon their stock. Between the date of this mortgage and its recording, Root & Co. and others gave credit to Harl & Stevens in ignorance of this mortgage. The complainants filed a bill for the appointment of a receiver of the assigned property, and claiming a preference of their debt, contracted as aforesaid, in ignorance of the unrecorded mortgage, over the Rumsey mortgage, because it was void under the Statute as against them. They had no lien, by legal process or otherwise, upon the property. They might be called "general creditors" of the debtors, except that they stood in a different relation to this mortgage than the others. In delivering the opinion in that case, it was said by *Chief Justice Campbell* that the "general creditors" could not attack the mortgage, but that Root & Co. could. "We have no doubt that, under our Statutes, any creditors have a right to avoid an unrecorded mortgage who have, during its absence from the record, done anything material which they may be fairly considered to have done on the basis of its non-existence." This doctrine was also enunciated in *Brown v. Brabb*, 67 Mich. 17, 10 West. Rep. 892, and in *Johnson v. Stellwagen*, 67 Mich.—(opinion of *Justice Champlin* at p. 14), 10 West. Rep. 848.

It would seem to be settled in *Root v. Harl*, 13 L. R. A.

supra, that, when an assignment is made by a debtor for the benefit of creditors, such creditors—as are the defendants in this case—can, upon the equity side of the court, attack the unrecorded mortgage and obtain a preference over it, although they have no lien whatever upon the debtor's property; and that they are not "general creditors," in such a sense that they cannot attack the mortgage without first obtaining a lien, by legal process or otherwise. If this is so, why cannot such a creditor who has obtained a mortgage lien upon the property, and possession under it, defend against a void mortgage without resorting to legal process against the property? And why should he be compelled to relinquish his possession under such mortgage lien, or pay the amount of a void mortgage? In my opinion, there is no equity or justice in the plaintiff's claim in this case, and no law under which he can enforce it.

I do not think that the fact that the defendants obtained their mortgage after the mortgage of plaintiff's testate was put on file cuts any figure in the case. The mortgage was a security for the payment of the debt, against which the Borgess mortgage had no standing and was void. The rights of defendants were not at all impaired by the taking of this security, but the security gave them a lien upon and possession of the property out of which to make their debt. If, instead of giving this mortgage, the debtors had turned out to them enough of the property to pay the debt, I think no one would seriously contend that the holder of this void mortgage could have demanded the goods of them, and, if the demand was refused, have sued them in trover and recovered, although at the time the goods were so turned out to defendants the mortgage had been placed of record. I can see no difference in principle in the two cases.

But it is further contended that in taking this mortgage the defendants canceled the old indebtedness under which they might have claimed the benefit of the Statute, and with full knowledge of the Borgess mortgage, and its invalidity, as against their debt, not only extended the time of payment of the old indebtedness, but made a new contract, looking towards further dealings with Harris & Karpp, thereby waiving their rights under the Statute, and deliberately entering into another contract, to which the Statute would not apply to give them preference to the Borgess mortgage; that by this dealing they elected their remedy, and must abide by such election, and cannot sell the property under their mortgage, and also claim as creditors without notice. It does not appear by the record that the taking of this mortgage was a cancellation or extinguishment of the first indebtedness, nor can there be any presumption that the mortgage and notes were taken in payment and extinguishment of the original indebtedness. The presumption would be that they were taken as security rather than in payment. The recital in the mortgage, also securing indebtedness that might be credited thereafter, cuts no figure in the case, as there were no subsequent dealings between Harris & Karpp and the defendants. The mortgage recites that it is given in security of an indebtedness of \$2,528.58, which is the exact amount

of the indebtedness incurred between the dates of the execution and filing of the Borgess mortgage. Nor does the extension of the time of payment of the indebtedness alter the rights of the defendants as against the Borgess mortgage because such extension did not in any way impair the security of Borgess, or hinder him from proceeding to enforce such security, the same as if no extension had been granted by defendants in the payment of their debt. Furthermore, part of the debt was made payable on demand, and the mortgage provided that, in default of the payment of any of the indebtedness at the day named for its payment, the entire amount should become due and payable at once; and it would seem that there was

really no extension, and the only thing in view and accomplished was the securing of defendants' claim by a mortgage lien, which would also give them possession of the property. We think, under the facts as stipulated, the defendants were entitled to the possession of the property as against the plaintiff, and to make their claim out of it by a sale of the property under such mortgage.

The judgment in favor of the plaintiffs is reversed, and a judgment will be entered here in favor of the defendants for the costs of both courts.

McGrath, J., did not sit; the other Justices concurred.

GEORGIA SUPREME COURT.

E. O'CONNELL, Plff. in Err.,
v.
EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(.....Ga.....)

***Where a railway company erects an embankment for its track along the margin of a river,** the accumulated waters of which, in times of flood, had previously escaped on that side, it being lower than the other, but which thereafter, and because of the embankment, overflowed the opposite side more than it had done before, and thus injured land there situate, the owner has a right of action against the company; or if, by the erection of such embankment, the river was deflected from its natural course, or deposits were made therein so as to raise its bottom, and from either of these causes such land was injured by the river when swollen, a recovery may be had for the damages thereby occasioned.

(May 27, 1891.)

*Head note by LUMPKIN, J.

NOTE.—Facts of each case determine rights.

Each case must of necessity depend largely upon its own facts. Even in those States where the common law prevails the courts hold that the landowner must improve his property in a reasonable manner. *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 329; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271; *Pettigrew v. Evansville, 25 Wis.* 229.

But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. Each proprietor, in such case, is left to protect his own lands against the common enemy of all, so as to cause no unnecessary inconvenience or damage to plaintiff. *McCormick v. Kansas City, St. J. & C. B. R. Co.* 57 Mo. 433. See also *Benson v. Chicago & A. R. Co.* 78 Mo. 504.

The law prevailing in different States.

In some of the States the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or in-

ERROR to the Superior Court for Bibb County to review a judgment overruling a demurrer to the complaint in an action brought to recover damages for injuries to plaintiff's property alleged to have resulted from defendant's negligently building an embankment which caused the waters of a river to overflow plaintiff's land. *Reversed.*

The facts are stated in the opinion.

Messrs. Gustin, Guerry & Hall for plaintiff in error.

Mr. Augustus O. Bacon, for defendant in error:

It is important to note the distinction recognized by all courts between the water within the banks of a natural stream, and the water which in times of freshets overflows the boundary of the natural and ordinary channel of the stream, and rests or flows outside such boundary and upon the lands adjacent thereto. Such overflowing water upon the lands outside of the natural banks of the stream is recognized and classed as surface water. This recognition and classification is uniform.

creased the servitude. *Corp. Jur. Civ. 39, title 3, §§ 2-5; Domat (Cush. ed.) 616; Code Napoleon, art. 640; Code Louisiana, art. 656.*

The courts of Pennsylvania, Illinois, California and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle, 26 Pa.* 415; *Kauffman v. Griesemer, Id.* 407; *Gillham v. Madison County R. Co.* 49 Ill. 484; *Gormley v. Sanford, 52 Ill.* 159; *Ogburn v. Connor, 46 Cal.* 346; *Delahoussaye v. Judice, 18 La. Ann.* 587; *Hays v. Hays, 19 La.* 351; *Butler v. Peck, 16 Ohio St.* 334; *Laumier v. Francis, 23 Mo.* 181.

On the other hand, the courts of Massachusetts, New Jersey, New Hampshire and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from

See *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 238; *Taylor v. Fickas*, 64 Ind. 167; *Broadbent v. Ramotham*, 11 Exch. 602.

The distinguishing principle is this: Water running within the natural banks of a stream is known as a living stream, to the equal enjoyment of which all persons are entitled through whose land it runs; and to protection from the overflow of the waters of which all such land-holders are entitled, whether caused by the obstruction or diversion of the same. On the other hand, all other waters from rain, melted snows, etc., wherever found outside the natural banks of a stream, are surface water, to be absolutely appropriated, if he sees fit, by the one on whose land it is found, or, if he prefers, to be fenced out or embanked against to keep it off his land, regarding it in the language of *Lord Tenterden in Rex v. Pagham Comrs.*, 8 Barn. & C. 355, as "the common enemy," against which all are authorized to protect themselves, as the necessity of the case may require.

On this distinguishing principle rest the varying rules of servitude in the two cases, and from which, in the two cases, different rights, obligations, and liabilities necessarily result.

In examining into the nature of these rights, obligations, and liabilities, the fact must not be lost sight of that the rule establishing the same under the civil law is very different from that recognized and enforced by the common law.

In Pennsylvania, Ohio, Illinois, Louisiana, North Carolina and Iowa the rule of the civil law has been followed.

The contention that the landowners on the one bank owe a duty or obligation to the landowners on the opposite bank as respects the fending off of the overflow water, is based on the legal maxim, "*Sic utere tuo ut alienum non ledas*." This maxim is found of force both in civil law and in the common law; but the construction of the rule in the former system of law is very different from that which is enforced in the latter.

The construction by the civil law writers and courts is expressed in the statement of the rule

by Pothier: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he doth not injure the neighboring heritage."

Customs of Orleans, chap. 13.

Under this broad construction of the rule, it may be generally stated that under the civil law any act is unlawful on one man's land which is injurious to another's land. From this rule are deduced the principles as to surface water: *first*, that the upper landowner cannot divert the flow of surface water so as to deprive the lower land-holder of the right to receive it in its natural flow; *second*, that the lower land-holder cannot embank against it so as to prevent its flowing on to his land from the upper landowner; and *third*, that the upper landowner cannot by any change or use of his own land cause surface water to flow on the land of his neighbor when it would not otherwise do so.

The construction of the maxim by the common-law courts is very different, and the rules deduced therefrom as to surface water are in direct conflict with those of the civil law above stated.

See *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Chatfield v. Wilson*, 28 Vt. 49.

The simple fact that injury results to one does not give a right of action. Such injury to be actionable must result from the violation of some right existing in and belonging to the party injured.

Limiting the inquiry to the case of the erection of any kind of structure by one on his own land, the only "legal right" which can so exist in another as to make that structure unlawful, is some easement in the land, to the enjoyment of which that other is entitled, and through the interference with which that other receives injury and damage. Upon this principle rests the common-law doctrine of ancient lights.

See *Bradbee v. London*, 5 Scott, N. R. 120; *Partridge v. Scott*, 3 Mees. & W. 220; *Wyatt v. Harrison*, 3 Barn. & Ad. 871, 876; *Brown v. Windsor*, 1 Crompt. & J. 20.

passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. Winnisimmet Co.* 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Bowlsby v. Spear*, 31 N. J. L. 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Wis. 656; *Swett v. Cutts*, 50 N. H. 436.

Embankment must not occasion injury to others.

"While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of or to those above or below him on the stream." *Wood, Nuisances*, § 350, citing *Gerrich v. Clough*, 48 N. H. 9, where the defendant had erected a break-water upon his bank of the river to protect it from injury by the water, but the effect of this was to throw the water against another's land, so that in high water his land was washed away, and such injury was held actionable.

It is held by the Ohio court that "a railway company, like an individual, may, on his own land, lawfully cut a new channel for a stream of water and turn the stream into such new channel, if thereby no danger is caused to another; but when

it so controls and directs the course of the stream that the water is thrown across the old channel and against and upon the land of another, and thereby causes damage to such other, the company is liable for such damage." *Valley R. Co. v. Franz*, 2 West. Rep. 368, 48 Ohio St. 623.

The court said in *Livingston v. McDonald*, 21 Iowa, 172, that "the rules of the civil law, . . . so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; . . . and to this extent it is supported by the weight of authority in the common-law courts."

The law recognizes the general rule that each may do with his own as he pleases, but it also recognizes the qualification to that rule that each should so use his own as not to injure his neighbor. *Id.* 173.

The same principle, as applied to the obstructing of a flow of surface water from the dominant to the servient estate, was recognized in *Drake v. Chicago, R. I. & P. R. Co.* 68 Iowa, 308. See *notes to Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 6 L. R. A. 573; *Haines v. Hall* (Or.) 3 L. R. A. 609.

Upon this same principle is based the right of one man to have his house sustained by land of an adjacent landowner.

See *Stansell v. Jollard*, cited in *Solomon v. Vintners Co.* 4 Hurlst. & N. 585; *Hide v. Thornborough*, 2 Car. & K. 250.

The cases of the obstruction of lights not ancient, and of the excavation of ground up to land line, thereby causing the fall of a house of less than twenty years' standing, furnish illustrations of the familiar principle *damnum absque injuria*.

Humphries v. Brogden, 12 Q. B. 748; *Tapping v. Jones*, 11 H. L. Cas. 311.

Where one man's land owes a legal servitude to another man's property, that servitude cannot be interfered with by the owner of the land, even by an act otherwise lawful in itself; and if such servitude is interfered with, or destroyed, liability arises for the damage occasioned thereby to the other. But, unless there is such servitude due to another, the owner of the land may erect thereon such structure, lawful in itself, which he may deem to his interest.

This proprietary interest of one man in the land of another is "the legal right," which the law requires the owner of land to so regard that it shall not be injured or destroyed in the use of property otherwise lawful.

An analysis of all the decisions relative to the obstruction of streams will show that they necessarily rest on this rule of servitude, creating, so far as the bed of the stream is concerned, "the legal rights" of one man in the land of another man.

The low grounds adjacent to a river, but outside of its well-defined banks, do not owe any servitude to the waters resulting from rain, etc., in time of freshet, which do not flow within such banks, but which are found on such adjacent lands.

If such servitude is imposed by the law, it is perpetual in its obligations. It condemns these lands to unending slavery as the receptacle of waste, irregular, useless and vagrant waters. It is a lasting prohibition to the improvement and utilization of such lands. It extends to all structures on such lands, and to any change in the lands themselves by which the capacity of such lands to hold the water will be decreased. It extends to lands in the city, and to those in the country. On the border of the river no factories or mills could be erected, or any other building. In the cities no wharves could be built, nor could the lands ever be raised by filling in earth so that the same could be useful for streets, stores, and dwellings. The inhabitants in the lower part of a city could not be protected by levees from the inundations which would destroy their dwellings. In the country not only could no embankments or levees be raised, but the lowlands and marshes could not be filled up and made valuable for cultivation.

All authorities agree that the principles applicable to running streams, or watercourses, are not applicable to questions affecting mere surface water—rain-water or melting snow.

Washb. Easem. p. 489; Angell, Watercourses, § 108 a; *Flagg v. Worcester*, 18 Gray. 601; *Parks v. Newburyport*, 10 Gray, 28; *Luther v.*

Winnisimmet Co. 9 Cush. 174; *Mellen v. Western R. Corp.* 4 Gray, 301; *Perry v. Worcester*, 6 Gray, 546; *Gannon v. Hargadon*, 10 Allen, 106; *Goodale v. Tuttle*, 20 N. Y. 459; *Hoyt v. Hudson*, 27 Wis. 656; *Bowleby v. Speer*, 31 N. J. L. 851; *Dickinson v. Worcester*, 7 Allen, 19; *Chatfield v. Wilson*, 28 Vt. 49; *Sweet v. Cutts*, 50 N. H. 489, 9 Am. Rep. 276; *Delhi v. Youmans*, 50 Barb. 816; *Waffle v. New York Cent. R. Co.* 58 Barb. 418.

The rule of the common law is that no legal right of any kind can be claimed, *jure natura*, in the flow of surface water, so that neither its retention, diversion, nor repulsion is an actionable injury, even though damage ensue.

Bowleby v. Speer, 31 N. J. L. 351; *Taylor v. Fickas*, 64 Ind. 167, 81 Am. Rep. 114; *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan. 768, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Greatrex v. Hayward*, 8 Exch. 291; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Shields v. Arndt*, 42 N. J. Eq. 284.

Both by the civil law and the common law it is unlawful for one to collect surface water into ditches, sewers, etc., and in this concentrated form discharge it on the lower landowner.

Goldsmith v. Eleas, 53 Ga. 186.

But this rule does not in any manner conflict with the general rule governing surface water and the flow thereof. This general rule is recognized in Georgia.

Phinizy v. Augusta City Council, 47 Ga. 260.

There being no servitude due by the lowlands of a river to the overflow waters of a freshet from excessive rains, etc., there is no "legal right" in the owners on the opposite side of the river which is violated when such overflow waters are fended off from such lowlands, and in consequence no right of action for any supposed or real injury resulting therefrom. If there is any such actual injury it is *damnum absque injuria*.

That the rule of the civil law is otherwise is indisputable, but the common law is the law of Georgia.

One of the strongest cases maintaining the rule of the civil law, *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480, is overruled in *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271. See also *Martin v. Jett*, 12 La. 508; *Somers v. Shift*, 15 La. Ann. 300.

In the case before the court there is no ponding of water on the same side of the stream, and the effect of the embankment complained of is to turn the overflow water into the channel of the stream. This it is legitimate to do.

Slater v. Fox, 5 Hun, 544; *Harding v. Whitney*, 40 Ind. 379; *Wheeler v. Worcester*, 10 Allen, 591.

Lumpkin, J., delivered the opinion of the court:

The precise question in this case is whether the owner of land on the bank of a river can without liability erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury thereof; or is there any duty for each owner to receive upon his

land the share allotted it by nature of the flood-waters of the river? It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man may protect himself without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water; the former allowing the landowner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. *Gillham v. Madison County R. Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 159; and the able opinion in *Boyd v. Conklin*, 54 Mich. 588.

There is much conflict in the American cases (*Washb. Easem.* p. 485, *353 *et seq.*), the majority of the States seeming to follow the so-called "civil-law rule." Thus it is material to consider whether the overflow, as above stated, is properly classed with surface water. This depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood-water becomes severed from the main current or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a "flood channel," to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage.

The English cases on the question are not numerous, though from the decisions and dicta of the judges the law appears to be well understood and settled. In *Rez v. Pagham Comrs.*, 8 Barn. & C. 855, it was held that an owner of land on the seashore could erect works to protect his land from encroachments by the sea, without liability for damage inflicted on his neighbor. The sea was called a "common enemy," against which each might fortify at will.

It appeared in *Rez v. Trafford*, 1 Barn. & Ad. 874, that a canal had been built by authority of Parliament, and carried across a river and the adjoining valley by means of an aqueduct and an embankment containing several arches. A brook fell into the river above its point of intersection with the canal. In times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches into the river, doing much mischief to the lands over which it passed. The aqueduct was sufficiently wide for the passage of the river

at all times but those of high flood. The occupiers of the injured lands adjoining the river and brook, for the protection thereof, erected banks (called "fenders"), so as to prevent the flood-water from escaping; consequently the water, in time of flood, came down in so large a body against the aqueduct and canal as to endanger them, and obstruct the navigation. The fenders were not unnecessarily high, and without them many hundred acres of land would be exposed to inundation. It was held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action would have lain at the suit of an individual; and, consequently, that an indictment lay where the act affected the public. The conviction was accordingly sustained. The doctrine of *Rez v. Pagham Comrs.*, *supra*, was sought to be extended to this case, but Tenterden, *Ch. J.*, who had rendered the decision in that case, said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction. The *Pagham Case* . . . is of a very different kind. . . . In the one case the water is prevented from coming where, within time of memory at least, it never had come; in the other it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass." This seems to be an authoritative enunciation of the common law. *Menzies v. Breadalbane*, 3 Bligh, N. S. 414, is directly in point, but was determined by the law of Scotland. Yet the Lord Chancellor said: "It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water-way, to the prejudice of the proprietor on the other side." In *Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 387, 20 L. T. N. S. 84, it was attempted to extend the sea doctrine to the case of a tidal river, but *Vice-Chancellor Malins* refused to so extend it on the authority of *Menzies v. Breadalbane*, *supra*, saying that *Lord Eldon* put that case upon the general law of England. In *Mason v. Shrewsbury & H. R. Co.*, L. R. 6 Q. B. 581, we find a dictum by *Blackburn, J.*, as follows: "Before the canal was made, the person whose estate the plaintiff now has, had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit,—as, for instance, to turn his mill, or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands."

Lawrence v. Great Western R. Co., 4 Eng. L. & Eq. 265, 16 Q. B. 643, is considerably in point. A railway was constructed across certain low lands adjoining a river, over which the flood-waters used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain Drainage Acts, which protected the plaintiff's lands from floods. By the construction of the railway the flood-waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. It was held that an action would lie against the company for the injury. Patteeson, J., said: "Prima facie this would give the plaintiff a cause of action, and the question is whether the company are protected by their act;" a question which cannot arise in our law. In connection with the cases of *Rez v. Trafford* and *Lawrence v. Great Western R. Co.*, *supra*, it must be borne in mind that the first obstruction of the flood-waters there mentioned is, in England, justified by the statute authorizing it, and therefore stands on much the same footing as a natural obstruction; but the liability of the other party, who erected the second obstruction without statute authority, springs from the common law. No English authority has been found to controvert these principles, but the text-writers recognize them as settled law. Woolf, *Waters*, 218 (78 Law Lib. 212); Crabb, *Real Prop.* 420 (54 Law Lib. 263); Michael & W. Gas. & Water (London ed. 1884), pp. 213, 214, 666; Angell, *Watercourses*, §§ 333, 334; Gould, *Waters*, §§ 160, 209.

In grouping the American cases, those tending to sustain the contention of the defendant in error will first be stated. *Taylor v. Fickas*, 64 Ind. 167, was much relied upon. There the injury was caused by the obstruction of the passage of driftwood, both owners being on the same side of the river, and the lower owner having planted a row of trees along the dividing line. The opinion, it is true, treats overflow in flood times as surface water, but it will be noticed that nothing is said or decided about changing the course of the water. The facts are obviously different from those in the present case. In *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, the plaintiff's land was between the river and the railroad embankment. The overflow is treated as surface water, and the road held not liable; but it would seem that the water doing the damage had left the river, never to return. *Shelbyville & V. Turnp. Co. v. Green*, 99 Ind. 205, follows the last case. The turnpike was flooded because of an embankment erected by Green to protect his land from overflow, both parties being on the same side. It was held that the company could not recover. But note that the court adverts to the fact that the company did not own the soil over which the pike ran, but merely had an easement therein. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433, can also be distinguished. Here the overflowing water left the stream permanently, and entered a pond formed thereby and by other surface water, the draining of which pond caused the injury sued for.

In *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 288, the overflow is apparently treated as surface water, although it had a way.

through a slough, back into the stream. But the court applied the civil law, and held the railroad liable. This case, together with that of *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359, is overruled, in so far as the civil law was followed, by *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 88 Mo. 271, 20 Am. & Eng. R. R. Cas. 103, and the common law as to surface water returned to. In this last case it is said that the court in the *Shane Case* treated the overflow as part of the stream, and, therefore, that the decision was correct on common-law principles. In the *Abbott Case*, the court expressly assumes the waters to be surface waters. It seems they escaped from the bed of the creek, and flowed over the lands without any return. *Lamb v. Reclamation Dist. No. 108*, 78 Cal. 125, is not much in point. The defendant was a public corporation for the purpose of reclaiming the low lands protected by the embankment, which closed up a slough through which an inconsiderable part of the flood-waters escaped into a natural basin. The plaintiff's land lay two miles below, on the opposite side. The court applied the sea doctrine of the common law, and held the company not liable; but the decision is mainly rested on another ground, namely, that the corporation was not liable as for exercising the right of eminent domain; and in view also of the concurring opinions, the case is weak on the question involved in the case at bar. See below for an earlier decision by the same court looking another way, not noticed in the case above.

In *Hoard v. Des Moines*, 62 Iowa, 326, the plaintiff's land was between the river and the embankment, and it was held that the plaintiff had no right to have the flood-waters from the river pass over his land on to that of another, although they finally joined the river again at a point further down. At first view, *Moyer v. New York Cent. & H. R. R. Co.*, 88 N. Y. 351, seems to support the defendant's position; but a close examination shows otherwise. The complaint averred that the damage was caused by the railroad building an embankment on the opposite side of the river. Evidence was offered and objected to, to show damage caused by raising the tracks. It was admitted, the railroad excepting. The referee included in his finding for the plaintiff the damages caused by raising the tracks, as to which the complaint alleged nothing, thus tainting the whole finding with illegality. The judgment was reversed for the error in admitting said evidence and in said finding. The court says the defendant, as a matter of law, would not be liable for consequential damages caused by the raising of the embankment on the company's own land in a proper and workman-like manner, citing *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 47. This case bases the freedom from liability upon the legislative authority, but concedes that a private individual would be liable under the same conditions. In our law the railroad occupies no better position in this respect than the private individual.

Now will be stated the American cases going to show that the defendant is liable if it has erected the obstruction to the flood-waters of the river, as complained of in this case. The surplus waters do not cease to be a part of the river when they spread over the adjacent low

grounds, without well-defined banks or channel, so long as they form with it one body of water, eventually to be discharged through the channel proper. Thus it is held, where the waters of a stream disperse themselves over low ground, without any well-marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them then gives the injured party a right of action. *Macomber v. Godfrey*, 108 Mass. 219; *Gillett v. Johnson*, 30 Conn. 180; *Briscoe v. Drought*, 11 Ir. C. L. 250; *West v. Taylor*, 16 Or. 165. But if it were conceded that the overflow is surface water, it would certainly cease to be such when turned back into the stream by the defendant's obstruction. *Sullens v. Chicago, R. I. & P. R. Co.* 74 Iowa, 659; *Moore v. Chicago, B. & Q. R. Co.* 75 Iowa, 268; *Jones v. Hannover*, 55 Mo. 462; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 88. Under these authorities, this declaration might be sustained as complaining that the defendant prevented the flood-waters from becoming surface waters, and threw them back across the river upon plaintiff's land. See, further, as to surface water, 17 Cent. L. J. 42, 62; *Angell, Water-courses*, § 108a et seq.; *Gould, Waters*, § 208 et seq. But it is not necessary to take this view, as the following authorities show the defendant to be liable under the alleged facts: Where the effect of the defendant's dike was to retain on the land of the plaintiff flood-waters from the river longer than they would otherwise remain, the injury was held actionable, and the demurrer overruled. *Montgomery v. Locke* (Cal.) 11 Pac. Rep. 874. Where, in a freshet, the stream broke over one of its banks, carrying a part of it away, it was held that the owner might replace the bank with a dam, provided he did not build higher than the original bank, or otherwise cause the water to flow differently from the natural flow. *Pierce v. Kinney*, 59 Barb. 56.

"It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away, and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods. If he does, he will be liable for the injury." *Wallace v. Drew*, 59 Barb. 418. There is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood. *Burnell v. Hobson*, 12 Gratt. 322. This case is in point, and holds the defendant liable. Another case in point is *Oranford v. Rambo*, 44 Ohio St. 279, 4 West. Rep. 445, holding that flood-water is not surface water, and that interference therewith gives a right of action. So *Byrne v. Minneapolis & St. L. R. Co.*, 88 Minn. 212, holds that overflow in times of high water is not surface water, and the railroad is liable for obstruction of such water by an embankment erected on its own land. See also *Rau v. Minnesota Valley R. Co.* 18 Minn. 442 (Gil. 407), where the railroad made an extensive excavation on its own land, into which overflow waters from the Mississippi River entered, to the damage of an adjoining

owner. The railroad was liable. *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, and *notes*, and *Truthill v. Scott*, 43 Vt. 525, seem not to involve the question as to the action of the water in times of flood, but are adverse to defendant as far as they go.

In *Carriger v. East Tennessee, V. & G. R. Co.*, 7 Lea, 388, the railroad embankment did not affect the usual flow of the streams, but obstructed the flood channel, and threw the excessive waters upon the plaintiff's lands. This same defendant contended that they were surface waters, which it had a right to obstruct. The trial court gave judgment for the defendant, holding "that the overflow in question resulted from accumulations of surface water caused by extraordinary rains, and that the law relating to surface water, and not that of running streams, governs the case." The supreme court said: "The question to be determined is, Is this such surface water as to relieve the defendant? . . . The springs and their branches are never-failing, and flow off in a northward direction towards the farm of plaintiff. In ordinary times they find outlets through the caverns or sinks in the earth. In extraordinary times their volumes are too great for the usual place of discharge. These springs and branches are sometimes large and sometimes small; still they are the same springs and branches, requiring, as all running streams do, sometimes less and at other times more surface for their escape. . . . If the embankment had been erected in a valley, near a low bank of the river, which overflowed at high tide, but escaped in one passage, so as not to materially injure adjoining lands, but, if obstructed by the embankment, would overflow and damage, as in this case, we think it would not be insisted that it was not obligatory on the defendant to build a culvert to prevent damage that must certainly come with the high tide. Is there a difference in reason as to the case put and the one at bar? We think not. While they may not be so frequent, the overflows from the branches are as certain as those from the river; one is as certainly a constant running stream as the other. . . . It is no defense for it to say that it was only in extraordinary times the injuries now complained of could result. The rises in the waters had for all time occurred at intervals before the building of the road, and it was to be conclusively presumed they would occur afterwards from similar causes." The court entered judgment for the plaintiff. This is a stronger case than the one now to be decided. Counsel for defendant ably and strenuously insist that the common, and not the civil, law be applied to this case. The above authorities prove that the common law does not regard the waters here complained of as mere surface water, but as a part of the river. The civil law might be more favorable to the defendant's case, for it seems to regard the flood-waters of a river as a common enemy, against which each riparian owner may build defenses with impunity. *Maitlot v. Pugh*, 80 La. Ann. 1859, citing authorities. The defendant also claims that the question is settled by an Act of the Legislature, and cites section 2232 of the Code. That section says: "All persons owning, or who may hereafter own, lands on any water-

courses in this State, are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses; provided, always, that the said ditching and embanking does not divert said watercourse from its ordinary channel; but nothing shall be so construed as to prevent the owners of land from diverting unnavigable watercourses through their own lands." This contention may be answered in three ways: *First*. The declaration in this case distinctly alleges that the defendant did divert the river from its ordinary channel, for which act the Statute affords no shadow of protection. *Secondly*. The allegations of the declaration do not show that defendant embanked its land "so as to protect the same," but constructed an embankment on which to lay its track, without regard to any consequences of benefit or injury to the contiguous country. *Thirdly*. The construction long ago and repeatedly put by this court on the last part of the section, which says, "Nothing shall be so construed as to prevent the owners of land from diverting unnavigable watercourses through their own lands," necessitates the conclusion that this whole Statute is not alternative, but only declaratory, of the common law. In other words, the Legislature did not intend to give riparian owners the privilege of ditching or embanking their lands, or of diverting unnavigable watercourses, so as to injure neighboring proprietors, without liability therefor. Indeed, the power of the Legislature so to alter the common law is expressly denied in *Persons v. Hill*, 33 Ga. Supp. 143. And in *Cheeves v. Dantelly*, 80 Ga. 118, the same view is taken as to the intention of the Legislature in passing this Act. It is true, these cases deal with the diversion of an unnavigable stream, but it would be absurd to impute to the Legislature two conflicting intentions in the same Act; and the ground taken in *Persons v. Hill* will equally well support the same rule of construction as to the other branch of the Statute. The facts in *Persons v. Hill* require notice. The owners were on the same side of the Flint River, into which Beaver Creek emptied after passing through the defendant's land. By mutual agreement between the upper owner (plaintiff) and the lower owner (defendant), the expense being also shared, an embankment was erected along the river to keep back the flood-waters which, from the facts of the case, seemed to have this course,—that is to say, coming out on plaintiff's land, they flowed across the same over defendant's land into the creek, by which they would empty back into the river. The embankment not being kept up according to the agreement, defendant proposed to protect himself by diverting the creek through a canal on his own land to the river and building an embankment along his side of the canal. This canal would make an opening through the high bank of the river, and, with the embankment, would allow and cause the high waters to back up on the plaintiff's land. This court granted an injunction against the construction of the canal, but allowed the defendant to continue the embankment. One great difference from the present case might be found in the agreement for consideration to have the common protec-

tion of the first embankment. See *Savannah, P. & W. R. Co. v. Lawton*, 75 Ga. 192. But at any rate the decision does not contemplate that defendant's individual embankment would injure the plaintiff's land, such an inference being inconsistent with the plain language of the opinion on page 197.

There is another section of the Code, not cited or discussed in the argument, which deserves mention in this connection: "No person shall be permitted to make or keep up any dam to stop the natural course of any water, so as to overflow the lands of any other person, without his consent; nor shall any person stop or prevent any water from running off of any person's field, whereby such person may be prevented from planting in season, or receive any other injury thereby; nor so as to turn the natural course of any water from one channel or swamp to another, to the prejudice of any person." Code, § 1807. This Statute was passed September 29, 1778, and apparently revived by the Act of February 25, 1784 (*Marbury & C. Dig.* p. 404), being recognized by subsequent amendments and by the Codes (Acts 1855-56, p. 12; Acts 1865-66, p. 27). It is put in the Code under the head "Cultivation of Rice," but from reading the original Act (*Marbury & C. p. 178*) it is by no means clear that it was intended to apply only on rice farms. Neither the title nor the body of the Act contains the slightest intimation to that effect. Its terms are as broad and general as they well could be. The preamble, it is true, in stating the mischiefs to be remedied, describes such as probably were common in the localities where rice was cultivated, though even here there is no distinct allusion to rice culture. These mischiefs may, as a matter of history, have occasioned the enactment of the Statute. But might not the Legislature have deemed it wise to pass a general law, applicable in all portions of the State where similar mischiefs were likely to happen? It is not inconsistent with the purpose of an Act for curing a special class of mischiefs to provide therein a remedy at the same time for all mischiefs of that genus. On the contrary, that would be highly a proper mode of legislation. If the preamble is not to be given a controlling and restrictive effect, this Act alone would completely and effectually dispose of the present case, as the declaration alleges acts by the defendant which violate the law in question if it was intended to have a general application. But, since it is unnecessary for the purposes of this case to measure the extent of this statute, the question is not decided, especially as it deserves more argument and consideration. It was urged in the argument that the law ought to encourage the reclaiming and improvement of lands which are subject to injury from the natural action of floods and surface water, and it is surprising to find this argument unquestioningly relied upon in many cases which are supposed to follow the common law of surface water. The error therein is easily exposed, for to the same extent as the land of an adjoining owner is damaged by the improvement on the defendant's land, so far exactly is the development of the damaged land set back and retarded. The defendant might bring his land to perfection for his uses, and then have all

that good work ruined by the first measures of improvement adopted by his less progressive neighbor. The rule contended for by the defendant would be a poor encouragement to painstaking labor engaged in reclaiming unprofitable land. Everyone is charged with notice of nature's operations; but who can tell when a man will build his bulwarks against the flood? There is no public policy to allow one landowner to improve his condition at the cost of his neighbor; but the improver must, at his peril, see to it that the benefit to himself is large enough to pay both him and his neighbor's damage, if any. The law does not look to the interest of one individual, but recognizes and enforces the duties implied in his relation to others. Of course, for these principles to apply, there must be, as in this case, an invasion of some tangible right. *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787.

And it must not be understood that this discussion rules anything beyond the questions contained in this particular case. Undoubtedly there is a class of rare cases not within the general rule, as indicated by the eloquent language of Agnew, J., in *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 452, where he says: "There is therefore no liability for extraordinary floods—those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." But such is not the case made by this declaration. For the foregoing reasons it is evident that the court erred in sustaining the demurrer to the declaration.

Judgment reversed.

NEW YORK COURT OF APPEALS.

Lena PAPPENHEIM, *Recept.*,

v.

METROPOLITAN ELEVATED R. CO.,
et al., *Appts.*

(....N. Y.....)

The transfer of property abutting on a street in which an elevated railroad has been constructed, before bringing suit for damages for injuries to the appurtenant easements of light, air, and access or the transfer of them to the company, carries with it all the grantor's rights and remedies to compel payment of such damages, regardless of the price paid for the land.

(October 13, 1891.)

APPPEAL by defendants from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to compel payment of damages for injuries caused to plaintiff's property by the construction and operation of defendants' elevated railroad. *Affirmed.*

Statement by **Peckham, J.**:

This action is brought to perpetually enjoin the defendants from operating their railway in Second Avenue, between 120th and 121st Streets, in the City of New York, in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from defendants the loss and damage already sustained by reason of the past operating of the defendants' railway in front of the plaintiff's premises, and, if the defendants shall be permitted to so operate their road in the future, that it shall be only upon condition that they first pay to the plaintiff the amount of the permanent loss and damage to her premises sustained by her by reason of such operation, and also the amount of her loss and damage already sus-

tained. This is, in substance, the relief asked for by the plaintiff. The defendants in their answer to the complaint, set up various defenses, the chief of which, and the one particularly argued and relied upon here, is that the railway was built in 1880, and has been in operation ever since, and, if any damage has been inflicted upon plaintiff's premises by the erection and operation of the railway, such damage was inflicted at the time it was so built and operated, and at that time the premises were owned and possessed by some other person, and the plaintiff was not then their owner, and is not the owner of the cause of action. The court found that the plaintiff, on the 23d of April, 1883, became the owner of the premises, and has ever since owned them, and since that time there has been a valuable building standing on them. Since that time the plaintiff has also owned, as attached or appurtenant to the premises, an easement of light, air, and access in and over Second Avenue, and the only property rights of the plaintiff interfered with by the defendants are easements of light, air, and access therein appurtenant to the plaintiff's premises, and she is not seised of any estate in the land forming the bed of such avenue in front of her premises. The railroad had in fact been built and had been in operation along Second Avenue for some years prior to the time when the plaintiff purchased, in 1883. She paid, according to some of the evidence, the fair market value of the lot with the railroad in the avenue. It was also proved that the plaintiff had sustained injuries by the construction and operation of the road from the time of her purchase to the trial of the action in the sum of \$1,800, and that the value of the plaintiff's easement in fee taken, appropriated, or interfered with by reason of such construction and perpetual maintenance and operation of defendants' railway, over and above any benefits resulting therefrom and peculiar to the premises, was the sum of \$2,000. It was also found that the defendants were author-

NOTE.—Servitudes of light and air. See note to *Abendroth v. Manhattan R. Co.* 122 N. Y. 1.

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ized by certain Acts of the Legislature to exercise the right of eminent domain, and thus to acquire plaintiff's easement, if necessary, and defendants had like authority to build the railway in the streets in which it has been built; but there was nothing in the acts giving the defendants any authority to take plaintiff's property without compensation. The road has been built under the provisions of the so-called "Rapid Transit Act." Laws 1875, chap. 606.

Judgment was given for the plaintiff in accordance with the findings of the court, and it was provided that the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by plaintiff of a deed conveying to defendants plaintiff's interest in the easement taken by defendants. The judgment so entered was affirmed by the general term of the superior court of the City of New York upon appeal (13 N. Y. Supp. 955); and from the judgment of affirmance the defendants appeal here.

Messrs. John F. Dillon, Julien T. Davies and Brainard Tolles, with Messrs. Davies & Rapallo, for appellants:

Equity does not intervene to prevent every trivial, insignificant or unsubstantial violation of a bare legal right.

McLaury v. Hart, 121 N. Y. 636; *Genet v. Delaware & H. Canal Co.* 57 Hun, 174; *Jeffers v. Jeffers*, 9 Cent. Rep. 875, 107 N. Y. 658; *Cornring v. Troy I. & N. Factory*, 40 N. Y. 230; *Clinton v. Myers*, 48 N. Y. 521; *People v. Canal Board*, 55 N. Y. 897; *Health Dept. of New York City v. Purdon*, 99 N. Y. 287; *Morgan v. Binghamton*, 3 Cent. Rep. 648, 102 N. Y. 500; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 106; *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Jerome v. Ross*, 7 Johns. Ch. 815, 2 L. ed. 805; *Livingston v. Livingston*, 6 Johns. Ch. 497, 2 L. ed. 196; *Sargent v. George*, 56 Vt. 627; *Blake v. Brooklyn*, 26 Barb. 301; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 342; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 78; *Bigelow v. Hartford Bridge Co.* 14 Conn. 580; *Elmhurst v. Spencer*, 2 Macn. & G. 50; *Saunders v. Smith*, 3 Myl. & C. 711; *Dover Harbour v. Southeastern R. Co.* 9 Hare, 493; *Holyoake v. Shrewsbury & B. R. Co.* 5 Eng. R. & Canal Cas. 421; *Cooper v. Crabtree*, L. R. 19 Ch. Div. 198. See also *Purdy v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 43, and cases there cited.

Plaintiff's right, in the ultimate analysis, is really and substantially a right to compensation and not a right to the enjoyment of specific real property.

Henderson v. New York Cent. R. Co. 78 N. Y. 423; *Uline v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98; *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 189; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1; *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 34 L. ed. 231; *Krone v. Kings County Elev. R. Co.* 50 Hun, 481; *Taylor v. Metropolitan Elev. R. Co.* 18 Jones & S. 811; *Knox v. Metropolitan Elev. R.*

Co. 58 Hun, 517; *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 56 Hun, 182; *Pittsburgh, V. & C. R. Co. v. Oliver*, 131 Pa. 408, 44 Am. & Eng. R. Cas. 175; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Paterson N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq. 93.

The easements in question have in themselves no more than a nominal value, and plaintiff's claim to substantial compensation rests wholly upon proof of consequential injury.

Newman v. Metropolitan Elev. R. Co. 7 L. R. A. 289, 118 N. Y. 616; *Henderson v. New York Cent. & H. R. R. Co.* 78 N. Y. 423; *Re New York, L. & W. R. Co.* 27 Hun, 151; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Re Brooklyn Elev. R. Co.* 55 Hun, 165; *Re Union Elev. R. Co.* 80 N. Y. S. R. 164; *Re Kings County Elev. R. Co.* 85 N. Y. S. R. 367; *Brush v. Manhattan R. Co.* 26 Abb. N. C. 73; *Gray v. Manhattan Elev. R. Co.* 35 N. Y. S. R. 32; *Welsh v. New York Elev. R. Co.* 35 N. Y. S. R. 85; *Purdy v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 43.

The measure of compensation, where part of an entire tract is taken, is the difference between the actual market value of the entire tract at the time of condemnation and the market value of what will be left after the part proposed to be appropriated is taken out.

Newman v. Metropolitan Elev. R. Co. supra; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Re New York, L. & W. R. Co. and Re New York, W. S. & B. R. Co. supra*; *Re Utica, C. & S. V. R. Co.* 56 Barb. 456; *Re New York Cent. & H. R. Co. v. Judge*, 15 Hun, 68; *Re Furman Street*, 17 Wend. 649; *Müller v. Southern P. B. R. Co.* 83 Cal. 240; *Geissinger v. Hillertown*, 133 Pa. 522; *Central Land Co. v. Providence*, 1 New Eng. Rep. 873, 15 R. I. 246; *Fl. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281; *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714; *Pennsylvania S. V. R. Co. v. Cleary*, 125 Pa. 442; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Cresson, C. C. & N. Y. S. R. Co. v. Aunsman* (Pa.) 10 Cent. Rep. 340; *Reading & P. R. Co. v. Balhasar*, 12 Cent. Rep. 173, 119 Pa. 483; *Kucheman v. C. C. & D. R. Co.* 46 Iowa, 386; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 667; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165; *Dearborn v. Boston, C. & M. R. Co.* 24 N. H. 179; *Mt. Washington Road Co's Petition*, 35 N. H. 184; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324.

A property owner who has the bare legal title to the easement, and must rely upon present market values alone for the measure of his compensation, can receive only a nominal award.

A jury might well find that the loss sustained by one who exercised his lawful right of selling his own property, and was compelled because of the proximity of an elevated railroad to accept a diminished price for it, was the natural and proximate result of the construction and maintenance of the railroad. And if they so found, there is no legal reason why the railway company should not be liable to make compensation for the loss actually sustained.

Squier v. Gould, 14 Wend. 159.

The wrong to be redressed in such a case is one which is personal to the owner and which

results from discrediting the property in the market, and which accrues only when the property is brought into the market for sale. It bears more analogy to slander of title than to any other tort mentioned in the books.

See Bishop, Non-cont. Law, § 345; *Like v. McKinstry*, 41 Barb. 186, 4 Keyes, 397; *Dodge v. Colby*, 11 Cent. Rep. 466, 108 N. Y. 445; *Linden v. Graham*, 1 Duer, 870.

An instance of a recovery by an abutting owner, who had sold his lots after the construction of a railway in front of them, of the loss sustained through the lessening of the price obtained, is furnished by—

Henderson v. New York Cent. R. Co. 78 N. Y. 423.

A cause of action for damages already accrued would not in any event pass by the deed.

Porter v. Metropolitan Elev. R. Co. 120 N. Y. 284; *King v. New York*, 3 Cent. Rep. 39, 102 N. Y. 171; *McFadden v. Johnson*, 72 Pa. 335. See *Foot v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 119.

Other instances of a recovery for the diminution in the price obtained for property upon a sale are found in—

Porter v. Metropolitan Elev. R. Co. supra, and *Paret v. New York Elev. R. Co.* See also *Hine v. New York Elev. R. Co.* 37 N. Y. S. R. 606; *Mulford v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 51; *Mortimer v. Manhattan R. Co.* 25 Jones & S. 509.

In other States instructive decisions may be found denying the right of one who has purchased land under such conditions as this plaintiff did to maintain an action for substantial damages.

Dunlap v. Toledo, A. A. & G. T. R. Co. 50 Mich. 470; *Pomeroy v. Chicago & M. R. Co.* 25 Wis. 643; *Dixon v. Baltimore & P. R. Co.* 1 Mackey (D. C.) 78, 3 Am. & Eng. R. Cas. 207; *Lewis v. Wilmington & M. R. Co.* 11 Rich. L. 91; *Church v. Grand Rapids & I. R. Co.* 70 Ind. 167.

Messrs. Sackett & Bennett, for respondent:

Lord Coke calls the Register Brevium the oldest book of the law; and Fitzherbert in his new Natura Brevium, p. 290, says that the Register contains a writ for a grantee of land against the grantee of other land for abatement of a nuisance erected prior to either grant.

Among the early examples of actions on the case for nuisance are two which involve the points under consideration and decide it in accordance with the doctrine of Fitzherbert, where the remedy was pursued by *quod permittat*.

Westbourne v. Mordant, 1 Cro. Eliz. 191; *Beswick v. Comden*, 1 Cro. Eliz. 402. See also *Penruddock's Case*, 5 Coke, 101.

These cases go on the ground that a continuance of the nuisance was a new wrong or nuisance. Upon the same ground from the Year Books down have the cases proceeded, which have held that an action could be maintained against the heir of a person who had levied a continuing nuisance.

4 Liber Assisorum, 8; *Johnson v. Long*, 1 Ld. Raym. 870; *Roswell v. Prior*, 1 Ld. Raym. 718; *Moore v. Brown*, Dyer, p. 819, pl. 17; *Blunt v. Ailn*, 15 Wend. 522.

In *Lord Eldon's* time, chancery began to 18 L. R. A.

grant injunctions against nuisances of a continuous nature, and also against continuing trespasses. In this State the chancellor, following the authority of *Lord Eldon*, began at an early day to exercise a similar jurisdiction.

See *Brady v. Weeks*, 8 Barb. 157; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191; *Campbell v. Seaman*, 63 N. Y. 568. See also *Barnhart v. Painter*, 2 Rawle, 82; *Staple v. Spring*, 10 Mass. 74.

The action at bar is not for a nuisance according to the technical language of the black-letter lawyers, but for a continuing trespass; but this makes the argument against the appellants all the stronger, if we consider the origin and nature of the action of the trespass. The writ of trespass is one of the oldest of the formed writs, *breviter formata*.

See Register, p. 98, *de Transgressionibus*.

In case of a continuing trespass, the person might bring a new action every day.

Mahon v. New York Cent. & H. R. R. Co. 24 N. Y. 658; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

Every argument which can be made in favor of the rule announced by Fitzherbert and followed by *Earl, J.*, in *Campbell v. Seaman*, 63 N. Y. 568, in an action for a continuing nuisance, applies with greater force in an action for a continuing trespass.

In the *Broiestadt Case*, 55 N. Y. 220, this court sustained a perpetual injunction, obtained by a purchaser of land abutting on a public street in the City of Brooklyn, restraining the further maintenance of a railway in the street in front of his premises, which was constructed and in operation prior to his purchase.

See *Griswold v. Metropolitan Elev. R. Co.* 122 N. Y. 102.

For years in all the lower courts the law has been settled adversely to the appellant's contention.

Glover Case, 19 Jones & S. 1; *Mitchell v. Metropolitan Elev. R. Co.* 56 Hun, 548; *Foot Case*, 36 N. Y. S. R. 119.

Mr. E. Willett Van Nest, also, for respondents:

A purchaser has the same right as his vendor to recover.

The Constitution requires compensation to be made before any real estate can be taken. Until the money is paid railroad companies acquire no rights under the Constitution and under the express provisions of the statutes.

Laws 1850, chap. 140, § 18; Laws 1875, chap. 606, § 20; *Sixth Ave. v. Kerr*, 72 N. Y. 338; *Re Washington Park Comrs.* 56 N. Y. 152; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 19.

The easements of light, air, and access pass to the purchaser whether he acquire his title by will or deed.

Story v. New York Elev. R. Co. 90 N. Y. 145; *Hills v. Miller*, 8 Paige, 254, 8 L. ed. 141; *Child v. Chappell*, 9 N. Y. 246; *Taylor v. Hopper*, 62 N. Y. 649; *Arnold v. Hudson River R. Co.* 55 N. Y. 861; *Glover v. Manhattan R. Co.* 19 Jones & S. 1; *Rolf v. Rolf*, 5 Coke, 101a; *Penruddock's Case*, 5 Coke, 100; *Griswold v. Metropolitan Elev. R. Co.* 122 N. Y. 102; *Broiestadt v. South Side R. Co.* 55 N. Y. 220; *Corning v. Troy I. & N. Factory*, 40 N. Y. 192; *Orippen v. Moses*, 49 N. Y. 63; *Shepard v. Manhattan R. Co.* 117 N. Y. 442; *Dean v. Metropolitan*

Elev. R. Co. 119 N. Y. 546; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119.

A person who sells property before condemnation proceedings have been begun cannot recover the diminished selling value.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 123; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

Peckham, J., delivered the opinion of the court:

The structure erected by defendants in Second Avenue, in front of the plaintiff's premises, was an illegal structure, and inconsistent with the use of the avenue as a public street. At the time of building the railway a trespass was committed by the defendants upon the property now owned by the plaintiff, although she did not own it at that time. Such trespass has been continued from the time when the road was built up to the time when the judgment in this action was entered. By continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action. These propositions are clear, and are now undisputed. They have been settled by the *Story* and the *Uline Cases*, so familiar to the court and the bar. 90 N. Y. 122; 101 N. Y. 98, 2 Cent. Rep. 116.

As the structure is illegal, and as it constitutes while it exists a continuing trespass, the Railroad Company is under a legal obligation to remove it, and the law presumes that the Company will do so.

In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damages which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum, and that the plaintiff shall so convey. It provides, that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the 13 L. R. A.

cases where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and a strict injunction would issue upon the right of the owner being determined. *Henderson v. New York Cent. R. Co.* 78 N. Y. 423. The owner, if he receive the amount of the permanent damage, is by the court compelled to convey the interest to the defendant which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition, and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

In a case where the defendant has no power to condemn the property, if the owner in that event proceed in equity, he recovers only his damage up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. If the owner sue at law, he recovers his damages as stated. If the owner, without having brought any suit in equity, sell his property at a loss caused by the erection of the railroad, the question at once arises as to what rights are acquired by the purchaser, and what claim, if any, has the vendor against defendant. The vendee has purchased and the vendor has sold to him, in fee simple absolute, the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air, and access which the defendant has already interfered with and trespassed upon by the erection and operation of the road. *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 6 Cent. Rep. 871; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640.

The vendee finds the Railroad making use of a portion of his property without right, and in the character of a mere wrong-doer. That use depreciates the value of the remaining part of the owner's property, and causes him daily damage. He institutes his action, either at law or in equity, to recover damages up to the time of the commencement of the action or permanently, and for an injunction, as the case may be, and, in answer to proof of ownership and daily or permanent damage, he is told by way of defense that the Railroad Company paid or is liable to pay to his vendor the difference between what the vendor sold the property for to him and what it could have been sold for if the railroad were not there, and therefore it has the right to continue the act which by such payment or liability has been changed from a trespass to a valid action. It is true that the railroad has not received any conveyance of any right to continue the trespass. On the contrary, the vendor conveyed to plaintiff the absolute fee simple in the property, and all the ordinary rights of ownership passed with such conveyance. It was after such

conveyance, and when the vendor was no longer owner, that, according to defendants, the Company paid, or became liable to pay, his alleged loss caused by such sale, and which payment or liability defendants now claim has altered the situation so effectually. The vendee, who obtained the property at what may have been a low price, has nevertheless the rights of a general owner which are not dependent upon the price which he paid for his title. Every day that the Company operates its road over or through the property of the plaintiff, it commit an illegal act or trespass; and the character of that act with respect to the property of the plaintiff is not in any degree affected by the fact that the plaintiff's vendor sold his property at a loss, which that vendor says he sustained from the illegal action of the defendant. There is no doubt that the same easements which were appurtenant to the premises owned by the plaintiff's vendor passed to his vendee, the present plaintiff, by the conveyance to her. They passed because they were appurtenant, and the vendor never attempted to reserve them, assuming even that such reservation were a legal possibility. As these easements passed to the vendee and became her property, as much so as the land itself, how is it that the Railroad Company has become possessed of the right to appropriate such easements, or any portion of them, without payment to her? Her private property is taken without compensation to her under such circumstances, if defendant have the right to permanently enter upon and use these easements; and thus a constitutional guaranty is violated in her case, and she is without redress. The answer to this assertion is made by the counsel for defendants in a very ingenious argument, the foundation of which is, however, laid in what seems to me an erroneous application of a general rule relating to the measure of damages in condemnation proceedings, and from which it is argued that the real actionable loss falls upon the owner of the property when the road was built, provided he sells his property in a depreciated market. They claim that such an owner has a cause of action to recover the loss he has sustained by a sale of his property in a market depreciated by the wrongful act of defendants in entering upon or appropriating the easements appurtenant to such property. The argument, of course, assumes that, if such a cause of action be made out, it must follow that none arises in favor of a subsequent purchaser who obtains the land at a price reduced on account of the existence of the road. Unless the one cause of action exclude the other, the defendants would accomplish nothing by proving the existence of one in favor of the original owner.

The defendants' counsel assert that the permanent damage to the property was sustained by the vendor at the time he sold to the plaintiff, and that the Company is liable to pay the same to him. Hence they say that in taking from the present owner the easements spoken of,—which, when separated from the land to which they are appurtenant, are of themselves but of a nominal value,—

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the defendants would only be condemned to pay therefor a nominal sum, such as six cents; and as to the resulting loss in value to the adjoining land of the vendee, caused by the erection and operation of the railroad, the vendee has not sustained that loss, because she has only paid for the property the sum to which it had depreciated by reason of the existence of the road in front of it. Continuing the argument, the counsel for the defendants state that if the present owner (the vendee) should commence an action to restrain the further trespass the defendants could at once commence proceedings to condemn the easements, and that the rule of damages would be the difference between the present market value of the whole property and that portion which would be left after the taking, and that difference would be nominal only; so that when the present owner commences her action to restrain the further commission of the trespass the whole matter may be adjusted in such suit, and the same rule of damages would obtain. The result would be either that the defendants would be enjoined from further operating their road until they paid six cents, the nominal damage sustained by the present owner, or else the bill would be dismissed entirely, on the ground that the aid of equity could not be invoked for the purpose of compelling the payment of merely nominal damages. This course of argument does not, as it seems to me, answer the claim of the present owner to enjoin the further trespass upon her property unless she is paid the damage which such trespass will permanently cause her. That damage is not merely nominal. In 1880, the defendants erected their road, and by its erection and operation depreciated the value of the property now owned by the plaintiff. In erecting their road, they trespassed upon the easements appurtenant to that property, and such trespass has been continuous ever since. By these wrongful acts the market value of the plaintiff's property has been greatly depreciated. If they were compelled to resort to condemnation proceedings, the defendants say it is the present market value which they must pay. The vice in this argument lies in the erroneous statement of the measure of damages. In such case, and under these circumstances, where the value has been depreciated by the wrongful entry of defendants upon the property, it is not the present market value of such property thus damaged that the defendants must pay. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry. But when the defendant has already entered upon the property, and has depreciated its value thereby, it is plain that the simple question of value at the time of condemnation is not the proper rule. In such case the inquiry must be, What would be the fair market value of the whole property at the time of condemnation, without the railroad? and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled. This inaugurates no new

rule of damages in condemnation proceedings in this State. As the entry was unlawful, it is, for the purpose of arriving at the value of the property, regarded as not made, and the inquiry is, What is the present value of such property without the presence of a structure which is there without right, and which cannot be continued without payment in full for all damage done? Its existence cannot be considered for the purpose of diminishing what would otherwise be the present market value of the property. I think the same rule would hold in the case put by the defendants, where the city or any other body having the power should seek to take the owner's property, even though such owner had himself purchased subsequent to the erection of the road. The city would have no right to take the property from its owner on a valuation based upon the permanent character of a trespass which the law regards as temporary. The inquiry in the case supposed would still be, What would be the fair market value of the property with the railroad away? That sum the city would have to pay; and when it acquired the title it would have the same right as any other owner to compel the defendants to desist from their trespass, or pay the amount of permanent damage they caused by its continuance. Under this rule the amount which the present owner may have paid for the property will be wholly immaterial. As the act of the defendants in trespassing upon or appropriating any portion of the property was unlawful, any depreciation in the value of the property caused by such illegal action cannot be regarded in fixing the value of the property to be taken, or the damage to that which will remain. The claim of the defendants that this depreciation in value was suffered by the original owner when he sold, and that it is a personal claim in his case against them for which they are responsible, cannot, as it seems to me, be maintained. Such a doctrine would do away with the right of an owner of property to prevent a continuous trespass upon it by another. The defendants would say that, because the original owner transferred the property to his vendee, the defendants by reason thereof were thereby invested with the right to continue forever the original trespass, and the consideration for such license rested in their liability to pay (not necessarily in the payment to) the vendor the difference between the sum which he actually received for the conveyance of his land and that which he would have been able to secure, had it not been for the acts of the defendants. Whether such sum had been paid or not would be immaterial so far as concerned the present owner. That would be a matter between the original owner and the defendants. But the present owner, on account of the transfer of the land to him, would really have no right to prevent the trespass, no matter how much in truth his property was damaged, and although the defendants had no more title to the property trespassed upon than they ever had. They could have no title, because the original owner transferred it to his vendee, and after such transfer, of course, that owner could

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not again transfer any portion of the property to anyone else. The vendee took the title, and he certainly has not conveyed it to the defendants, but, on the contrary, still retains it absolutely. Thus, with no title, the defendants have, by this course of reasoning, been in substance invested with a right to perpetually appropriate property belonging to the plaintiff, because of a liability on their part, as they allege, to pay a former owner certain damages which he alleges he sustained by selling his property to the plaintiff at a reduced value caused by defendants' illegal act. This mere liability of the defendants to reimburse the vendor operates, by defendants' argument, as a bar to the rights of the vendee. If not paid by the defendants, the liability still remains, and of course the bar still continues; and thus the general right which follows the possession of property to protect it from a trespass is denied an owner because the defendants are, they say, liable to a former owner on a personal claim by him for a loss occasioned by a sale. Heretofore absolute ownership or legal possession of property has been regarded as sufficient to enable the owner to protect it from a trespass. It has been sufficient to permit him to maintain an action to restrain its continuance, even though he was fortunate enough to secure the property at one half its value. The inquiry in such cases, where the owner sought to restrain the future trespass, has never been in regard to the price which the owner paid, or whether the former owner sold at a loss on account of the trespass. The inquiry has been whether the plaintiff was the owner or entitled to the possession, and whether the acts of the defendant were illegal. That is all that should now be required.

I have thus far referred to the case of the vendee for the purpose of inquiring what rights appertained to him as the present owner of the property. But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market caused by the wrongful acts of the defendants, is not to my mind very strong. In the first place, he had his right of action to recover for all damage caused by the trespass up to the time of the commencement of his action, and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain its further continuance, or to recover for the permanent damage caused, he could while owner commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell instead of using the remedies which the law gives him, that was a matter, legally speaking, of his own choice. The defendants did not compel or limit or restrain such sale. Nothing that they did could be said to amount to any compulsion by them. The law says their action cannot be regarded as a permanent trespass, for the very reason that it is unlawful, and the law will not presume that an unlawful act is to be forever continued. His choice to sell, rather than avail himself of the remedies given him by the law, does not furnish a cause of action against the defendants to reimburse him for a loss,

arising because of the presumption he has indulged in that the trespass would be continuous and unpaid for. He has chosen to regard the trespass in a light opposite to that in which the law regards it, and the loss he has suffered thereby is not one which the law can regard as caused by the defendants. If the original owner thus chooses to sell his property without enforcing those rights which he has only by virtue of such ownership, the purchaser at any rate takes his fee, and with it the rights of such an owner. The right to enjoin the continuance of the trespass has not escaped by the conveyance. It cannot rest with the vendor, for he has no longer any interest in the land. Unless it passed to the vendee, it has vanished; and yet no conveyance by anyone having the right to convey has been made to the trespasser, and so far as the legal title to the property is concerned the trespasser has no lot or parcel in it. It seems to me the right passed to the vendee. I can see no similarity in the case of the owner of property who has thus sold at a loss, to that of one who has suffered from a slander of his title. To start with, there is in the case at bar no slander. And again, there is no malice. The erection of a structure on plaintiff's property by defendants cannot be twisted into a slander of plaintiff's title by them. No one asserts that the defendants built their road knowing they were wrong-doers or trespassers. The findings in this case substantially negative any such idea. The court finds that the road was built in conformity with plans prescribed by boards of commissioners appointed under legislative authority. It has been held that punitive damages ought not to be awarded against defendants for the taking of the property of abutting owners by the building of their road. *Powers v. Manhattan R. Co.* 120 N. Y. 178.

In brief, all the substantial facts which constitute a cause of action for slander of title are absent in this case, and the facts which exist here have no analogy to those which constitute such a cause of action. The wrong by the defendants in the erection of the railroad does not directly or proximately cause the sale of the vendor's property at a loss. The defendants' counsel lays down the rule broadly that "whoever, by a wrongful act, limits or restrains another in respect to his lawful right to dispose of his property in the market to the best advantage, is liable in an action at law for the damages thereby occasioned." Without stopping to question the accuracy of the rule which the defendants here lay down as an abstract proposition, I think no case can be found where it has been enforced under such circumstances as this case presents. All the facts must be here taken into account. It must be remembered that the law regards the act as a temporary wrong only, and as such it provides a full remedy for it. It provides a full equitable remedy if the owner choose to pursue it, and the act be of a permanent nature. If, instead of resorting to his legal or equitable remedy, he chooses to sell, it cannot be said that in a legal sense he has been limited or restrained in respect to his lawful right to sell his property by

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defendants' wrongful act. The connection between the sale and the alleged cause is too remote and indefinite. It is not proximate or direct. Further than this, however, the right of action with respect to the damage inheres in the owner and possessor of the land and it is by reason of such ownership and possession that the right of action accrues. *Broistedt's Case*, 55 N. Y. 220; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191.

A perpetual injunction was sustained in the first above-entitled case, which was obtained by a purchaser of land abutting on the street, restraining the further operation of the road, although it was operated prior to his purchase. Nothing that has been said in any other case in this court is opposed to these views. On the contrary, they are in the line of all its previous utterances. The point was not decided in the *Henderson Case* nor has it been decided in the *Lawrence Case*, against these same defendants. Reported in 126 N. Y. 483, 13 L. R. A. 102. The question in the last case was in relation to the validity of the defense alleging that the property was used for the purposes of a house of prostitution. The defense was disallowed for the reasons stated in the opinion of Andrews, J., and the rule of damages stated in the *Utine Case* was reiterated,—that of diminished rental value.

The case of *King v. New York*, 102 N. Y. 171, 3 Cent. Rep. 89, simply held that the right to compensation for the property taken belonged to him who was the owner of the fee at the time the city took possession, although before the award under the statute the original owner had conveyed the premises. This was upon the ground that the Statute authorizing the taking contained an adequate and certain method for raising the money on the part of the city to pay for the taking, and that when the possession was taken by the city under the Statute it was a legal possession, and the award which was subsequently made paid for the title at the time the possession was taken, and that was in the original owner, who conveyed before the award was made. The *Tallman Case*, 121 N. Y. 119, 8 L. R. A. 173, does not assert or assume that the plaintiff could recover for the diminished rental value for a term any portion of which was in the future. The recovery in that case had been allowed for a possible use of the premises which the plaintiff had not, in fact, attempted to make, and the possible profits for such possible use we held he was not entitled to. I have, as is seen, alluded to but a few of the many cases cited by counsel in the very elaborate briefs submitted to us. I have, however, read them, and I feel confident that nothing is laid down herein which is opposed to anything heretofore decided by this court.

What the ultimate rights of lessor and lessees, against defendants, may be, we, of course, do not decide in this case. Their rights are not before us. Whether there is or is not any distinction between the rights of a vendor in fee and those of a lessor, is not the question, and we do not, therefore, argue it.

The judgment here should be affirmed, with costs.
All concur.

IOWA SUPREME COURT.

William J. LEMP

v.

Nixon FULLERTON, Sheriff, etc., Appt.

(.....Iowa.....)

1. **Replevin will not lie** for goods in the hands of a sheriff by virtue of a search warrant in proceedings to declare a forfeiture, even if they are in the original packages in which they were brought into the State and the plaintiff is therefore entitled to have them restored to his possession.
2. **Jurisdiction to grant a continuance** in proceedings for the forfeiture of goods cannot be inquired into in replevin for the goods against the sheriff.

(June 1, 1891.)

APPEAL by defendant from a judgment of the District Court for Des Moines County, in favor of plaintiff in an action brought to recover possession of certain personal property. *Reversed.*

The facts are stated in the opinion.

Messrs. Newman & Blake, for appellant:

The replevin proceeding was disorderly without support of any statute whatever, glaringly illegal, and was in contempt of the decisions of this court (*State v. Harris*, 38 Iowa, 246; *Funk v. Israel*, 5 Iowa, 452), and of the United States Circuit Court for the Southern District of Iowa.

Senior v. Pierce, 31 Fed. Rep. 632.

Where personal property has been seized under a legal writ from a court having jurisdiction, such property cannot be replevied by the owner.

Ibid.

NOTE.—*Replevin will not lie for property in legal custody.*

At common law, property in the custody of an officer, under a valid, legal process, could not be the subject of replevin. *Smith v. Huntington*, 3 N. H. 78; *Perry v. Richardson*, 9 Gray, 216; *Gardner v. Campbell*, 15 Johns. 401; *Pott v. Oldwine*, 7 Watts, 173; *Gist v. Cole*, 2 Nott & McC. L. 456; *Griffith v. Smith*, 22 Wis. 646; *Raiford v. Hyde*, 36 Ga. 93; *Goodrich v. Fritz*, 4 Ark. 525; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Carroll v. Hussey*, 31 N. C. 89; *Lathrop v. Cook*, 14 Me. 414.

But in order to exempt property from seizure under a writ of replevin, in such a case, it must be held by a valid process, and the rule does not apply if the law under which the first process issued is unconstitutional. *Cooley v. Davis*, 34 Iowa, 128.

And if it is apparent on the face of the process that it was issued without jurisdiction, it would not protect the goods taken thereon from a writ of replevin. *Wood v. Orser*, 25 N. Y. 343.

Goods in custody of the law, or held by an officer or by any legal process, are not ordinarily the subject of replevin. Any attempt to interfere with them was formerly regarded as a contempt, and punished severely. *Cobbey, Replevin*, § 299, citing 1 Chitty, Pl. 164; *Phillips v. Harries*, 3 J. J. Marsh. 123; *Funk v. Israel*, 5 Iowa, 450; *Cooley v. Davis*, 34 Iowa, 128; *Powell v. Bradlee*, 9 Gill & J. 220; *Hagan v. Deuell*, 24 Ark. 216; *Goodrich v. Fritz*, 4 Ark. 525; *Allen v. Staples*, 6 Gray, 498; *Beers v. Wuerpui*, 24 Ark. 273; *Shearick v. Huber*, 6 Binn. 4; *Morgan v. Craig*, Hardin, 101; *Hall v. Tuttle*, 2 Wend. 478; *McLeod v. Oates*, 30 N. C. 387; *Jenner v. Joliffe*, 9 13 L. R. A.

Where liquors were seized under search warrant they could not be replevied.

Funk v. Israel, *supra*; *Cooley v. Davis*, 34 Iowa, 128; *State v. Harris*, *supra*; *Weir v. Allen*, 47 Iowa, 482; *Fries v. Porch*, 49 Iowa, 351; *Thompson v. Button*, 14 Johns. 84; *Kellogg v. Churchill*, 2 N. H. 412; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Deahler v. Dodge*, 57 U. S. 16 How. 622, 14 L. ed. 1084; *Mugrage v. Hall*, 40 Me. 498; *Griffith v. Smith*, 22 Wis. 646.

Mr. S. L. Glasgow, for appellee:

The action of replevin can be maintained upon the facts involved in this case, and is the proper remedy. The petition of appellee contains all the requirements of the Code, prescribed for actions in replevin.

McClain's Code, 1888, § 4455; *Fries v. Porch*, 49 Iowa, 356.

The law under which the warrant was issued being unconstitutional, the search warrant therefore furnished no authority for the retention of the property.

Cooley v. Davis, 34 Iowa, 130.

Replevin will lie if the property is not rightfully held by the officer under the writ, and the question of the wrongful detention, therefore, is the gist of the action.

State v. Harris, 38 Iowa, 242; *Armel v. Lendrum*, 47 Iowa, 537.

In the case at bar, the law under which the pretended warrant was issued, and under which the seizure was made, is unconstitutional and has been so declared; therefore, the process or warrant under which the seizure in question was made is void and this action may be maintained for the property so seized.

Bowman v. Chicago & N. W. R. Co. 125 U.

Johns, 384; *Buckley v. Buckley*, 9 Nev. 379; *Watkins v. Page*, 2 Wis. 97; *Reese v. Fischer*, 2 Harr. & G. 320; *Spring v. Bourland*, 11 Ark. 658; *Watson v. Todd*, 5 Mass. 271; *Mulholm v. Cheney*, Add. 331; *Goodheart v. Bowen*, 2 Ill. App. 578; *Badlam v. Tucker*, 1 Pick. 889; *Brownell v. Manchester*, Id. 234; *Miliken v. Selye*, 6 Hill, 623; *Squires v. Smith*, 10 B. Mon. 38; *Cromwell v. Owings*, 7 Harr. & J. 53; *Mugrage v. Hall*, 40 Me. 498; *Armel v. Lendrum*, 47 Iowa, 535.

It was undoubtedly well settled at common law, even with respect to courts sitting under the same general jurisdiction, that the custody of property by one court under legal process could not be disturbed by the authority of any other court of concurrent judicial power. See *Payne v. Drew*, 4 East, 523; *Evelyn v. Lewis*, 3 Hare, 472; *Noe v. Gibson*, 7 Paige, 513, 4 L. ed. 252.

This principle has been modified by the legislation of Iowa with respect to civil actions in its own courts. The Code of Iowa, § 8225, provides that the action of replevin may be under certain circumstances maintained for property in the possession of an officer holding it by legal process.

Money, credits and property are in the custody of the law when held by executors, administrators, guardians and like quasi officers, in their representative and administrative capacity. They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of the things and credits should not be disturbed in their hands, as there is for non-disturbance in the hands of a sheriff or other officer. *Roth v. Hotard*, 32 La. Ann. 280; *Brooks v. Cook*, 8 Mass.

S. 465, 81 L. ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 84 L. ed. 128. See *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 788, 6 L. ed. 204.

The official acts of a justice of the peace, to be valid, must be in accordance with the provisions of the statute from which he derives his legal and official existence.

Cook v. United States, 1 G. Greene, 42.

Even had appellee consented to an adjournment, the justice would have lost jurisdiction over the subject matter of the suit. Jurisdiction over the "subject matter" cannot be conferred by consent.

Boyer v. Moore, 42 Iowa, 544; *Hamilton v. Hilhouse*, 46 Iowa, 74; *McMeans v. Cameron*, 51 Iowa, 691; *Hynds v. Fay*, 70 Iowa, 438.

This is not a collateral attack upon the pretended judgment of the justice, but is a question of jurisdiction which is never waived, and can be raised at any time.

Moore v. Reeves, 47 Iowa, 81; *Brown v. Davis*, 59 Iowa, 641.

A seizure, if valid originally, must be followed up by the forfeiture of the property seized. If the proceedings be abandoned, the seizure becomes a nullity.

Josefa Segunda, 28 U. S. 10 Wheat. 312, 6 L. ed. 329.

Robinson, J., delivered the opinion of the court:

In the year 1889 plaintiff was a brewer, engaged in business in St. Louis. In May of that year he shipped from St. Louis to Burlington, consigned to himself, a car-load of beer. His agents at Burlington were Werthmueller & Ende. After the car containing the beer had been placed on a side track at Burlington, it was opened by the agents named, but on the 15th day of May,

before the beer had been removed, and while it was in the original casks in which it had been shipped, a part of it, including that in controversy, was seized by the defendant, as sheriff, by virtue of a search-warrant issued under the provisions of section 1544 of the Code. The information on which the search-warrant was issued charged that the intoxicating liquors which it described were owned by Werthmueller & Ende. After defendant made his return on the search-warrant, the justice of the peace who had issued it caused notice to be given to Werthmueller & Ende, and to all others whom it might concern, to appear at his office on the 24th day of May, to show cause, if any they had, why the liquors seized should not be forfeited. On the day fixed for the hearing plaintiff appeared in the justice's court, and filed a pleading, in which he alleged that he was the owner of the property in controversy; that it was shipped from Missouri to Iowa, and seized by the sheriff while in the original packages, and before it had been delivered by the railway company; that it had not been sold, nor kept for sale, in violation of the Laws of Iowa. On the 16th day of May this action was commenced, and the property in controversy was surrendered to the coroner. After the plaintiff in this action had filed the pleading described in justice's court, the State moved for a continuance, and as ground for the motion showed that this action had been commenced, and that the property seized by the sheriff under the search-warrant had been taken from him and was not at that time under his control, nor subject to the order of the court. The court thereupon sustained the application, and continued the case until November

46; *Commercial Bank v. Neally*, 39 Me. 402; *Hanson v. Butler*, 48 Me. 81; *Force v. Brown*, 32 N. J. Eq. 118; *Conway v. Armington*, 11 R. I. 116; *Davis v. Drew*, 6 N. H. 399; *Bank of Chester v. Ralston*, 7 Pa. 482; *Parker v. Donnally*, 4 W. Va. 648; *Thorn v. Woodruff*, 5 Ark. 56; *Fowler v. McClelland*, 5 Ark. 188; *Post v. Love*, 19 Fla. 684; *Mock v. King*, 15 Ala. 66; *McCreary v. Topper*, 10 Pa. 419.

It is laid down as a well-established principle, that, whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Buck v. Colbath*, 70 U. S. 3 Wall. 341, 18 L. ed. 260. See also *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Watson v. Jones*, 80 U. S. 18 Wall. 679, 20 L. ed. 686; *Noe v. Gibson*, 7 Paige, 513, 4 L. ed. 252.

It has been held that property in the hands of a garnishee is in the custody of the law, and that an officer has no right, after the garnishment, to take the property from the garnishee. *Dennistoun v. New York Croton & S. Faucet Co.* 6 La. Ann. 782.

In general, goods in the custody of the law cannot be replevied, even if the execution has been paid and satisfied. If the officer, upon an execution against A, seizes the goods of B, the latter may bring replevin. Or, if the judgment was void for want of jurisdiction, replevin lies. 2 *Estes*, Pl. 8 2155.

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To constitute a valid levy, the officer must bring his property under dominion and control. This he cannot do while it is in the hands of another officer under levy, for he could not lawfully obtain any dominion over it while thus in custody of the law. *Seymour v. Newton*, 17 Hun. 32.

In accordance with the principle stated in the preceding cases, it is held that property once levied on under a valid execution remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction. *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028; *Clymer v. Willis*, 3 Cal. 363; *Thompson v. Brown*, 17 Pick. 462; *Kidder v. Orcutt*, 40 Me. 589.

Reason for the rule.

This principle is said to be essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. A departure from it would lead to the utmost confusion, and to endless strife between concurrent jurisdiction deriving their powers from the same source; but the consequences of such a departure would be still more disastrous in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject matter of the suit. *Buck v. Colbath*, 70 U. S. 3 Wall. 334, 341, 18 L. ed. 257, 260.

5, 1889, "to enable the district court to make some adjudication in the replevin suit." It was further ordered that, if the suit should be still pending at the date to which the cause was continued, then it should be subject to a further continuance, on the request of the State. On the 5th day of November, 1889, the cause was continued to the next day by the justice, on account of the general election. On the 6th day of November, there being no appearance by the claimants, the property in controversy was adjudged to be forfeited. When the coroner attempted to serve the writ of replevin, the sheriff at first refused to surrender the property. Thereupon an application was made to the court from which the order issued, which recited the refusal of the sheriff and asked that he be required to show cause why he should not be punished for contempt. The court upon that application ordered the sheriff forthwith to deliver to the coroner the property in controversy, and that order was obeyed. The defendant asked the court, by motion, to cancel that order, but the motion was overruled. In September, 1889, the defendant filed his answer. In January, 1890, the plaintiff filed a reply, and the trial of the cause was commenced to a jury. After all the evidence had been introduced, the defendant asked the court to direct the jury to return a verdict for him, but was refused. The court then, upon its own motion, instructed the jury to return a verdict for plaintiff, which was done.

1. The plaintiff contends that the law under which the seizure was made by defendant is unconstitutional, and relies upon the case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 123, as sustaining his claim. In that case the Supreme Court of the United States held that a citizen of one State has a right to import intoxicating liquor into another State, and there sell it in original packages, notwithstanding a prohibition of the statutes of the State into which the liquor was imported; and in which it was sold. So far as such statutes prohibit transactions of that kind, they were held to be in conflict with the Constitution of the United States, and therefore void. But it was not held that a State may not enforce its police regulations against traffic in liquor which is not in the nature of interstate commerce. The State has the right to enforce such regulations, and one of the means provided is a proceeding by search warrant, such as was adopted in regard to the liquor in controversy. It may be conceded that such liquor was prohibited from forfeiture by reason of the rule announced in the *Leisy Case*, and that upon the final hearing before the justice it should have been restored to plaintiff. But the object of the proceeding was to ascertain if a law of the State was being violated, not to declare forfeited property which was not subject to its provisions. In such a case, if the court errs, the party aggrieved has the right of appeal. The proceeding cannot, however, be ignored nor treated as a nullity. It is a duly constituted

means of ascertaining and determining the rights of the respective parties in interest, including the right of the owner of the property to claim it as exempt from the operation of the state laws, and the decision of the court is binding, as in other cases. It follows from what we have said that the search warrant was properly issued, and the property in controversy was rightfully in the hands of the defendant when this action was commenced and the writ of replevin was issued.

It was said in *Funk v. Israel*, 5 Iowa, 450, that liquors seized by virtue of a search warrant issued under a statute substantially the same as section 1544 of the Code could not be replevied. That decision was approved in *State v. Harris*, 38 Iowa, 246. It was said in the case last cited that the writ of replevin was not a lawful process for taking property from the possession of an officer rightfully holding it, under a writ properly issued in a criminal proceeding. We conclude that the writ of replevin was wrongfully sued out in this case, and that the court had no power to cure the defect by ordering the sheriff to deliver the property in question to the coroner.

2. It is urged that the action of the justice in continuing the proceedings in connection with the search warrant from May 24 to November 5, 1889, was unauthorized, and that by so doing he lost jurisdiction of the case. When this action was commenced, the justice's court had jurisdiction of the property in controversy. It was in the custody of the law, subject to the further order of that court. The proceedings of that court were entirely regular, until after plaintiff had appeared and pleaded. When he entered his appearance, the court had complete jurisdiction of both the person and property of the plaintiff in this action. If it exceeded its jurisdiction in granting the continuance demanded, the plaintiff had an appropriate remedy for correcting the error by direct proceedings. We cannot in this action inquire into that question. In our opinion on the undisputed evidence, the motion of defendant for a verdict in his favor should have been sustained.

3. The petition alleges that the value of the property in controversy is \$200. The answer alleges that it is worth more than that sum. On the trial defendant conceded that it was of the value alleged in the petition. Evidence was given on behalf of plaintiff to the same effect. The defendant, in his motion for a verdict, asked that the value of the property be fixed "at the sum testified to." Since there was practically no dispute as to the value, defendant was entitled to judgment for \$200.

The judgment of the District Court is reversed, and the cause is remanded, with directions to that court to render judgment in favor of defendant for the amount stated, with interest thereon at 6 per cent per annum from the date of its former judgment, and costs.

Rehearing denied October 22, 1891.

MINNESOTA SUPREME COURT.

Giles GILBERT, *Appt.*,
v.

Charles H. ELDRIDGE *et al.*, *Respts.*

(....Minn.....)

- *1. The riparian right of the owner of lands on the shore of navigable water, as on our great lakes, to reclaim, improve, and occupy the land submerged by shallow water, beyond the shore, may be dissociated from the shore-land by the act of the owner, so that a conveyance by him of the shore-land would not include such riparian rights as incident thereto.
2. This principle applied in a case where the owner of shore-land platted it, together with the shallows beyond the shore, into town blocks and streets.
3. The owner, after such platting, having conveyed an inland block with reference to the platting, and the water having gradually encroached upon the land, until the shore-line reached that block,—*Held*, that the riparian right to reclaim and use the platted blocks and streets in the water did not attach to the block thus conveyed as incident thereto.

(September 7, 1891.)

APPEAL by complainant from a judgment of the District Court for St. Louis County in favor of defendants in an action brought to enjoin the filling in of certain land covered by water lying between complainant's land and the deep waters of Lake Superior or the Bay of Duluth. *Affirmed*.

The facts are stated in the opinion.

Mr. William W. Billson, for appellant:

Lands gradually and imperceptibly denuded and submerged by the action of navigable waters cease to be private property as a part of the bank, and become public property as a part of the bed.

The theory that, as the respondents were formerly the owners of block 110, by title which extended indefinitely downward toward the center of the earth, they must still be the owners of it, notwithstanding that its surface has been washed away, was decently buried more than two hundred years ago, and the doctrine of alluvion or accretion is the grass which grew upon its grave.

It was precisely upon this ground that the possibility of acquiring title by accretion or reliction was originally denied.

De Jure Maris, p 14.

There could be no right, either of alluvion or reliction, until the inaccuracy of this reasoning was confessed. The rights of alluvion, reliction and erosion are strictly correlative.

There is no possible process of reasoning which justifies or establishes any one of them which does not justify and establish all of them.

*Head notes by DICKINSON, J.

NOTE.—Riparian rights: reclamation of submerged land. See *note* to *Case v. Loftus* (Or.) 5 L. R. A. 689. And see *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582.

The riparian owner on conveying land may reserve to himself the right to build wharves out into

In *Smith v. St Louis Public Schools*, 80 Mo. 290, it is said: "The law of alluvion is understood to be a part of the *jus gentium*, that code which natural reason has established among all men. The principle upon which the right is placed is, that the proprietor of land bounded by a river, being exposed to danger from its floods, is entitled to increment, which, from the same cause, may be gradually annexed to it."

Another accepted basis of the right of accretion and reliction is that suggested by Blackstone: *De Minimis non curat lex*.

2 Bl. Com. 262. See also *Lord Abinger in Re Hull & S. R. Co.* 5 Mees. & W. 327; *Foster v. Wright*, L. R. 4 C. P. Div. 438.

The most searching examination will fail to disclose any judicial decision or text-book in the English language, in which the doctrine of the loss of title by erosion has been questioned within the last two hundred years.

See 2 Bl. Com. 262; *Callis, Sewers*, 51, 52; *Phear, Rights of Water*, 43; *Coulson & Forbes, Waters*, p. 28; 8 Kent, Com. 485; *Gould, Waters*, § 155; *Tyler, Boundaries*, p. 92; *Hall, Sea Shore*, pp. 108-134; 2 Hall, Law Journal, pp. 826, 355, 356, 357; 5 Hall, Law Journal, pp. 150, 160, 161, 162; *Vattel, Law of Nations*, bk. 1, chap. 22, § 275; *Re Hull & Selby R. Co.* 5 Mees. & W. 327; *Scrutton v. Brown*, 4 Barn. & C. 485; *Dunlap v. Stetson*, 4 Mason, 849; *Camden & A. L. Co. v. Lippincott*, 45 N. J. L. 405-417; *New Orleans v. United States*, 35 U. S. 10 Pet. 662-717, 9 L. ed. 578-594; *Gerrish v. Clough*, 48 N. H. 9; *Steele v. Sanchez*, 72 Iowa, 65; *Welles v. Bailey*, 55 Conn. 292.

It was once considered with reference to both alluvion and gradual reliction, that, except in cases of local custom, they existed only in the absence of means to identify the original boundaries.

De Jure Maris, chap. 6.

All the three branches of the doctrine of accretion were then still in the embryo. But they long ago assumed definite form in England as well as in this country.

Rez v. Yarbrough, 8 Barn. & C. 91; *Foster v. Wright*, L. R. 4 C. P. Div. 438; *Re Hull & S. R. Co.* 5 Mees. & W. 327.

This case is directly within the authority of *Gerrish v. Clough*, 48 N. H. 9; *Rez v. Yarbrough*, 8 Barn. & C. 91; *Camden & A. L. Co. v. Lippincott*, 45 N. J. L. 405.

The fact that artificial causes have contributed to a gradual shifting of the water line does not affect the legal result.

Gould, Waters, § 155, p. 288, and cases cited; *Coulson & Forbes, Waters*, 22, 23, and cases cited; *Livingston v. St. Clair County*, 64 Ill. 58, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Hunt, Boundaries*, 23; *Adams v. Frothingham*, 3 Mass. 352; *Henry v. Vermont Cent. R. Co.* 30 Vt. 638.

The case of the respondents is not withdrawn from the operation of the general rule respect-

the water. *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510.

Rights may be dissociated and separately transferred. *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95.

ing the loss of title by erosion, by the fact that the water gradually advanced until it denuded and submerged their entire tract.

Welles v. Bailey, 55 Conn. 292; *Giraud v. Hughes*, 1 Gill & J. 249.

The principle of the separableness of the ownership of the bank from that of the riparian privileges, adopted by this court in the *Hanford Case*, has neither direct nor indirect bearing upon this controversy.

It is doubtful whether the lines platted in the water had the effect of curtailing in any respect the rights acquired under the deed of the riparian block.

Richardson v. Prentiss, 48 Mich. 88.

Messrs. William B. Phelps and White, Reynolds & Schmidt for respondents.

Dickinson, J., delivered the opinion of the court:

At the head of Lake Superior a peninsula of land called "Rice's Point" extends from the main land eastward into the water. On the northerly or northeasterly side of this peninsula is the Bay of Duluth, constituting the present harbor of the City of Duluth. On the south of the peninsula is St. Louis Bay. In 1858 one Orrin Rice, who then owned this land, platted the same as a town-site, and filed the plat thereof in the proper public office. The name of Rice's Point was given to the platted lands. Embraced in this platting were two blocks designated, respectively, by numbers as blocks "108" and "110." At that time the land comprising block 110 was situate on the northeasterly shore of the peninsula. The line of low water crossed the block, so that the northeasterly part of it was within the shallow water of the Bay of Duluth, while the southwesterly part of it was dry land. Block 108 was southwest of block 110, separated from it by a street, and was wholly above and beyond the shore-line. The platting of Rice extended into the shallow water of the Bay of Duluth, beyond the shore-line; other lots, blocks, and streets being platted in the shallow water beyond block 110. December 31, 1858, Rice, by warranty deed in the usual form, conveyed block 110 to one Wilson, to whose rights the defendants have succeeded, and block 108 to one Meeker, to whose rights the plaintiff has succeeded. In 1873 the common council of the City of Duluth, under authority of the Legislature, by ordinance established a dock-line in the waters of the Bay of Duluth, several hundred feet distant from this block 110, and nearly parallel with its water-front, thereby definitely limiting the right to construct wharves and other structures to that part of the bay within such dock-line. In 1872, for the improvement of the harbor of Duluth, the city caused a ship canal to be dug through another point of land lying between the Bay of Duluth and Lake Superior, which resulted in so changing the currents of water in the bay that from this, with perhaps other causes, the water gradually encroached upon and washed away the shore at the easterly end and on the northeasterly side of Rice's Point. The process of erosion and encroachment was so gradual as not to be perceptible, except by

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comparison of the conditions in different seasons. In 1885 this encroachment of the water had extended so far inland, on the northeasterly side of this point, that the shore-line at low water then ran across block 108, block 110, and the intervening street having become submerged. At the time of the commencement of this action a process of filling was being carried on under the authority of the defendants, so as to again raise the surface of block 110 and of the intervening street above the surface of the water. Thereupon the plaintiff instituted this action to prevent by injunction such attempted and proposed reclamation. The plaintiff rests his claim of right to the relief sought upon the ground that, by the gradual and imperceptible encroachment of the water, and the retrogression of the shore-line, his land (block 108) has come to be the riparian estate, and that whatever riparian rights were originally incident to the shore-land are now vested in him as the riparian owner; and that the title of the defendants to block 110, and the riparian rights which may have been incident thereto, have been extinguished. The decision and judgment of the district court being in favor of the defendants, the plaintiff appealed.

We shall assume, in accordance with the claim of the plaintiff, but without so deciding, that it is a general principle of the common law that when the sea or navigable water, although not forming a boundary between adjacent estates, gradually encroaches upon and submerges the shore-land, the owner of the land thus won by the water becomes divested of his estate, and of such riparian rights as had been incident thereto; and that, in general, whoever may own the land constituting the shore has also, as incident thereto, the ordinary rights of riparian owners over the submerged lands beyond the shore, and out to the point of actual navigability. But, while this may be the general rule of law, it is not necessarily applicable alike in all cases. It may be controlled in its operation by the conditions under which titles have been acquired and held; and we are of the opinion that, by reason of the facts to which we have referred, of the platting of the submerged lands as well as of the upland, and of the conveyances of the platted blocks, under which these parties acquired titles, it is not open to the plaintiff to interpose objection to the refilling of the submerged block 110, or to assert that the defendants' title thereto or rights therein have become extinguished. Of course, the plaintiff cannot consistently claim that by the retrogression of the shore-line, and the submerging of block 110, he has acquired a title to that block. The shore-line did not constitute a boundary between the property of the plaintiff and that of the defendants; and, if we accept the theory of the plaintiff, that by the gradual submergence of block 110 the defendants' title became divested, it did not pass to the plaintiff. Not until and only as the defendants' title became extinguished by the retirement of the shore-line to and across the line of boundary between the two blocks, did the plaintiff acquire any

proprietary right or interest in the premises beyond that boundary. If the defendants lost their title, it was by the slow process of erosion, and little by little, as the water advanced upon the land. If the title was thus gradually devested, as fast as the shore-line was worn away, the title either was extinguished, or, if it was transferred or passed to any other holder, it was to the State: and when, at length, the last thread of shore-land on block 110 was submerged, the title had either become extinct, or had passed to the State. As the line forming the boundary between the two blocks was crossed by the advancing water the title to the submerged block, if extinguished by the encroachment of the water, did not suddenly revive, to vest in the plaintiff; and, if already vested in the State, it did not pass from it to the plaintiff. If, then, it be conceded that the defendants lost their title, it is certain that the plaintiff never acquired it. The utmost that he can reasonably claim is that by reason of the gradual encroachment of the water, submerging the defendants' land and hence divesting them of their title, the plaintiff's land (block 108) has come to be the shore-land, and that, as incident thereto, he has acquired the ordinary rights of riparian owners, including the exclusive and riparian right to refill the submerged block 110, or to otherwise improve it, and to occupy it for his private purposes. Our inquiry, then, is narrowed to the question whether the plaintiff has become thus possessed of such rights, so that he may be heard to complain of the defendants when they proceed to fill in and reclaim the submerged block. The State not only does not complain, but, impliedly, from the establishing of the dock-line, it concedes and ever since 1873 has conceded, the right to reclaim, improve, and use the submerged lands. *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89. The defendants undoubtedly formerly enjoyed that right as respects this block of land, and might certainly have exercised it, at least at any time before the last thread of their land became submerged. The only question is whether that right has now come to be in the plaintiff. The defendants have never transferred it, and, if the plaintiff has become possessed of it, it is only because it must be deemed to attach as an incident to the shore land, and to have passed to him as the owner of block 108, as the shore-line receded until it reached that land. We have heretofore decided that riparian rights of this nature, although originally incident or appurtenant to the shore-land, do not necessarily remain so; that they are property rights subject to the control of the owner; that they may be transferred by him, and remain in existence and be enjoyed by his grantees, although having no interests in the estate to which such rights were originally incident. *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 48 Minn. 104, and see *Miller v. Mendenhall*, *supra*. See also, to the same effect, *Ladies S. F. Soc. v. Halstead*, 58 Conn. 144.

It follows that when, by the act of the owner of the principal estate, such rights have been legally dissociated therefrom, 13 L. R. A.

the ordinary principles of law relating to the existence, transfer, and enjoyment of merely incidental rights would to a great extent cease to be applicable. Subsequent changes in the condition and right of enjoyment of the principal estate would not, of necessity, correspondingly and incidentally affect such rights. To illustrate, we will suppose that after Rice, the owner of this peninsula, and hence entitled to the right to reclaim, improve, and use the submerged lands, had platted it, and recorded his plat, as he did do, he had by deed conveyed the blocks lying in the shallow water outside of this block 110, across which the shore-line then ran; that such deed had been recorded, so as to be notice to all subsequent purchasers; and that thereafter he had conveyed to another person block 110. Except for the prior platting and conveyance of the submerged lands, the deed conveying the shore-land would have been effectual to transfer to the grantee the riparian rights of Rice, naturally incident thereto. But in view of those facts, and under the late decisions to which we have referred, the result would not be so. The platting and conveyance of the lands in the water beyond the shore-line would be legally effectual to transfer to the grantee all the right which Rice might have to reclaim and occupy such lands. To that extent the riparian rights belonging to him as the owner of the shore-land would be divested and transferred to his grantee. He would thereafter be precluded from enjoying such rights by virtue of his continued ownership of the shore, not merely by reason of an estoppel springing from any covenants which may have been embraced in his deed, but because he had effectually conveyed those property rights which had been appurtenant to his shore-land. His grantee would have acquired, at least as against him and those who might succeed to his estate, the legal right to occupy, improve, and enjoy the submerged lands, subject only to the paramount rights of the State. This right thus coming to exist in another than the owner of the shore estate, and enjoyable independent of it, could no longer be deemed incident to that particular estate or a part thereof. By the subsequent conveyance by Rice of the shore-land, these rights would remain unaffected. They would not pass by the deed as incident or appurtenant to the land conveyed.

As Rice might have conveyed the rights which he, as the owner of the shore-land, had in the submerged land, so, and for the same reasons, he might have conveyed the land above low-water mark, and have reserved the rights naturally incident thereto in respect to the shallows lying beyond the shore; and the grantee, in a deed clearly importing an intention to limit the grant to the land above the shore-line, would acquire only such land. The proposition thus stated and illustrated, that the owner of the shore-land may legally dissociate therefrom and transfer to another, or reserve to himself, to be enjoyed independent of the shore-land, his riparian right to reclaim and use the shallows lying beyond, so that neither he nor his grantee of the shore-land may there-

after claim such rights as incident to their estate, is applicable to the facts of this case. When Rice conveyed block 108 (through which conveyance the plaintiff's title was derived), he had already made and recorded the plat embracing not only the dry land, but the shallows beyond. Block 110, the land here in controversy, was located partly within the shoal water beyond the shore, and still beyond that other blocks, with intervening streets, were platted. Rice, and no one else,—subject to certain public rights which have not been, and probably never will be, asserted, and which do not affect the question before us,—then had the exclusive right to appropriate the submerged lands to occupancy, improvement, and use in the manner indicated by the platting; that is, in separate or distinct parcels, as town blocks and streets, wholly independent of the future ownership or use of his shore-land. No principle of policy or of law forbade him, as the owner of all this property and of these property rights, from thus doing, however it might result in adding to or impairing the natural advantages of the shore-land, or that lying inland from the shore, all of which he owned. Subsequent purchasers from him of the shore-land, or of the inland, purchasing with reference to the plat, might well be deemed to take their estates subject to the disadvantages as well as to the advantages resulting therefrom. He might thus restrict or limit the rights incident to his shore-land or inland, so as to bind, not only himself, but his grantees. *Yates v. Judd*, 18 Wis. 126.

It was said in *Wilder v. St. Paul*, 12 Minn. 192, 204 (Gil. 116): "The purchaser of a lot according to such plan acquires a right to every advantage, privilege, and easement which the plan represents. His lot is made valuable by other streets, as well as the one on which it fronts. By the sale of a lot according to such plan there is an implied warranty that the purchaser shall enjoy all the privileges and benefits which it is calculated to secure, and by no private arrangement can he be deprived of this." And so it may be said that such a purchaser takes subject to whatever disadvantages may be involved in the platting. For instance, as against the purchaser of block 108, Rice, although he had remained the owner of the riparian block 110, would have been precluded by his platting and conveyance from afterwards appropriating the street, platted in the shallow water beyond it, to his private use, so as to prevent the improvement and use of it as a street. But the grantee of block 108, conveyed with reference to the plat, would also be precluded from denying to the grantor or to his assigns the right to occupy, improve, reclaim, and use the blocks platted in the shallow water, even though in the course of time the shore-line should gradually move inland so as to reach this block 108, as has actually occurred. It was perfectly apparent from such a platting that Rice intended thereby to devote the platted blocks within the shallow water to disposal and use in separate parcels, and wholly independent of the ownership or use of the

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shore-land; and when the plaintiff's grantor purchased and accepted a conveyance of block 108, although the deed was in the ordinary form and included the "appurtenances thereunto belonging," it must have been understood that no right or interest in the blocks located in the water passed thereby. Even if the block conveyed had been in fact situate on the shore, it could hardly have been supposed that it was intended that the deed should, in legal effect, include all the platted blocks lying beyond the shore; or that, notwithstanding the platting of the submerged lands, it was intended that, by the conveyance of the shore block alone, with its boundary lines on all sides precisely defined by means of the plat, the ordinary and unlimited rights of riparian ownership should pass with the deed, so that the grantee should acquire thereby the exclusive right to occupy, improve, and use for his own benefit all the platted blocks and streets lying beyond. If, under such circumstances, a conveyance of the block situate on the shore would have been deemed not to have been intended to transfer to the grantee the existing property rights in respect to the platted lands beyond the shore, then, for the same reason, the gradual retirement of the shore-line, until the plaintiff's block has come to be on the water-front, has been of no effect to vest in him any property rights in respect to such submerged blocks. The conveyance of a platted inland block was as much subject to the effect of the platting as a conveyance of a riparian block would be; and if in the latter case the ordinary riparian rights,—that is, the exclusive right to occupy improve, reclaim, and use the blocks lying in the water,—would not pass, then, for the same reason, the gradual retirement of the shore-line would not be incidentally attended with the consequence of vesting such rights in the plaintiff. He took his title subject to the existence of rights which, at least as between parties claiming under the common grantor and in accordance with the platting, had ceased to depend upon the location of the shore-line, or to be affected or devested by the shifting of that line. We have treated the conveyance to the grantor of the plaintiff as having been made with reference to the plat. It is true that the finding of the court does not show that the conveyance was in terms so made, and that probably would not be necessary to affect the grantee in the manner above considered. We suppose, however, that we are justified in assuming that the conveyance was really, if not in express terms, made with reference to the plat, not only from the finding that the conveyance was of the platted block numbered 108 of Rice's Point, but because the plaintiff in his complaint alleges his ownership of the block so described, "according to the recorded plat thereof," etc.

The conclusions which we have expressed, as to the power of a riparian owner upon a body of water, which does not form a boundary between his own and a neighboring estate, by his own act to dissociate his riparian rights in the submerged lands from his principal estate and with the consequences

here indicated, naturally and logically follow from our former decisions above cited, and we know no good reason why those decisions should not be followed to the results here stated. The undoubted and exclusive owners of riparian rights, of rights in real property susceptible of enjoyment independent of the riparian lands, are thus held to be competent, not only to themselves use valuable property, the right to use which belongs exclusively to them, but, if more desirable, to dispose of their rights so that their grantees may make the property useful. Purchasers of the principal estate, after the riparian rights have been by any means dissociated therefrom, acquire all that they purchase. It is no hardship if, as in this case, the purchaser of a part of the platted inland is denied the advantage of claiming, to the exclusion of former owners, interests in property which he never purchased, and probably never expected to acquire, and which, if it vests in him at all, does so only by means which may be fitly called accidental. And on the other hand, if we have rightly declared and applied legal principles, those who have purchased and acquired the unquestioned and exclusive right of the riparian owner to occupy and enjoy the use of platted lands beyond the line of the shore, whether or not they may have reclaimed the same from the water or otherwise improved it, retain what they purchased; and neither their grantors, nor those who may succeed to the estate of the latter in any of the platted lands, can, by virtue of holding or succeeding to such estates, successfully claim that the rights of the purchasers have been divested, upon the ground that they were incident to the gradually shifting line of the shore.

Judgment affirmed.

Collins, J., did not hear the argument, and so takes no part in this decision.

ST. PAUL UNION DEPOT CO., *Appt.*,
v.
MINNESOTA & NORTHWESTERN R.
Co., *Resp.*

(.....Minn.....)

*1. **The object of the plaintiff's incorporation considered** as being the combining in this corporate organization of all the railroad companies whose lines of road enter or may enter the City of St. Paul, for the purpose of providing and maintaining depot and other railroad

*Head notes by DICKINSON, J.

facilities for the common benefit of all such railroad companies and of the public.

2. **In view of this purpose, and construing the provisions of this charter,**—*Held*, that railroad companies entering the city since this corporate organization, are entitled, for the purpose of becoming members of the corporation, and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value.

3. **If necessary for this purpose,** and for a proper apportionment of the stock, the existing members may be required to surrender or sell a part of the stock held by them.

(August 24, 1891.)

A PPEAL by plaintiff from a judgment of the District Court for Ramsay County in favor of defendant and from an order denying a motion for leave to file a supplemental reply in an action brought to enjoin defendant from connecting its tracks with those of the plaintiff until it had complied with plaintiff's regulations and by-laws and had become the owner of a certain number of shares of plaintiff's stock at a specified value. *Affirmed.*

The facts are stated in the opinion.

Mr. W. H. Norris, for appellant:

The power of a corporation to issue stock and to receive money therefor is a corporate franchise, the exercise of which is vested in the discretion of its board. But this discretion is not unlimited. It is subject to the duty of the board to give *pro rata* preference to the existing stockholders as first and best entitled to fruitage of their previous investment and labor; and no majority of the stockholders can in this respect enlarge the powers of the board. If the corporation, either through its officers, directors or a majority of its stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus, and in the good will or value of the established business.

Jones v. Morrison, 31 Minn. 140.

A corporation cannot issue new shares at less than their full market value, except by equal distribution among all shareholders.

1 Morawetz, *Priv. Corp.* 2d ed. § 454, and cases cited.

The interest of each individual shareholder is a share of the net proceeds of the capital stock of the corporation, when brought into one fund.

Boone, *Corp.* § 105.

Messrs. Lusk, Bunn & Hadley for respondent.

NOTE.—*Formation of union depots.*

A contract to form a corporation to acquire realty to furnish terminal facilities for railroad companies is not against public policy. *King v. Barnes*, 12 Cent. Rep. 204, 100 N. Y. 287.

That one of the railroad companies to be benefited by the agreement reimbursed one of the parties for advances for the purchase of realty is no reason why his associates should not respond to him for such advances. *Ibid.*

The rights and liabilities of the parties as among 13 L. R. A.

themselves are enforced upon principles applicable to partnership transactions. *Ibid.*

That certain parties to the contract were officials of the railroad companies does not deprive them of their individual interest. *Ibid.*

The Union Yards & Transit Company of Chicago having by charter the right to own and operate its railway, and to connect its yard with all railroad lines running into the city, is subject to the same duties and liabilities to the public and individuals as all railroad companies. *Pennsylvania Co. v. Ellett*, 122 Ill. 654.

Dickinson, J., delivered the opinion of the court:

The plaintiff is a domestic corporation, the general object of the organization of which may be said to have been to secure and afford necessary depot and terminal facilities for railroads running into the City of St. Paul, by means of a combination of all such railroads for that purpose. Its stockholders are various railroad corporations, at present five in number, operating lines of railroad running into that city. The defendant, a domestic corporation with a line of railroad running into the city, desires to avail itself of the benefits afforded by the plaintiff's incorporation, and claims the right so to do. In this action it was decided in the district court that, in order that the defendant be entitled to such benefits, it must become the owner of a proper proportion (one-sixth) of the stock of the plaintiff corporation. Of the whole amount of stock authorized, there was still unissued more than the amount required for this purpose, and the plaintiff was willing to sell such stock to the defendant at what the plaintiff deemed to be the actual value of it (a price much above the par value), and thereupon to admit the defendant to the enjoyment of the benefits desired by the latter; but the defendant contends that it should be allowed to purchase its proper proportion of the stock at its par value, without regard to the fact that the property held by and devoted to the use of the Depot Company may have greatly increased in value. The principal controversy on this appeal is whether the defendant should be required to pay more than the par value for the stock. In deciding this question, attention is directed to the peculiar nature and objects of the plaintiff's incorporation.

We had occasion to consider this subject for another purpose in *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 6 L. R. A. 234, and the opinion in that case so fully sets forth the character and objects of the corporation that we will avoid repetition by here referring to that statement. We are of the opinion that it was rightly decided that the defendant should only be required to pay the par value of the stock, which is all that any of the companies composing the corporation have heretofore paid for their stock therein. This conclusion is most consistent with the purposes and intention entering into the plan of incorporation, as shown in the articles adopted, and in the Special Law of 1879 (chap. 318), which was accepted by the corporation, and became a part of the law of its existence. It seems apparent that the object sought to be accomplished was to bring all the railroads, whose lines of road should enter the city, into a legal acting, efficient combination, as a convenient and advantageous means of providing and maintaining suitable depot and terminal facilities, for the common use of all the roads, facilitating transfers from one line of road to another, and contributing to the convenience and advantage both of the railroad companies and of the public. The scheme contemplated the combination, not only of the railroads entering the city at the time the organization was effected, but of such as should come thereafter. It was doubtless considered that it would not only be advantageous for the

new companies to enter the combination, but desirable on the part of the previous members that they should do so. For the most complete accomplishment of some, at least, of the obvious purposes contemplated, such a general combination was to be desired. Not only did the original articles of incorporation indicate that it was intended that the contemplated facilities should be "open alike to the use [under proper regulations] of all railroads now constructed, or which may be hereafter constructed, to or into the said city;" but, by the special law above referred to, any such corporation was empowered to "subscribe to the capital stock of the said St. Paul Union Depot Company, or become a stockholder thereof;" and upon becoming the owner of such a number of shares of the stock "as shall be deemed equitable by the board of directors of the said St. Paul Depot Company, and upon executing an agreement to conform to its by-laws and regulations, and to pay such charges as are required to be paid by the other railroad companies, any such company is declared to be entitled to elect or appoint one member of the board of directors. By section 4 it is declared: "There shall be no unjust discrimination against or in favor of any railroad corporation or railroad company using, or desiring to use, the said road, tracks, and union depot of the said the Saint Paul Union Depot Company, but the terms, conditions, and regulations adopted for the same shall be, as far as practicable, uniform, and apply alike to all railroads using, or desiring to use, the said road, tracks, and union depot of the said the St. Paul Union Depot Company." As being significant of the intention that only the par value should be required to be paid by a railroad company entitled to acquire a membership in this corporation, it is to be noticed that, while it was obviously intended that, from time to time, subsequent to the corporate organization, other railroad companies were to become the owners of stock, and become members of this corporation, provision is made, as above indicated, for determining or apportioning the number of shares which any such railroad company should take, while no provision is made respecting the price to be paid therefor. Both the original articles of incorporation and the amended articles, adopted in 1884, however, provide that the stock shall be divided into a specified number of shares, of \$100 each. All this is naturally consistent with the theory that all the companies whose roads enter the city should be permitted to take their proper proportion of the stock, as subscribers, at the value named in the articles of incorporation. Thus would the "conditions" under which different companies might be entitled to the benefits to result from the combination be, "as far as practicable, uniform, and apply alike to all," as the special law requires. On the other hand, if effect be given to the claim of the plaintiff, and if its theory as to the increased value of the depot property, and hence of its stock, be correct, it might directly result in an inequality of burden between the corporations sharing alike in the benefits of the organization, which would be quite contrary to the provisions of the special law, and to the obvious purposes of the corporate organization. The five companies constituting the present membership

paid for their stock at the par value of \$100 per share; but it is demanded of this defendant that it pay for its proper proportion of the stock at the rate of \$342.86 per share, amounting to \$200,000 for one sixth of the stock. It may be readily seen that the admission of new members upon such terms might provide funds sufficient to pay off the whole indebtedness of the corporation (\$250,000), and, if the stock is to be reapportioned as new members come in, so as to preserve equality in the amount of stock held, it would reimburse to the companies now composing the corporation all that their stock had cost them, thus giving to them the advantages and benefits of the combination at the expense of the junior members of the corporation.

In view of the peculiar purposes for the accomplishment of which this corporation exists, of the means contemplated and adopted for securing such purposes, and of the conditions relating to the holding of its stock, there would seem to be not much propriety in assigning to it a commercial or market value greater than that fixed in the corporate articles. It is difficult to understand how it could commercially bear a value greater than that, if, indeed, it can be said to have a commercial value. The title of the property which the corporation acquired, improved, and occupies, and upon which the alleged increase in the value of the stock may be supposed to rest, is not an unqualified title in fee simple. It is conditioned upon the continued use of the premises for the specified corporate purposes. Its value to the corporation, or to its members, consists in its practical usefulness; its adaptation to the actual uses of the organization. That usefulness is not affected by any enhancement in the commercial value of the land. The plan of incorporation was not to secure a profit to the corporation or to its members, in the ordinary sense of the term, but to unite the several railroad companies in the undertaking of providing and maintaining necessary railroad facilities for their common benefit, as well as for that of the public. The income was chiefly derived from the members themselves, by tolls or rates for the use of the depot and other railroad facilities, and was graduated to meet the necessary current expenses, and to pay interest on its bonded indebtedness, and 6 per cent interest, and no more, on the stock. To a large extent, at least, the amounts of interest received by stockholders may be said to come from tolls or rates paid by themselves. There could be no profit, such as could enhance the value of stock, derived from an income paid by the stockholders themselves. The right to hold this stock, and to enjoy the benefits of the organization, is restricted to railroad corporations whose lines of road enter the City of St. Paul; and by the action of the corporation its stock is made subject to be forfeited if the Railroad Company holding it fails to avail itself of the use of the facilities

afforded, and to pay the tolls and rentals charged. By resolution of the corporation, it is provided that the stock shall not be transferable. These considerations, from which it would seem to be improbable that this stock can bear a value above par, also go to support the view, already expressed, that it was not originally contemplated that any other than the fixed par value should be paid by the corporations who should be entitled to become stockholders, and to share in and contribute to the benefits of the organization. As it could have hardly been anticipated that the stock would come to have a value greater than the price fixed in the articles of incorporation, it may readily be supposed that no other price was intended to be paid for it. This view of the matter is most consistent, not only with what is expressed in the articles and in the special law, but with the significant omission, already referred to, to make provision with reference to the price to be paid for stock subscribed for. It is consistent, too, with the construction which the corporation itself seems to have hitherto adopted and applied.

After the rendition of the judgment in this action, the plaintiff moved for leave to file a supplemental reply, alleging that, since the completion of the trial, the plaintiff had offered to issue and sell to its present stockholders, at its par value, all the stock which it is authorized to issue (the limit being \$500,000), and that three of the five stockholders had elected to take their proper proportion of it. This is alleged to have been necessary as a means for providing funds for making needed improvements in the depot facilities, and which have been made at an expense of more than \$180,000. The motion was denied, and the plaintiff has appealed both from the order denying the motion and from the judgment. We think that, for at least two reasons, the court was justified in refusing the plaintiff's application. One is that it does not appear that all of the unissued stock has been or will be taken by the present members of the corporation, or that enough will not remain to be issued to this defendant in accordance with the judgment. The other reason is that, even if all the stock had been issued to the existing members of the corporation, the defendant would still be entitled to an apportionment and transfer to it of its proper share of the stock; and for that purpose the present stockholders should surrender so much of the stock held by them as may be necessary. They received and hold the stock subject to this condition. The obvious and expressed purposes of the corporation are not to be frustrated by allowing the existing stockholders to take and to hold all the stock so as to exclude other corporations from participation. That would be opposed to the purposes for which the corporation has its existence.

Order and judgment affirmed.

CALIFORNIA SUPREME COURT.

Charles KIESSIG, *Resp't.*,

v.

A. M. ALLSPAUGH *et al.*, and N. P. Lundeen, *App't.*

(.....Cal.....)

A surety upon a contractor's bond conditioned to save harmless the owner from any claims for materials or labor used in the construction of the building, is discharged from liability if the owner without his consent pays over to the contractor money which the building contract provides he shall retain in his possession until final settlement for the discharge of claims; at least such will be the result if such money would have canceled all claims.

(September 16, 1891.)

APPEAL by defendant N. P. Lundeen from a judgment of the Superior Court for San Diego County in favor of plaintiff in an action upon a contractor's bond brought to recover the amount which plaintiff alleged that he was compelled to pay because of defendant's failure to satisfy certain mechanics' liens in accordance with the provisions of the bond. *Reversed.*

The facts sufficiently appear in the opinion. *Meers. Parrish, Mossholder & Lewis*, for appellant:

There is no principle of law or equity that will

permit a beneficiary of a bond to bring about a loss by his own gross misconduct and then compel the surety to make good such loss.

Brandt, Suretyship & Guaranty, § 886.

The obligee can do nothing that would change or increase the liability of the surety without at once releasing the surety from liability on his contract.

See Brandt, Suretyship & Guaranty, §§ 79, 108, 878, 886, 457; *Law v. East India Co.* 4 Ves. Jr. 824.

Mr. Carl Schutze for respondent.

De Haven, J., delivered the opinion of the court:

The defendant, Lundeen, was a surety for his co-defendants, Allspaugh and Hall, upon a bond executed to plaintiff to indemnify and save him harmless against any claims or liens for material or labor used or employed by his principals in the construction of a building, which they had theretofore contracted to erect for plaintiff. The contract price for the construction of the building was \$8,000, and by the terms of the building contract the plaintiff was authorized to retain one fourth of that sum in his hands until final settlement between the parties thereto. The complaint alleges "that after the time said house had been finished, and when final settlement was made as per contract aforesaid, there were good and valid claims and demands and liens for mate-

NOTE.—Sureties' Liability not to be extended by implication.

The liability of a surety is not to be extended by implication. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. *Miller v. Stewart*, 22 U. S. 9 Wheat. 703, 6 L. ed. 195; *Anderson*, *Law Dict. title, Surety*. See also *M'Kay v. M'Donald*, 5 Ala. 388; *Granite Bank v. Ellis*, 43 Me. 367; *Reed v. Garvin*, 12 Serg. & R. 100; *Ludlow v. Simond*, 2 Cal. Cas. 38.

The liability of a surety is always *strictissimi juris*, and may not be extended by construction beyond his specific engagement. *National Mechanics Bkg. Asso. v. Conkling*, 90 N. Y. 116.

The courts are not concerned with the inquiry whether the alteration is prejudicial or beneficial to the surety. This is immaterial. He is sponsor for one contract and but one, and no one has a right to make another contract for him. *Fellows v. Prentiss*, 3 Denio, 521. See also *Ludlow v. Simond*, *supra*; *Ward v. Stahl*, 81 N. Y. 406; *Barnes v. Barrow*, 61 N. Y. 39.

It is an elementary rule governing the liability of sureties that they can only be charged when the case is brought within the strict terms of their contract (*Brookhead v. Brown*, 5 Hill, 685); and that their liability is not to be so extended by implication as to embrace purposes and objects not originally contemplated by the parties. *McCluskey v. Cromwell*, 11 N. Y. 586.

This principle applies with equal force to sureties upon a bond. *United States v. Kirkpatrick*, 22 U. S. 9 Wheat. 720, 6 L. ed. 199; *Brookhead v. Brown* and *McCluskey v. Cromwell*, *supra*; *McMicken v. Webb*, 47 U. S. 6 How. 232, 12 L. ed. 443.

13 L. R. A.

The alteration of the obligation of a surety without his knowledge or consent extinguishes his obligation and discharges the surety. *People v. Vilas*, 36 N. Y. 480; *Martin v. Thomas*, 65 U. S. 24 How. 317, 16 L. ed. 690; *Miller v. Stewart*, 22 U. S. 9 Wheat. 702, 6 L. ed. 195.

A surety is not liable beyond the express terms of his contract, even where liquidated damages are provided for its breach; and the liability of the surety cannot exceed the penalty agreed upon. *Tunison v. Cramer*, 5 N. J. L. 498; *Dickerson v. Cook*, 8 Duer, 324; *Clark v. Bush*, 3 Cow. 151; *Ludlow v. Simons*, 2 Cal. Cas. 1; *Walsh v. Bailie*, 10 Johns. 180; *Penoyer v. Watson*, 16 Johns. 100; *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174.

What acts will release the surety.

The surety may be released by substitution. *Reld v. Nunnally*, 24 Ark. 356; *McIntyre v. Borst*, 26 How. Pr. 411.

Or the creditor may discharge him by a parol declaration that he will look to others for relief. *Harris v. Brooks*, 21 Pick. 195; *Foster v. Walker*, 34 Miss. 385; *Hope v. Eddington*, Hill & D. Supp. 48.

Any fraudulent conduct of the creditor will relieve the surety from liability. *Franklin Bank v. Cooper*, 36 Me. 179; *Ham v. Greve*, 34 Ind. 19; *Shively v. United States*, 5 Watts, 332; *Peacock v. Chapman*, 8 La. Ann. 87.

And if the creditor prevents performance, the surety will be discharged. *Trustees of Section 16 v. Miller*, 3 Ohio, 261; *Blest v. Brown*, 4 DeG. F. & J. 367.

So where the surety abandons an appeal from a judgment rendered against the principal and himself on the faith of the creditor's promise that he will seek indemnity from the principal alone, the surety is released. *Wimberly v. Adams*, 51 Ga. 423. See note to *Best v. Johnson* (Cal.) 3 L. R. A. 168.

rial and labor expended and used in the building, construction, and finishing said house, in excess of the contract price of said building, to the amount of one thousand eight hundred seventeen 25-100 dollars;" and that by reason of the failure of the contractors to discharge them the plaintiff was compelled to pay the same after having paid the full contract price for the house. This action is brought against the principals and sureties on the bond referred to, to recover the amount so paid by plaintiff. The plaintiff recovered judgment in the superior court, and from that judgment the defendant Lundeen prosecutes this appeal. The judgment cannot be sustained upon the facts. The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and the plaintiff was not authorized to surrender it without their knowledge or consent, and, having done so, the appellant was discharged. *Bragg v. Shain*, 49 Cal. 131; *Taylor v. Jeter*, 23 Mo. 244. In this latter case the court used this language: "The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be

incumbered with these liens. The owner, having notice of them, and paying what, by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly."

This is an elementary rule of law governing the relation of principal and surety, and is thus stated by the Master of the Rolls in *Law v. East India Co.*, 4 Ves. Jr. 829. "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon."

The failure of the plaintiff to retain this balance, or to apply it for the satisfaction of the obligation for which the appellant was surety, does not present the case of a mere neglect upon the part of a creditor to insist upon a set-off in his favor, arising out of some other transaction, before paying what might be due on a particular contract, but was the neglect to resort to a fund already in his hands for his own protection, in the very matter for which the defendant was a surety, and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent constitutes a defense to this action.

Judgment reversed as to appellant Lundeen.

We concur: **McFarland, J.; Sharpstein, J.**

MISSOURI SUPREME COURT (2d Div.).

STATE OF MISSOURI

v.

A. G. ARMSTRONG, *Appt.*

(....Mo.....)

1. An oath on the "best knowledge and

belief" of the prosecutrix is a sufficient verification to an information for criminal libel.

2. **Duplicity in an information** which amounts only to surplusage is not ground for motion in arrest.

3. **An information need not all be written** by the prosecuting attorney himself.

NOTE.—*Libel defined.*

A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. See *Desty*, Cal. Penal Code, § 248, and *note*.

Of libel in general.

Libel is an offense under the law both of England and of the States of the Union. *Com. v. Holmes*, 17 Mass. 336; *Com. v. Chapman*, 13 Met. 68; *State v. Burnham*, 9 N. H. 84.

It is a representation in writing or by pictures, calculated to lead to any act which, when done, is indictable. *Com. v. Clap*, 4 Mass. 163; *State v. Far-13 L. R. A.*

ley, 4 McCord, L. 317; *Steele v. Southwick*, 9 Johns. 214.

Any publication which tends to excite people to the commission of any crime is a libel. *Starkie*, *Slander & Libel*, § 152.

A malicious publication in printing, writing, signs, or pictures, tending to injure reputation, disgrace and degrade a person, and lower him in the esteem of the world, or bring him into public hatred, contempt, or ridicule is a libel. *State v. Jeaudell*, 5 Harr. (Del.) 475; *Layton v. Harris*, 3 Harr. (Del.) 408; *Rice v. Simmons*, 2 Harr. (Del.) 417.

Intent is an essential element (*Com. v. Snelling*, 15 Pick. 387; *Root v. King*, 7 Cow. 613; *Rex v. Beeves*, *Peake*, Ad. Cas. 84; *Rex v. Harvey*, 2 Barn. & C. 257); and the party will be presumed to intend the consequences of his act. See *Taylor v. State*, 4 Ga. 14; *Com. v. Snelling* and *Rex v. Harvey*, *supra*; *Reg. v. Lovett*, 9 Car. & P. 462.

4. The words "Bad Debt Collecting Agency" printed in large bold type on envelopes mailed to a debtor, especially when mailed in care of his employers, constitute a criminal libel under Rev. Stat. 1888, § 3869, as tending to "expose him to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence," etc.

5. A creditor may be guilty of criminal libel in permitting libelous communications to be sent to his debtor by his agents or associates in a collecting agency.

6. A portion of an envelope containing a libel is not inadmissible in evidence on a trial for criminal libel because it has been unnecessarily pasted in the information.

7. A letter written by the debtor protesting against libelous demands from a collecting agency and claiming that the debt has been paid, on which the creditor writes a reply, is admissible against the latter on a trial for criminal libel.

8. Evidence of specific indebtedness of the prosecutrix to other persons is not admissible in behalf of a defendant in an action for criminal libel.

9. The jury are final judges of the law as well as of the facts in a prosecution for criminal libel under Const., art. 2, § 14, although the judge should assist and inform them what the law is.

(June 2, 1891.)

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction which convicted him of criminal libel. *Affirmed.*

What necessary to sustain charge.

To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel, under circumstances which exposed it to be read or seen by any other person than himself. *Desty, Cal. Penal Code, § 252, and note.*

Publication defined.

The offense is committed by sending the libel to the one libeled, though it reaches the ear of no third person. *Watrous v. Chalker, 7 Conn. 226; Swindle v. State, 2 Yerg. 581.*

The transmission of a sealed letter containing libelous matter is indictable. *Hodges v. State, 5 Humph. 112; Giles v. State, 6 Ga. 276.*

Incidents of libel.

Whenever an action lies for libel without laying special damages, indictment lies. *Stanton v. Andrews, 5 U. C. Q. R. O. S. 229.*

The provisions of state statutes, in relation to malicious libels, are not violable of the constitutional guaranty of the freedom of speech. *Morton v. State, 3 Tex. App. 510; Com. v. Blanding, 20 Mass. 304. See Desty, Am. Crim. Law, § 140.*

So charging or imputing to one the commission of some crime is libelous (*Walker v. Winn, 8 Mass. 248; Chaddock v. Briggs, 13 Mass. 248; Wonson v. Sayward, 30 Mass. 402; Miller v. Parish, 25 Mass. 384; Gay v. Homer, 30 Mass. 535; Hotchkiss v. Oliphant, 2 Hill, 510; Stilwell v. Barter, 19 Wend. 13 L. R. A.*

Statement by Gantt, P. J.:

This is a charge of criminal libel. The defendant lived in Mexico, Mo., and the Sprague Collecting Agency did business in Chicago, Ill., and the defendant's firm, consisting of Kabrick, Armstrong, Atkins and Snyder, employed this agency to do some collecting for them; and among the claims placed in its hands was one of \$5 against the prosecuting witness, Mary Vincil. The agency used an envelope which bore the device "Bad Debt" in large letters. The charge consists in accusing the defendant of procuring the said agency to send envelopes to the address of the said Mrs. Mary Vincil, in St. Louis, from Chicago, Ill., and that the said words so used on the envelope are libelous. The information is as follows:

"State of Missouri, } ss.
"City of St. Louis, }

"In the St. Louis Court of Criminal Correction. St. Louis, March 29, 1888. State of Missouri, Plaintiff, v. A. G. Armstrong, Defendant. Charged with criminal libel. Bernard Dierkes, assistant prosecuting attorney of the St. Louis Court of Criminal Correction, now here in court, on behalf of the State of Missouri, information makes as follows: That A. G. Armstrong, of Mexico, Audrain County, Missouri, in the City of St. Louis, on the 27th day of March, 1888, and on divers days in said year, did willfully and maliciously libel and defame one Mary Vincil, of the City of St. Louis, by causing to be published and issued in said city, and by having sent through the mails and put before the eyes of divers people in said city, a certain envelope, printing, writing, sign, representation and effigy, as follows:

487; *Nash v. Benedict, 25 Wend. 645; Cramer v. Riggs, 17 Wend. 209; Smith v. State, 82 Tex. 594; Woolnorth v. Meadows, 5 East, 463; Roberts v. Camden, 9 East, 93; Peake v. Oldham, Cowp. 275, 2 W. Bl. 959; Harrison v. King, 7 Taunt. 431; Beaver v. Hides, 2 Wils. 300; Onslow v. Horne, 3 Wils. 196, 2 W. Bl. 750; as charging one with engraving silver ore in a rock, to cheat (Williams v. Godkin, 5 Daly, 499); or that one was tempting another to commit adultery. State v. Avery, 7 Conn. 268.*

It is a malicious publication though it impute no crime (*State v. Henderson, 1 Rich. L. 179*); as simply charging a person with forging. *Jackson v. Weisger, 2 B. Mon. 214.*

The law presumes that the party intended what the libel is calculated to effect. *Reg. v. Atkinson, 17 U. C. C. P. 295; Desty, Am. Crim. Law, § 140 a.*

The proprietors of a mercantile agency engaged in collecting and publishing for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable. *Sunderlin v. Bradstreet, 46 N. Y. 188.*

No basis for an excuse will permit a wanton and deliberate assault, insult and outrage upon feelings of a person, by sending through the mail, in a manner to be seen by others, scurrilous notices, and libelous envelopes. *King v. Patterson, 8 Cent. Rep. 357, 49 N. J. L. 417; Montgomery v. Knox, 23 Fla. 575; Byam v. Collins, 2 L. R. A. 129, 111 N. Y. 143, 7 Am. St. Rep. 726; Lynch v. Febiger, 39 La. Ann. 896.*

BAD DEBT
Collecting Agency,
218 La Salle St.,
Chicago.



U. S.
Postage
Stamp.

Mrs. Mary Vincil,

c-o Scruggs, Vandervoort & Barney,

2 N. Beaumont Street.

St. Louis, Mo.

—Intending and meaning thereby to indicate to the public, and to all persons seeing said writing, printing, sign, representation and effigy, that she, the said Mary Vincil, was dishonest; that she did not pay her just debts; that she had been guilty of unfair dealing; that she was a 'dead beat;' tending to provoke the said Mary Vincil to wrath, to expose her to public hatred, contempt and ridicule, and to deprive her of the benefits of public confidence and social intercourse. That said envelope contained certain scurrilous, blackmailing and indecent allegations concerning said Mary Vincil, as follows:

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I

"SPRAGUE'S

"Bad Debts

"Collecting Agency.

"Agency's 4th Letter.

"Mrs. Mary Vincil. Chicago, 3-26, 1888.

"c-o A. G. Armstrong: \$5.00

"We find that the account of which we notified you some time ago is still unsettled. Can you afford to have the public know that you refuse to pay this bill? You may need credit again some time, but as long as this account remains in this unsatisfactory manner it will be hard for you to obtain it. If you desire to have credit with the merchants in your locality, and maintain a reputation for honesty and fair dealing, you will adjust this claim. Call on or write the party, and make some kind of a settlement at once. If you will pay part of it now, and make some arrangements for the balance, we will not crowd you for a while. Have the party to whom the bill is due write us at once, stating what arrangements you have made, before we publish the delinquent list of your town. Very respectfully,
Sprague's Collecting Agency.

"Per."

"P. S. Should you positively refuse to make any arrangements for a liquidation of this claim we feel justified in advertising the same for sale in the newspapers, as well as to send you a statement regularly until the matter is settled. A delinquent list is published for the good and protection of the public, as well as a guide for business men in extending credit, as it contains the names of those who do not try to meet their obligations. Do not correspond with us. Settle the matter with the party to
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whom the account is due, whose name was given in our former letter.'

—"That said envelope was known by the public to contain said scurrilous and abusive matters, and said Armstrong intended, by causing said matter to be sent to said Mary Vincil through the mails, to advertise her as a 'dead beat,' as dishonest, as 'poor pay,' as unfit to be trusted, as unfit for public confidence; and said acts were done by said Armstrong to extort money from said Mary Vincil, under the pretense that she, the said Mary Vincil, was indebted to him, when such was not the fact, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

[Signed.]

Bernard Dierkes,

"Asst. Pros. Atty. St. Louis Court of Criminal Correction."

"State of Missouri, City of St. Louis, ss: Mary Vincil, being duly sworn, upon her oath says that the facts stated in the above information are true, according to her best knowledge and belief. [Signed.] Mrs. M. B. Vincil.

"Sworn to and subscribed before me, this 6th day of April, 1888. [Signed] Michael J. Keneflick."

The case, as made by the evidence, showed that defendant was a member of the firm of Kabrich & Co., merchants of Mexico, Mo. Mrs. Vincil, the prosecuting witness, had in her girlhood, and prior to her marriage, lived in Mexico. After her marriage she and her husband continued to live in Mexico, until he was killed in a railroad accident in 1880. After that, in the year 1881, she removed to St. Louis, and at the time of this prosecution she was clerking for Scruggs, Vandervoort & Barney, of St. Louis. According to the testimony of defendant, his firm claimed that she owed them an account of \$3.70, due in 1881, and interest to the date of this prosecution, amounting in all to \$5. This claim they placed in the hands of the Sprague Collecting Agency of Chicago. This agency used in its business an envelope, with these words printed on it in the left-hand upper corner: "Bad Debt Collecting Agency. 218 La Salle St., Chicago." Upon the receipt of this account, they opened a correspondence with Mrs. Vincil. It appears that she received four communications in envelopes like this in regard to this debt. The envelope

described in the information was the fourth of the series that she received. She testified that at the time she received the first she was working at Scruggs, Vandervoort & Barney's; that a large number of employes were in the house; that their mail was put in a common repository, and distributed out of a common box; that different ones saw this letter, and the superscription on it. She was so mortified at this that she went to the postoffice, and directed her mail sent to her residence. Her relations saw the other three letters she received. When she received the first letter, she wrote on 80th January, 1888, to Armstrong, the defendant:

"Dear Sir: I received the inclosed from some association in Chicago. How dare you do such a thing? I have never refused to pay a just debt, but I do most emphatically refuse to pay them twice. My word is as good as Mr. K's, and I say again I have paid this bill,—a part at one time, and the balance on leaving Mexico. I have a statement of \$5.85 from Mr. K. If he remembers a part of it being settled, how is it I am still charged with the full amount? I do not propose, with all my present grief and troubles, to be persecuted and annoyed further by you. There is a limit to all things. It is as much as I can possibly do to support myself and child; and, now that my father is dead, I will also have to contribute to my mother's support. This double method on your part to collect this bill twice is outrageous, more especially as it is against a woman who has no other resources but her own exertions to maintain herself and child. It is unworthy of a man. I will not submit to further insult. You will drop this at once, and withdraw my name, as you have no right to use it in such a manner. If you continue this it will be at your cost. [Signed] Mrs. M. B. Vincil, No. 2 N. Beaumont Street."

On the bottom of that is the answer to that. "2-1, 1888."

The Court. Did the letter that you wrote to the defendant come back to you with this lead-pencil memorandum at the bottom of it?

A. It did.

Mr. Goode (continuing to read). "We differ in opinion on this account. When paid, I will stop the agency, and would advise you to pay it at once, and avoid further trouble. Respectfully, A. G. Armstrong."

She received this letter from defendant, written, as the other one was, on the letter-head of Kabrich & Co., dated 14th February, and is as follows:

"Mrs. Mary Vincil, St. Louis, Mo.: Miss Mary, I have your letter 2-11, and contents noted. Herewith inclosed find your account. On receipt of five dollars I will stop Sprague's Collecting Agency. Hoping this to meet with your approval, etc., most respectfully, A. G. Armstrong."

To this is attached a bill dated "February 15, 1888, Mexico, Missouri," showing indebtedness, \$6.70; credit by cash, \$3.00; leaving due \$3.70; interest on above, \$1.30; making a total of \$5.00. "The above is correct, according to your own buying and paying when in Mexico. Missouri. Yours respectfully. [Signed] G. Kabrich and J. B. Snyder."

There seems to be no question but that this account was barred by the five years' limitation. 18 L. R. A.

Mrs. Vincil had been a resident of the State all the time. Kabrich, one of the firm, testified there were two small errors in the account; that the balance due in 1881 was \$3.45; that, with interest, it amounted to \$5. He denied that she had ever paid this balance. She testified that she paid it when she left Mexico, to live in St. Louis. Among other witnesses, Mr. Bassford, editor of the Ledger, a newspaper published in Mexico, testified that when he heard Armstrong was to be prosecuted for libel he "interviewed" him concerning the matter. He went into his store, and asked him to tell him something about it, and read him an article that had been printed in the St. Louis Evening Chronicle the day before. Defendant said it was "pretty rough, proceeded to explain the matter to me, how he had dunned Mrs. Vincil. Mr. Armstrong stated that this lady, Mrs. Vincil, had owed the firm a bill for a long time, of which she had repeatedly been sent a statement, and that didn't avail very much, and so he sent one registered—sent a registered letter—in care of Scruggs, Vandervoort & Barney, for whom the lady was working. That letter was received, but there was no money forthcoming. He said he was a member of Sprague's Collecting Agency of Chicago, and he sat down and filled out a blank supplied by this concern, and sent it to Mrs. Vincil. About that time—I don't know whether it was at that stage of the talk or not—he showed me one of those blanks I have spoken of. After he sent the blank, no money came, he said, and he resolved to place the matter in the hands of this agency of Chicago, which he said he did. A short time after having placed it in the hands of the agency in Chicago, he received a letter from Mrs. Vincil. He described it as being a stinging one, of several pages, in which she denied the debt. He said the debt was just, and the book showed it to be unpaid. He said he wanted the money. This was the substance of the interview." Defendant also stated to the witness that he thought from the tone of Mrs. Vincil's letter she had received "a chromo;" that is, he described it as being a large envelope, covered with heavy, black letters containing the sentence "Bad Debt" or "Dead Beat" "Collecting Agency," and so forth. On the part of the defendant, it was shown that Mrs. Vincil had not paid \$3.45 of the account; also evidence tending to impeach or deny Mr. Bassford's account of his conversation with defendant; also offers to prove she owed several other small bills in Mexico, which were refused by the court. Defendant testified in his own behalf that Mrs. Vincil owed his firm a book-account of \$5 and he desired to collect it. He mailed her a card as follows:

"Mexico, Missouri [giving the month], 1888. Mrs. Vincil: Your bill, amounting to five dollars, is past due. Please call and make a settlement inside of ten days. The principal merchants and leading professions of the west have organized a protective union. I have become a member of the union. Every member is required to report all persons who owe bills that are past due. Please do not compel us to report your name. Respectfully, A. G. Armstrong."

The heading to this card read as follows: "P. H. Sprague, President. A. H. Wilson,

Manager. T. W. Sprague, Secretary & Treasurer. Sprague's Collecting Agency, formerly Western Merchants' Retail Protective Union."

Defendant denied that he ever mailed a letter to Mrs. Vincil in one of the "Bad Debt" envelopes; denied knowing that the agency was using this form of envelope in writing to her until this prosecution commenced; and that he did not instruct or cause the agency to use this envelope. Whereupon the court gave the jury the following instructions:

"The jury are instructed that if they believe from the evidence that the defendant, on or about the 27th day of March, 1888, caused the envelope given in evidence to be sent to Mary Vincil, in the City of St. Louis, through the mails, willfully and maliciously intending and meaning to indicate to the public and to all persons seeing said envelope that she, the said Mary Vincil, was dishonest, or did not pay her just debts, or that she had been guilty of unfair dealing, or was a 'dead beat,' and that said envelope was so understood by those persons who saw it; and if the jury further believe that the reception through the mails of such envelope containing the inclosure set out in said information tended to provoke the said Mary Vincil to wrath, and to expose her to public hatred, contempt and ridicule, and to deprive her of the benefit of public confidence and social intercourse; and if the jury further believes that said defendant willfully and maliciously intended by said acts to advertise said Mary Vincil as a dead beat, or as dishonest,—then the jury will find the defendant guilty, unless they further find that said Mary Vincil is a dead beat, and is dishonest, and unfit to be trusted, and unfit for public confidence. (2) The jury are instructed that malice is the willful doing of a wrongful act without just cause or excuse; and they may infer malice from the facts, if they believe it to be the natural inference to be drawn from them. (3) The previous good character of the defendant, if established, is a fact in this case which the jury ought to consider in passing upon his guilt or innocence of this charge. (4) But if all the evidence in the case, including that given touching the previous good character of the defendant, shows him to be guilty, then his previous good character cannot justify or excuse the offense. (5) The defendant is a competent witness in his own behalf; but the fact that he is a witness testifying in his own behalf, and the interest he has at stake in this case, may be considered by the jury in determining the credibility of his testimony. (6) The jury are the exclusive judges of the credibility of the witnesses. With that the court has nothing to do. And if you believe and find from the evidence that any witness has willfully testified falsely to any material fact in the case, you are at liberty to disregard the whole or any portion of such witness' testimony. (7) The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by proof which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the State. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty, and be-

yond a reasonable doubt, your duty is to convict. If of his guilt you are not convinced beyond a reasonable doubt, your duty is to acquit. But to justify an acquittal on the ground of doubt alone, it should be reasonable and substantial, and not a mere guess or conjecture of the possibility of innocence. (8) The jury are further instructed that if defendant caused said envelope to be sent through the mails directed to the said Mary Vincil at the City of St. Louis, then such acts constitute a publication of the libel in said city. (9) If the jury find the defendant guilty, they may assess his punishment at imprisonment in the city jail for a term not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment. (10) The jury are instructed that the only meaning that they can put upon the words 'bad debt,' upon said envelope are the usual and ordinary meaning attached to them as used in the English language; and they are not to place the meaning and meanings alleged by way of innuendo in the information, unless they find that the words 'bad debt' and the said meaning and meanings so alleged by way of innuendo are the true meanings and sense of the said words 'bad debt.' (11) The court instructs the jury that the mere fact that the defendant, Armstrong, may have been a subscriber to or employer of the Sprague Collecting Agency of Chicago, will not render him liable for their criminal acts; and that said defendant is not responsible for the sending or publishing of the alleged libelous matter, unless such was done by him or upon his direction and instruction. (12) The court instructs the jury that an indebtedness by open account is a valid and legal debt, although of more than five years' existence. (13) The court instructs the jury that before the jury can convict they must find and believe beyond a reasonable doubt that the prints alleged and set forth in the information herein were of a libelous nature, and had the effect of charging the aforesaid Mary Vincil with being dishonest, and guilty of unfair dealing; and that, further, said prints were sent to the said Mary Vincil by the defendant, or by someone at his instance and request; and, further, that the inference to be drawn from the prints of 'bad debt,' etc., on the alleged envelope, were, as a matter of fact, untrue. (14) The jury are instructed that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and it is for them to find from the evidence in this case whether there was any intention on the part of the defendant, in the use of the means employed to collect a debt, to libel the prosecuting witness, Mary Vincil; and, if they find there was no such intention, then they will return a verdict of not guilty. (15) The court instructs the jury that under the Constitution of Missouri and the statutes thereof the jury are themselves the judges of the law of libel, as well as of the facts, and that they are not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is."

To the giving of which said instructions the defendant excepted, and saved his exceptions at the time.

Refused instructions. And the defendant asked the following instructions: "(1) The

court instructs the jury at the close of all the testimony that, under the evidence in this case, they must acquit the defendant. The court instructs the jury that they cannot construe the words 'bad debt' as meaning that one is a 'dead beat,' or that one 'has been guilty of unfair dealings,' or 'is dishonest;' and that the jury should disregard so much of the innuendo of the information in this case as charges such to be the meaning of said words 'bad debt.' (2) The court instructs the jury that there is no evidence in regard to the receipt by Mary Vincil of the letter set forth in the information, and purporting to come from the Sprague Collecting Agency of Chicago, nor publication of said letter in the City of St. Louis, and the jury should disregard said letter, and that portion of the information in reference to the same, and all charges of libel based on the same. The court instructs the jury that the law presumes the defendant to be innocent of the crime alleged in the information; and that, before the jury can find the defendant guilty in this case, the State must prove to the jury beyond a reasonable doubt that the defendant, at the City of St. Louis, on or about the 27th day of March, 1888, did unlawfully and maliciously mail to the said Mary Vincil, or that the defendant, at the City of St. Louis, on or about the 27th day of March, 1888, did unlawfully, willfully, and maliciously cause to be mailed to the said Mary Vincil, the said envelope shown in evidence, and that by so doing he, the defendant, intended thereby to commit the offense of criminal libel; and before the jury can find that the defendant did cause the mailing of said envelope to be done, the State must prove beyond a reasonable doubt that the defendant directed the said Sprague Collecting Agency to direct and mail the said envelope with the words 'bad debt' thereon; and the State must further prove to the jury beyond a reasonable doubt that the said Mary Vincil does not owe the debt claimed by defendant; and, unless the State has proven all of these things to the jury beyond a reasonable doubt, then the jury will return a verdict of not guilty. (3) The jury are instructed that if they believe from the evidence in this case that the said Mary Vincil owes the debt referred to in the correspondence put in evidence in this cause between her and the defendant, then it is their sworn duty to return into court a verdict of not guilty, although the jury may find that said debt is barred by the Statute of Limitations of five years. (4) The jury are instructed that, although they may find that the words 'bad debt,' as used upon said envelope, are libelous, still, before they can find the defendant guilty, they must further find that the defendant directed the composing of and publishing of said libelous matter, and this fact must be proven to the jury by the State beyond a reasonable doubt. (5) The court instructs the jury that evidence of good character is competent in favor of a person accused and on trial, as tending to show that he would not commit the offense alleged against him; and if in this case the jury believe from the evidence in this case that the defendant has always borne a good character for truth and honesty and quietude among his acquaintances and in the neighborhood where he lived, then

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this is a fact proper to be considered by the jury in arriving at a verdict; and if, after a careful consideration of all the evidence in the case, including that bearing on his character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. (6) The jury are instructed that they will reject and not consider any meaning placed upon the words 'bad debt' upon said envelope, except the usual and ordinary meaning attached to them in the English language. (7) The court instructs the jury that, although they may believe and find from the evidence that the defendant, Armstrong, placed an account against Mrs. Vincil in the hands of the Sprague Collecting Agency of Chicago for collecting, and that he may, at the time of doing so, have been aware of the methods used by said agency in attempting to make collections, yet the defendant cannot be held responsible for any acts of said agency in sending the alleged prints and writings, unless they were sent at the instance and request of defendant."

Which the court refused, to which refusal of the court the defendant excepted, and saved his exceptions at the time. After argument of counsel the jury returned into court the following verdict: "State of Missouri v. A. G. Armstrong. Charged with criminal libel. We, the jury in the above-entitled cause, find the defendant guilty as charged in the information, and assess his punishment at a fine of \$500. Thos. D. Ford, Foreman.

Mr. George Robertson, for appellant:

The court should have sustained the defendant's demurrer to the State's evidence, as it did not appear from the evidence that the defendant knowingly or willfully caused the matter to be published. He simply employed this agency to do some collecting, and the agency used its own methods. Sending the libelous matter, if it be such, was not within the scope of its employment.

Townshend, Slander & Libel, 4th ed. 104, note; *Harding v. Greening*, 1 Moore, 477, 1 Holt, N. P. 531, 8 Taunt. 42; *Hardin v. Cumstock*, 2 A. K. Marsh. 480.

It was error in the court to exclude the evidence offered by the defendant to show that the complainant owed numerous other debts that she had failed to pay.

In prosecutions for libel the truth thereof may be given in evidence.

Mo. Const. art. 2, § 14; Rev. Stat. 1889, § 3872; Rev. Stat. 1879, § 1594; *State v. Hosmer*, 85 Mo. 553.

Instruction No. 15 given by the court is erroneous.

State v. Hosmer, supra.

The court has no less or different duty to perform in libel cases, nor have the jury any greater rights or powers, than in other criminal cases.

Ree v. Burdett, 4 Barn. & Ald. 358; 2 Kent, Com. *19, pt. 4, note.

It was not the object, either in England or in this country, to set up instead of the arbitrary power of the court an equally arbitrary power of the jury, but simply to restore in the trial of these cases the anciently established and popularly approved course of the common law.

Hallam, *Constitutional History of England*, chap. 15; Proffatt, *Jury Trial*, §§ 382-385; Folkard's *Starkie, Slander & Libel*, H. G. Wood's notes *52-62, top p. 72-84; Thompson, *Trials*, §§ 2025-2029; Cooley, *Const. Lim.* 8d ed. 460 *et seq.*; *England in the 18th Century*, by Lecky, chap. 11; *Montgomery v. State*, 11 Ohio, 427.

Measrs. J. M. Wood, Atty-Gen., and Charles M. Napton, for respondent:

Evidence that Mary Vincil owed several debts in Mexico other than that claimed to be due defendant was properly excluded.

Townshend, *Slander & Libel*, pp. 818, 819.

The general charge of "dead beat" cannot be justified by a single instance.

Townshend, *Slander & Libel*, § 218, p. 819, and cases.

Gantt, P. J., delivered the opinion of the court:

The appellant contends that various errors were committed in this trial, and they will be noticed in the order in which he complains. His first assignment is the insufficiency of the information. The verification is claimed to be bad because the prosecutrix only swore that the facts stated were "true to her best knowledge and belief." This was ruled otherwise in the recent decision of this court in *State v. Bennett*, 102 Mo. 352, 10 L. R. A. 717. It is next said that the information is bad for duplicity. This objection is raised for the first time in the motion in arrest. There are various methods for taking advantage of duplicity in an indictment or information. A motion to quash, a demurrer, or motion to compel the State to elect, will, either of them, correct this fault; but it is almost universally held that it is too late after verdict to make this objection in a motion in arrest in a misdemeanor. 1 Bishop, *Crim. Proc.* §§ 442, 443; *Com. v. Tuck*, 20 Pick. 356; Wharton, *Crim. Pl.* §§ 255, 760. The cause was heard on the charge of libel, the evidence confined to that offense, and the instructions all had reference to that misdemeanor. We cannot see that any substantial right of the defendant was violated in this respect in overruling the motion in arrest. The matter complained of was at most mere surplusage, and this defect, if any, was cured by our Statute of Jeofails. Section 4115 or section 1821, Rev. Stat. 1879.

Equally groundless is the objection that the information did not charge the matter complained of was "willfully" or "maliciously" published. It distinctly alleges that defendant "did willfully and maliciously libel and defame the prosecuting witness by sending the said envelope with its indorsements through the mails," etc., and is sufficient according to the most approved precedents. The defendant was fully informed by it of the nature and character of the offense with which he was charged, and, after all, this is the great object of an information or indictment.

It is next urged against this information that it does not contain the written allegations of the libelous matter complained of. Anyone reading the information in this cause would be at a loss to understand this objection. As a matter of fact, the point made in argument was not that it was not in writing, but it was not

written by the prosecuting attorney at the time the remainder of the information was drawn, but the original envelope, or at least that portion containing the alleged libel, was pasted in the information, and made a part thereof. Learned counsel for defendant seem to think that it was very material who did the writing. This point is entirely too technical to be seriously entertained in a court of justice. Besides these specific objections, there is a general assignment of error that the information does not charge an offense under the Statute. This information is drawn under section 3869, Rev. Stat. 1889 (Rev. Stat. 1879, § 1591), which defines a libel as follows: "A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." Was the sending of this envelope with these indorsements on it the publishing of a libel, tending to expose the prosecutrix to contempt or ridicule, and bring her in disrepute with her employers and the public? We are clearly of the opinion that it was. The words "Bad Debt Collecting Agency" were printed in large, bold type on the envelopes, and were obviously intended to attract the attention of the public? These words must be construed in the light of the times in which they are used. Similar associations had sprung up all over the country, and these devices were resorted to to force debtors to pay their debts. To such extent did they go that the Congress of the United States forbade the use of the mails for their distribution. They had become so common that they were thoroughly understood in the mercantile world. Under this state of affairs, the defendant resorts to this Chicago agency to collect this debt of the prosecutrix. He sets in motion this machine for extorting this money from her. It was known that the prosecutrix was earning her living by her work in the large and responsible dry goods house of Scruggs, Vandervoort & Barney. Accordingly, these letters, four in number, are directed to her in the care of her employers. All the mail for the employés of this large house was put together and taken by the carriers to the store. There the various clerks went to a common repository for their mail. So that the scheme was well devised to attract the attention of those with whom she was most intimately connected, and without whose respect and good opinion the life of a sensitive woman would soon become a burden and unendurable. This envelope on its face was designed to attract the attention of the public, and when the prosecutrix received these letters in these envelopes the fact was thereby published that this association was in correspondence with her for the purpose of collecting a bad debt; and we cannot shut our eyes to the necessary implication that she was a bad debtor; that she was not in the habit of paying her honest debts; and was unworthy of credit. Nor are we left in doubt

that this was the purpose of the association. In the letter which came under cover of this envelope the agency asks her: "Can you afford to have the public know that you refuse to pay this bill? You may need credit again some time, but as long as this account remains in this unsatisfactory manner it will be hard for you to obtain it." In other words: "By means of this style of publishing you to the world we will advertise you as unworthy of credit." Nor was this all. She is warned: "Should you positively refuse to make any arrangements for a liquidation of this claim, we feel justified in advertising the same for sale in the newspapers, as well as to send you a statement regularly until the matter is settled." These regular communications, if sent without these libelous words in large type, would not attract any attention; but, received regularly in this form, would give a painful publicity. The evident purpose and design of the defendant and the association he employed, and for whose acts he is responsible in this matter, was to publish the prosecutrix as a bad debtor, a dishonest person, who would not pay her honest debts, and to degrade her in the eyes of the public and her employers, and as such was clearly libelous, and within the meaning of the Statute. *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86; *Dennis v. Johnson*, 43 Minn. 301; *Johnson v. Com.* (Pa.) 14 Atl. Rep. 425.

The law will not countenance or tolerate this method of collecting a debt. The facts that the debt was originally only \$3.45; that it was barred by the Statute of Limitations; that defendant persisted in his endeavor to extort the money from the prosecutrix after her protest; and the avowed intention of his agents to publish her to the world, and advertise this account for sale in the newspapers,—amply sustain the charge that this was maliciously done. To permit a defenseless woman in this day of enlightenment to be thus persecuted would be a reproach to our laws. *Beals v. Thompson*, 149 Mass. 405.

It is insisted by defendant that the court ought to have sustained a demurrer to the evidence. The defendant's own letters of February 1 and 14, 1888, both show that he was aware that this agency was sending to Mrs. Vincil letters that she regarded as insulting. She had appealed to him to call off this agency, and he complacently informs her he will when she sends the \$5. "*Qui facit per alium, facit per se*;" and this maxim applies in all its strictness in libel. Besides, Bassford, the editor of the Ledger, testified that the defendant told him he was a member of the Sprague Agency, and in referring to Mrs. Vincil's letter he said he thought she had received a "chromo," to which he alluded. After believing or thinking that she had received this style of a letter from his agents or associates in Chicago, he declined to stop them unless she pays the \$5. There was ample evidence to sustain the verdict of the jury as to his knowledge and complicity in originating and publishing the libelous envelope. The pasting of the portion of the envelope containing the libelous matter in the information so as to make it a component part thereof was unusual, and, we think, wholly unnecessary, but it certainly did not and could not destroy its character as original evidence 13 L. R. A.

in the case; hence the trial court committed no error in admitting it as evidence.

There was no error in admitting the letter of January 30, 1888, in evidence. It was admissible to show defendant's knowledge of the means his agency was pursuing in his behalf, and of the claim that the debt was paid; and his reply, written on the letter itself, shows his determination to persist, notwithstanding the protest of Mrs. Vincil. Nor did the court err in excluding the evidence of Reed, Emmons, Bedell, and Mrs. Harding, tending to prove that Mrs. Vincil owed them altogether some \$18.50. No offer was made to prove her general reputation in regard to paying her just debts. She was not expected, nor was the State required, to come prepared to meet and try every individual claim that might be made against her. Evidence of specific indebtedness was not admissible. *Wilson v. Noonan*, 27 Wis. 508; *Campbell v. Campbell*, 54 Wis. 90; *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86. Indeed, the fact that, after the zealous efforts of defendant to destroy her character as an honest woman, he could only find an indebtedness of \$18.50 against her in a community where she had lived for many years, is rather a vindication. It is questionable, if admitted, if it would have had any appreciable effect upon any sensible juror.

The point made, that the court permitted the State's counsel to cross-examine the defendant on matter not elicited by his counsel in chief, has been carefully examined, and we have concluded that it really amounts to nothing more than an inquiry if he understood what Mrs. Vincil referred to as insulting in her letter of the 30th of January. No possible injury could come from this. The court expressly ruled the counsel for the State to a cross-examination of the matter brought out by defendant, and none other was elicited. The instructions correctly told the jury what was necessary to constitute the libel under the information. The only one requiring special examination is the fifteenth, which informs the jury that they are the judges of the law of libel as well as of the facts, and they were not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is. Section 14 of article 2 of the Constitution of Missouri declares "that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." It was to this constitutional provision in our Bill of Rights this instruction referred. In *State v. Hoerner*, 85 Mo. 558, Judge Henry, in discussing an instruction similar to the one complained of here, says: "The defendant asks the court to declare the law to be 'that under the law the jury are to determine the law and the facts in this case.' Section 1594, Rev. Stat. 1879, is as follows: 'In all prosecutions for libel or verbal slander the truth may be given in evidence to the jury, and shall constitute a complete defense; and the jury, under the direction of the court, shall determine the law and the

fact.' I confess that I do not fully comprehend the meaning of the remarkable concluding clause of that section," and he condemns that instruction. No allusion is made by the learned judge to the Bill of Rights, nor to the history of this provision in our Constitution and law. Section 14, art. 2, of our Constitution is but a rescript of section 1, Fox's Libel Act, enacted by the British Parliament (32 Geo. III.) in 1792. Before that Act it had become to be the rule that the judge, not the jury, should decide whether or not the publication was a libel. The judge would direct the jury to find the defendant guilty on proof of the publication, of the innuendoes, and of the other necessary averments. But that Act declared and enacted that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them. This Act in full will be found in Odgers on Libel and Slander, p. 665. In the case of *Reg. v. Sullivan*, for seditious libel, in 1868, this law was interpreted by Fitzgerald, J., who presided in the trial. It is reported in 11 Cox, C. C. 51. Among other things, in his charge to the jury, he said: "The next question is of paramount importance, and it is the one of which the jury are the sole judges,—whether these publications are seditious libels. That question of law and fact is intrusted to the jury alone. I know that some of you have considerable experience as jurors, and I have often had the duty cast upon me of addressing you as such. You must have observed that in ordinary cases, especially in the crown courts, the questions were divided into those of law and fact. The questions of law are usually for the judge, and on them the jury are bound to take his direction. The questions of fact are solely for their determination. In this peculiar case of libel the law of the land says the jury shall determine the whole question whether the publication is a libel or a seditious libel. That power has been given to the jury for the purpose of protecting the inviolable blessing of a free and independent press. You should bear in mind that, while you will receive assistance from me, you are not bound to follow anything I tell you. You are the sole judges of the law and fact."

In *Reg. v. Burdett*, 4 Barn. & Ald. 181, Mr. Justice Best said: "Libel is a question of law, and the judge is the judge of the law, in libel, as in all other cases. The jury have the power of acting agreeably to his statement or not." When we remember the origin of this provision in our Constitution, that it was the result of the speech made by Lord Erskine, in his defense

of the Dean of St. Asaph in 1784, a speech declared by Fox to be the finest argument in the English language, and that this speech prepared the way for the adoption of Fox's Libel Bill in 1792, it is impossible for us to view it as having no other or different meaning than the other provisions guaranteeing a jury trial. Does not the usual construction apply here, as in other cases,—that, when foreign laws are adopted, and made a part of our Code, the presumption is that we adopt also the construction already given by the foreign courts where they had their origin? As we have seen, the English courts make a broad distinction in prosecutions for criminal libel and all other cases as to the province of court and jury. The scope of this opinion forbids any further elaboration of the great principles upon which this provision is founded. The argument of Lord Erskine on the right of juries in criminal libel is in itself a complete history, and will be found reported in full in 21 How. St. Tr. 847-1046.

Viewed in the light of the history of the constitutional provision, and the great contest for the freedom of the press out of which it grew, and of the construction given Fox's Libel Bill by the English judges, did the criminal court err, after it had fully instructed the jury in this cause, in further instructing them that they were themselves the judges of the law of libel, as well as of the facts, and that they were not required to accept the instructions given by the court as conclusive of the law of criminal libel? Is not this instruction, in substance and effect, just what the Constitution commands, and is it not simply another way of stating the same principles that were announced by Judge Fitzgerald in the *Sullivan Case*, *supra*, and Justice Best in *Reg. v. Burdett*, *supra*, viz., that while the judge may assist and inform him what the law is, and it is his duty to do so, still they are, by virtue of organic law, the final judges in a prosecution for criminal libel? We think so; and in so doing we conclude that the decision in *State v. Hosmer* was decided without this constitutional provision; and its history having been brought to the attention of this court, and inasmuch as it is of the very gravest importance that the Constitution itself should govern, we think State against Hosmer should not longer be followed.

This brings us to the conclusion that there are no reversible errors in the record in this cause, and the judgment of the Criminal Court is accordingly affirmed.

Thomas, J., concurs; Macfarlane, J., not sitting.

PENNSYLVANIA SUPREME COURT.

GENESEE FORD IMPROVEMENT CO.
v.

James IVES, Appt.

(.....Pa.....)

1. A second bond is not required from a corporation organized under the Act of 1883 for the improvement of the navigable R. A.

gation of a stream, which has failed to agree with abutting property owners as to payment of damages, before it can exercise its franchises, if it has given the one prescribed by section 5 of that Act, although section 4 provides that in case of failure to agree as to damages they shall be assessed under Act 1874, § 41, which requires the tender of a bond to the person claiming damages.

2. The right to exercise a corporate

franchise and collect tolls under a charter acquired under the Act of 1883 for improving the navigation of a stream cannot be defeated by denying the necessity of the franchise or questioning the degree of perfection in the improvements made by the company.

3. The reasonableness of the tolls charged by a company organized under the Act of 1883 for improving the navigation of a stream cannot be questioned so long as they are within the limit fixed by the statute.

4. A judgment will not be reversed for the error of the court in directing a verdict for plaintiff when the case should have been submitted to the jury because the right of recovery depended on oral testimony, where no interest of defendant would be subserved by reversal, if the assignments of error do not contain the language of the court *in totidem verbis*, and the question is not argued for appellant.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Potter County in favor of plaintiff in an action brought to recover tolls for logs floated on the Genesee Fork of Pine Creek. *Affirmed.*

At the trial defendant objected to evidence that he had floated logs on the stream by the aid of plaintiff's improvements on the ground that plaintiff had no rights in the stream because it had not filed the bonds required by statute. The objection was overruled, and the evidence admitted. [1st assignment of error.]

Defendant attempted to show that there was sufficient water in the stream to run out his logs without the assistance of any of defendant's improvements; that the stream was in no better condition for running logs after, than it was before, plaintiff's alleged improvements; that there had been no material improvement in the navigability of the stream; and that the improvements did not obviate the necessity of assistance from the banks in running the logs; all of which was objected to and excluded. [2d, 3d, 4th, 5th, assignments of error.]

He attempted further to show that ten cents per thousand feet was not a reasonable toll, and that no improvements had been made which would authorize the collection of any toll; all of which was objected to and excluded. [6th and 7th assignments of error.]

The court charged the jury that what was a reasonable charge per thousand feet was not for the court or jury to fix, but for the Company itself, the law simply fixing a maximum beyond which they cannot go. [8th assignment of error.]

The court instructed the jury to find for plaintiff the full amount charged. [9th assignment of error.]

The tenth assignment of error questioned the constitutionality of the Act of 1883.

Further facts appear in the opinion.

Messrs. Mann & Ormerod, for appellant: The plaintiff was a trespasser upon the defendant. It was attempting to exercise a right it had never obtained, not having made compensation to the defendant, who was a riparian owner, nor tendered security.

Lord v. Meadville Water Co. 8 L. R. A. 202, 185 Pa. 181.

It cannot be said that there was an implied 13 L. R. A.

contract on the part of Ives to pay when he rolled his logs into the stream. It was a natural highway which he had used for that purpose for more than twenty-one years. It was the only way of getting his logs to market, and the same reasoning would not apply to his use of the stream, that might apply to the use of an artificial highway such as a railroad or a turnpike road.

Irvine v. Lumbermen's Bank, 2 Watts & S. 190, and **Dyer v. Walker**, 40 Pa. 157, do not rule this case.

The franchise to collect tolls did not vest with the granting of the charter. The law contemplates the making of improvements before the imposition of tolls, and the franchise to collect tolls did not take effect until the improvements were made. Tolls were permitted by the Legislature in consideration of making improvements, not of making an application for a charter.

Carman v. Clarion River Nav. Co. 81* Pa. 412.

An interpretation of this law which will permit a corporation to blanket a stream by purchasing a charter and passing a resolution to charge tolls, is in conflict with the rule which requires a construction of a charter against the corporation and in favor of the public.

The Legislature certainly never intended to allow a corporation to appropriate a public highway, unless for the public benefit. It could not be for the public benefit unless they improved its use, and an attempt to collect tolls before they had done something to benefit the public would be an imposition and fraud upon the public which the law will not permit.

Scranton E. L. & H. Co's App. 1 L. R. A. 285, 122 Pa. 174, 175.

The rights and powers of a corporation can be inquired into by the courts under the Act of 1871, p. 1360.

McCandless's App. 70 Pa. 216; **Western Pennsylvania R. Co's App.** 104 Pa. 406.

There is nothing in the Act which gives the plaintiff exclusive control of the stream. The Legislature evidently intended to limit the rights of the corporation to the control of its improvements. All persons shall have the right to have their logs floated with the aid of these improvements, subject to the payment of tolls. Exclusive rights of corporations are not favored.

Scranton, E. L. & H. Co's App. supra; **Freeport Water Works Co. v. Prager**, 129 Pa. 605; **Emerson v. Com.** 108 Pa. 111; Act of 1887, Pa. Laws 812, § 3.

Ten cents is the maximum figure for twenty miles. Ten cents is the amount charged Ives for floating his logs one and a half miles from the mouth of the stream. While the discretion of a corporation, if exercised reasonably, cannot be inquired into in a suit at law, still when that discretion is misused or abused it may be redressed or restrained in a suit at law.

Pennsylvania R. Co's App. 128 Pa. 521-522; **Com. v. Erie & N. E. R. Co.** 27 Pa. 389; **Parke's App.** 64 Pa. 187; **Struthers v. Dunkirk, W. & P. R. Co.** 87 Pa. 282-286; **Clarke v. Birmingham & P. Bridge Co.** 41 Pa. 160.

Messrs. M. F. Elliott and Dornan & Peck, for appellee:

Our right to collect tolls was a franchise,

contained without any limitation in our charter, and the defendant cannot, in this collateral proceeding, inquire into this franchise to take tolls, and take away or forfeit this franchise of the corporation.

8 Wood, Railway Law, § 817; *Irvine v. Lumbermen's Bank*, 3 Watts & S. 190; *Murphy v. Schuylkill County Farmers' Bank*, 20 Pa. 415, 418; *Dyer v. Walker*, 40 Pa. 157; *Cleveland & P. R. Co. v. Spear*, 56 Pa. 825, 835; *Farnham v. Delaware & H. Canal Co.* 61 Pa. 265, 271; *Bennett's Branch Imp. Co's App.* 65 Pa. 242; 251; *Grant v. Henry Clay Coal Co.* 80 Pa. 208; *Building & L. Assn. v. Kenner*, 18 Phila. 107; 36 Legal Int. 124.

The Act of June 19, 1871, does not apply to this case, for that Act only authorizes a private citizen by bill in equity or other proceedings in accordance with said Act, to investigate into causes of forfeiture, which may appear from the limitations of the charter of the corporation.

Western Pennsylvania R. Co's App. 104 Pa. 399.

The stream was a public highway for the floating of logs.

Barclay R. Co. v. Ingham, 86 Pa. 194, 201, 202; *Meyer v. Phillips*, 97 N. Y. 485; *Brig "City of Erie" v. Canfield*, 27 Mich. 479; *Olsen v. Merrill*, 42 Wis. 208.

Then, what property of the defendant therein did the corporation take?

Bennett's Branch Imp. Co's App. supra.

Evidence that the improvements we had made were not beneficial to the navigation of the stream for floating logs, either generally, or so far as the defendant was concerned, was rightly excluded.

Ibid.

Within the maximum limits fixed by the statute, "the amount of tolls the corporation or its proper officers may require," "is to be regulated by the discretion of the corporation, exercised through its proper officers."

Cumberland Valley R. Co's App. 62 Pa. 229; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Pennsylvania R. Co's App.* 128 Pa. 509; *Parke's App.* 64 Pa. 137; *Clarke v. Birmingham & P. Bridge Co.* 41 Pa. 147.

Green, J., delivered the opinion of the court:

After the trial of this case the bond given by the appellees in the course of their organization proceeding under the 5th section of the Act of 1888 was found. The condition of the bond is in exact conformity with the requirement of the 5th section. It was duly approved by the court on March 22, 1888, and was therefore a full compliance with the statutory requirement in that regard. It is still contended, however, that the plaintiff was obliged to file another bond under the 4th section of the Act, before it could exercise its corporate franchise. While we do not consider that the defendant is entitled to raise this question in the present collateral proceeding, an examination of the 4th section satisfies us that there was no necessity for the giving of any other bond than the one required by the 5th section. The 4th section merely provides a method of proceeding for the assessment of damages sustained by the owners of dams and land along the streams,

and simply directs that when the Company and the owner cannot agree as to the damages the assessment shall be made under the forty-first section of the Act of 1874 to which the Act of 1888 is a supplement. Upon recurring to that section we find that it contains an elaborate provision for the assessment of damages by the appointment of viewers whose proceedings are prescribed in about the usual manner in which views for such purposes are conducted. The section contains a further provision that when the parties cannot agree upon the amount of the damages to be paid, the corporation shall tender a bond to the party claiming damages, with condition that the corporation will pay such amount of damages as the party shall be entitled to receive after the same shall have been agreed upon by the parties, or assessed in the manner provided for in the Act. It is plain that the duty to tender this bond arises as a part of the proceedings for the assessment of damages in the cases covered by the Act of 1874. Had the Act of 1888 contained no other provision for the giving of a bond than is contained in the Act of 1874 it would have been necessary for the plaintiff to have given the bond required by that Act. But the Act of 1888 does contain a specific provision for the giving of a bond in its 5th section. The condition of the bond there required to be given is for the indemnification of all and every person whose property may be injured by reason of the construction and operation of the improvements of the corporation. As this language is broad enough to include all owners of dams and lands on the streams in question it is manifest that it is ample to confer every remedy afforded by the bond required by the forty-first section of the Act of 1874. The giving of such a bond therefore is entirely unnecessary when the bond required by the fifth section of the Act of 1888 has been given. The first assignment of error is not sustained.

The questions raised by the second, third, fourth and fifth assignments relate to matters which must be considered as having been settled when the corporate franchise was acquired. The right to appropriate the stream for the purpose of floating logs upon it was conferred by the Act of 1888, under which the plaintiff was organized. It could not be tolerated that the right to exercise the franchise and collect the tolls allowed by the Act, should be defeated by objections which deny the necessity of the franchise, or call in question the degree of perfection in the improvements made by the Company. Although it might be possible for an owner to float his logs upon the natural state of the water and without assistance from the dams, at times, that is no reason why the Company may not claim the fruits of its franchise. And so also as to its right to collect tolls, which is called in question under the sixth and seventh assignments. So long as the Company keeps within the discretionary limit fixed by the Statute, its right to collect the tolls cannot be defeated, nor its discretion to fix the amount questioned. All of this was decided in the cases of *Boyle v. Philadelphia & Reading R. Co.* 54 Pa. 810, and *Cumberland Valley R. Co's App.* 62 Pa. 218. In the latter case Thompson, *Ch. J.*, said:

"The company has therefore the clear warrant of the charter for demanding the aggregate of the sums, viz.: seven cents per mile per ton for private freight in their own cars on their own road. Within this limit no court can interfere with them. This is settled by the charter and by the decision in the case of *Boyle v. Philadelphia & Reading R. Co.*, *supra*. The master finds that the company has not transcended this limit and the court, very properly concurring with the master, dismissed this portion of the bill."

In the case of *Parke's App.*, 64 Pa. 187, we held that the court has no right to interfere with a company's location of its road, on the score of preference, within the limits of its charter. In the case of *Struthers v. Dunkirk, W. & P. R. Co.*, 87 Pa. 282, the present chief justice said: "There is only one question remaining in the case and that is, whether the court below should have received evidence to show that the company might have located its road upon another route and thus have avoided laying the track upon High Street. We are clearly of opinion that the learned judge was right in excluding evidence of this character, and also in his answers to the points, in which the same question was presented. The discretion of the company in locating its road cannot be reviewed in this manner. The location was made in the exercise of an undoubted power. It was said in *Parke's App.*, 64 Pa. 187: "Neither the court below nor this court has any right to interfere with the location made by the company on the score of preference, if any be felt. The only question is whether it has or has not exceeded a discretion on the subject, apparent on the face of the Act of incorporation."

In the case of *Bennett's Branch Imp. Co's App.*, 65 Pa. 242, in which the company was authorized to clear out, improve and use Bennett's Branch, to use dams erected and erect new dams, and to use all of said dams and the waters of the said stream, in the floating of sawlogs down the same, Thompson, *Ch. J.*, in delivering the opinion, said: "The company, having authority by law to improve the stream in the manner prescribed for the consideration of taking toll on the lumber and logs floated thereon, would not lose its franchises, because the improvement was in fact not beneficial, there being no such condition prescribed. The Legislature determined that question in granting the charter and all the franchises granted will remain, in the absence of any limitation, until taken away by some direct action for that purpose, legislative or judicial. . . . The right to impose tolls as a consideration for the completion of an enterprise intended to benefit the public is a right of government. It is conceded to the promoters, as a compensation for the benefit, in contemplation of law, which every individual receives for an improved mode of transit of person or property. Individual complaints avail nothing against the right. These individual inconveniences must yield to the wants of the whole public. In 18 L. R. A.

most of these cases of improved navigation, by companies, or the State, if not all, individuals have always been found who would claim to be as well off without such improvements as with them, and yet they are obliged to pass over them with their property, and pay tolls. There is no reason in this for impeaching the validity of the law. This results from the accident of location and of this nobody is to blame but the owner, and he must submit to all legal consequences incident thereto." The consideration so well expressed in the foregoing opinion practically disposes of all the questions arising upon the rejected offers of testimony covered by the several assignments of error now under discussion, including the question of the reasonableness of the tolls charged for the logs floated in 1889. The only question discussed by counsel for the appellant under the eighth assignment of error is the correctness of the instruction that neither the court nor the jury had the right to determine what was a reasonable charge per thousand feet so long as the Company kept within the maximum price fixed by the Statute. As we have already held that this is a subject within the discretion of the Company, we think there was no error in this portion of the charge. We are bound to consider that so long as the charge did not exceed ten cents per thousand it was reasonable within the contemplation of the law. The ninth assignment of error, as it is pressed upon our attention, raises no other question than the one covered by the eighth assignment. The full amount charged was ten cents per thousand upon the number of feet of logs floated as stated in the testimony, and it is not claimed that there was any error in the court's statement of the quantity. It is true that the court did direct a verdict absolutely in favor of the plaintiff although the right of recovery depended upon oral testimony. This ordinarily would be error, as it includes substantially an instruction that the jury must believe the plaintiff's witnesses and that is a subject over which the jury has exclusive control. The ninth assignment is in violation of our rule of court as it does not contain the language of the court *in totidem verbis*. Expressed as it is, and discussed as it is, it complains only of the amount charged and not of the direction to find for the plaintiff. Were we at liberty to reverse for the technical error of the charge in this respect, we do not think any interest of the defendant would be subserved by our doing so. We prefer to say, therefore, that we disregard this feature of the assignment because it is not properly expressed, nor is the question itself anywhere discussed in the argument for the appellant. There is no force in the tenth assignment as the Act of 1888 is not an amendment to the Act of 1879, but to the Act of 1874, and the amended section of that Act is correctly re-enacted in the Act of 1883. Moreover, this point was not made in the court below and no exception on the record raises the question.

Judgment affirmed.

President, Managers & COMPANY FOR
ERECTING a BRIDGE over the Juniata
River AT or near the Village of MIF-
FLIN, in the County of Mifflin (now
Juniata).

v.

COUNTY OF JUNIATA, *Appl.*

(.....Pa.....)

1. In a proceeding to determine the compensation to be made to the owners of a toll-bridge which has been taken by the county, witnesses should be questioned as to the value and not the cost of the bridge.
2. The cost of repairs upon a toll bridge which has been taken by a county cannot be considered in determining the compensation which must be paid to the owners because of such taking.
3. Returns of the value of its capital stock, made by a toll-bridge company to the state auditor as required by law, is competent evidence upon the question of such value in a proceeding to determine the compensation to be made to the company for the taking of the bridge by the county.
4. For what sum the county could have erected a new bridge is immaterial in a proceeding to determine what compensation it must make to the owners of a toll bridge which it has taken for the use of the public.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Mifflin

County, fixing the compensation to be made to plaintiff because of the taking of its toll-bridge by the county. *Reversed.*

The case is sufficiently stated in the opinion. *Messrs. Alfred J. Patterson and D.W. Woods*, for appellant:

The certified copies of the returns made by the Bridge Company of the value of their capital stock, to the auditor general were competent evidence.

These returns were made under oath, and their object was to ascertain the value and worth of the stock for the purposes of taxation.

See *Lynch v. Lively*, 82 Ga. 575; *Ronken-dorff v. Taylor*, 29 U. S. 4 Pet. 349, 7 L. ed. 832; *State v. Gorham*, 65 Me. 270; *Clarke v. Dougan*, 12 Pa. 87.

The declarations of the secretary and treasurer of this Company, made under the law, and under the circumstances of this case, and enjoined upon them, were within the scope of their authority and were binding upon the company.

Magill v. Kauffman, 4 Serg. & R. 317; *Toll Bridge v. Betsworth*, 80 Conn. 380; *La Salle County v. Simmons*, 10 Ill. 216; *Cornington & L. R. Co. v. Ingles*, 15 B. Mon. 637; 2 Wharton, Ev. § 1078.

A written admission by a party, if published by him, is strong evidence against him or those claiming under him.

2 Wharton, Ev. § 1122.

The declarations and admissions of the real party in interest, though his name does not appear as the party of record, are competent

NOTE.—Right of eminent domain.

The right of eminent domain or inherent sovereign power gives to the Legislature the control of private property for public uses and for public uses only. *Memphis Freight Co. v. Memphis*, 4 Coldw. 426; *Coster v. Tide Water Co.* 18 N. J. Eq. 64; *Townsend v. Morris Canal & Bkg. Co.* 6 Trans. App. 276; *Varick v. Smith*, 5 Paige, 137, 3 L. ed. 659.

It must rest with the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. *Taylor v. Porter*, 4 Hill, 151; *Dingley v. Boston*, 100 Mass. 558; *St. Louis County Ct. v. Griswold*, 58 Mo. 124; *Coster v. Tide Water Co.* 18 N. J. Eq. 67; *Beekman v. Saratoga & S. B. Co.* 3 Paige, 73, 3 L. ed. 63.

A statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner although compensation is made. *Embury v. Conner*, 3 N.Y. 517, 53 Am. Dec. 329; *Hay v. Cohoes Co.* 3 Barb. 47; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 59; *Taylor v. Porter*, 4 Hill, 147; *Re John & Cherry Sts.* 19 Wend. 659; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 653, 7 L. ed. 553.

The legislative department of the government cannot divest a citizen of a lawfully acquired right or title, to property; and the maxim, *nemo potest mutare constitutum suum in alterius injuriam*, is a principle of the common as well as the civil law; and is applicable, in a free government, as well to the government as to individuals. *Dockery v. McDowell*, 40 Ala. 481.

There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law; or to take away that security of personal liberty, or private property, for the protec-

tion whereof government is established. *Durkee v. Janesville*, 28 Wis. 463, 9 Am. Rep. 504; *Calder v. Bull*, 3 U. S. 3 Dall. 387, 1 L. ed. 648; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 143, 3 L. ed. 180; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 50, 3 L. ed. 653. See note to *Logan v. Stogdale* (Ind.) 8 L. R. A. 58.

Compensation must be made to the owner.

The qualification of the right of eminent domain, existing by the general law of European nations and the common law of England, that compensation should be made for private property taken or sacrificed for public use, has in this country been established beyond legislative control by the provisions of the Constitution of the United States and the Constitutions of the several States. *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 163, 20 L. ed. 557.

By the Constitution of the Mexican State of Tamaulipas, in force in 1823, the land of an individual could not be devoted for an object of common recognized utility, without previous compensation. *Brownsville v. Cavazos*, 100 U. S. 133, 25 L. ed. 574.

The owner of a private bridge across which a public road was created by the county board to enable the county to appropriate the bridge, which is thereafter used by the public, is entitled to compensation. *Blaine County v. Brewster* (Neb.) June 30, 1891.

A statute which, under this power, repeals an Act of incorporation, and at the same time creates a new corporation with similar powers, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation, so taken by the new one. *Greenwood v. Union Freight R. Co.* 106 U. S. 13, 26 L. ed. 961. See note to *Alloway v. Nashville* (Tenn.) 8 L. R. A. 123.

evidence against him, the law giving him the same rights as though he were a party to the record.

1 Greenl. Ev. § 180; 2 Starkie, Ev. Metcalf's ed. 40, 41; Wharton, Ev. § 1218.

Messrs. B. F. Junkin and A. Reed for appellees.

Paxson, Ch. J., delivered the opinion of the court:

It was held in *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. 54, that where a bridge is taken by a county for public use under the Act of May 8, 1876 (Pub. Laws, 181), the measure of damages is the value of the property to the owners, not to the county taking it, and that such value is to be ascertained not only by the cost of the structure, but also by the value of its franchises. The value of its franchises depends largely upon its earning capacity. A bridge, as was observed in the case cited, is a peculiar kind of property, and seldom has a market value. The value of its capital stock may, and generally does, indicate with some accuracy, the value of its franchises. Hence in an action against a county for taking a bridge, the cost or value of the structure, the amount of net tolls, and the market value of its capital stock, are all elements to be considered in ascertaining the value of the bridge and its corporate franchises. No one of these elements, standing alone, would in all cases furnish a test; considered together, they will seldom fail to lead to a satisfactory result.

Property which may be taken.

The right of eminent domain clearly implies the right in the sovereign power to determine the time and occasion, and as to what particular property it may be exercised. *Heyward v. New York*, 7 N. Y. 325.

All private rights vested under the government, including those held by charter or other contracts, are subordinate to the power of eminent domain. *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535.

A franchise granted by a Legislature is subject to the right of eminent domain. *Richmond, F. & P. R. Co. v. Louisa R. Co.* 54 U. S. 13 How. 71, 14 L. ed. 55.

Like all other property, corporation property is subject to the necessities of the public; and not only its property, but its franchises, when inseparable, may be taken for public use on compensation being made therefor. *Re First Street*, 9 West. Rep. 573, 66 Mich. 42.

Any of its property not actually in use, or absolutely necessary for the enjoyment of the franchise, is subject to condemnation for other purposes, the same as the property of an individual. *Ibid.*; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 550; *Petree v. Somersworth*, 10 N. H. 370; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35, 63; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 638, 641, 9 L. ed. 781; *Bonaparte v. Camden & A. R. Co. Baldwin*, C. C. 205; *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.* 11 Leigh, 42; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *Armington v. Barnet*, 15 Vt. 745; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289.

Yet property taken by one corporation for a public use cannot be taken by another corporation, without an express grant or by necessary implication. Right by implication can arise only from ab-
13 L. R. A.

The first three assignments may be considered together. The witness, L. G. Brown, was asked as to the value of the bridge, by which I understand to be meant the superstructure only. This was objected to on the ground that Brown, having contracted for the erection of the bridge, should have been asked as to the contract price. We do not think this objection well taken. The true question was the value of the bridge, not what it cost. The contractor may have taken it at too low a figure, or the owner may have paid too much; the county is entitled to pay for it at its actual value at the time of taking.

The fourth and fifth assignments allege that the court below erred in rejecting evidence in reference to the cost of certain repairs to the bridge. The evidence was clearly irrelevant and properly rejected.

The sixth assignment is more serious. The defendant offered a certified copy of the return made by the Bridge Company of the value of its capital stock, to the auditor general under oath, from the year 1881 up to the present time. This was offered for the purpose of showing the value of the capital stock as made for the Company under oath by its officers.

The capital stock represents the property and franchises of the corporation, and as before observed is an element to ascertain the damages. The plaintiff had given in evidence, to show the value of the capital stock or franchises, the receipts from tolls for 1884, 1885, 1886, 1887, 1888, 1889. It was clearly

solite necessity, such as that without it the grant would be defeated. *'Pittsburg' Junction R. Co's App.* (Pa.) 4 Cent. Rep. 267; *Groff's App.* 5 L. R. A. 661, 128 Pa. 621.

A bridge held by an incorporated company under a charter from a State may be condemned and taken as part of a public road, under the laws of that State. *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535.

Measure of damages for toll-bridge taken.

The principle that the true measure of damages for property taken for public use is the market value of the property at the time of the taking does not apply to a toll-bridge company whose property is taken for a county bridge, such property being of a peculiar character and having no market value. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54.

The damages are not limited to the cost of the construction of a new and similar bridge at the time of the taking, but include the value of the franchises arising from the income from the tolls. *Ibid.*

In arriving at the value of the franchises it is proper to prove the receipts of the company for a matter of five years before the taking, but not to extend the inquiry back forty or fifty years to the organization of the company. *Ibid.*

A toll-house and canal bridge built by the company for the convenience and proper use of the bridge, are properly considered. *Ibid.*

In estimating the sum to be paid, the franchise of the corporation to collect tolls shall not be considered, but the court in *Re Condemnation of Lock & Dam No. 7*, 46 Phila. Leg. Int. 69, held that, as the question was not free from doubt, it would arrest the proceeding, but would overrule the objections, without prejudice to respondent's right to renew them thereafter.

competent, therefore, for the defendant to show the value placed by the company upon its own stock; a valuation made upon the oath of its officers. It is no answer to this to say that the return was made by the officers and not by the stockholders. The officers were the duly constituted agents or representatives of the latter, and their act was the act of the corporation itself. The return was made in pursuance of the Act of Assembly, and was the official act of the corporation. Hence we need not discuss the cases cited as to the power of an agent to bind his principal by his declarations. They are not relevant. While this return does not conclude the Bridge Company upon the question of value, it is nevertheless competent evidence for the consideration of the jury, and is moreover important. The difference between the verdict and the valuation placed upon its property by the Company under the oath of its officers is so great as to justify the suggestion that the verdict was too large, or the company has undervalued its property to escape taxation.

What has been said covers the seventh assignment. The eighth assignment is not sustained. It was not relevant to show what the county could have erected a new bridge for, at this or some other point. The county might have erected a new bridge, but it preferred to take the bridge of the plaintiffs, and must pay for it at its value to the latter. The remaining assignments refer to the charge of the court and are not sustained. The learned judge said in answer to the defendant's first point: "If the jury finds that the property was liable to destruction from flood or ice, this may be considered to the extent that this liability decreased the value of the property." This was an affirmation of the point, but the defendant complains that it was not strong enough, and that the learned judge should have instructed the jury that they *must* consider the matters referred to instead of that they *may* do so. This is somewhat of a refinement. The jury could not fail to have understood that if the liability to destruction from flood and ice lessened the value of the property, their verdict should be reduced to that extent.

The judgment is reversed and a venire facias de novo awarded.

A. Stanley ULRICH, Exr., etc., of Andrew Bleistine, Deceased, Appt.,

v.

Adolphus REINOEHL et al.

(..... Pa.)

1. Whether or not a policy of insurance taken out by a creditor on the life of his debtor,

NOTE.—Life insurance; insurable interest essential to validity of policy.

An insurable interest must be actual, and such as will reasonably justify a well grounded expectation of advantage dependent upon the life of the insured. *Corson v. Garnier* (Pa.) 4 Cent. Rep. 308; *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 238.

A creditor has an insurable interest in the life of his debtor. *American L. & H. Ins. Co. v. Robert-* 13 L. R. A.

to secure his debt, is so excessive as to be a wager policy, is a question for the court where the facts are not in dispute.

2. A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest thereon, and the cost of the insurance with interest thereon during the period of the expectancy of life of the insured, according to the Carlisle Tables, and may retain the full proceeds of the policy, regardless of the time of the debtor's death.

(October, 5, 1891.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Lebanon County in favor of defendants in an action brought to recover the excess of proceeds of an insurance policy taken out on the life of plaintiff's testator, over and above the amount of defendant's claim, with interest and the cost of insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Grant, Weidman and A. Stanley Ulrich, for appellant:

There was in this case every element of speculation in life insurance, viz.:

1. Want of relationship.

Gilbert v. Moose, 104 Pa. 74.

2. Disproportion between the policy for \$3,000 and the debt of \$110.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601.

3. The taking and holding of the policy and payment of all premiums and dues by the defendants, from the start to the finish.

Scott v. Dickson, 108 Pa. 16; *Downey v. Hoffer*, 110 Pa. 115.

4. The purchase of this policy by the defendants for the consideration of the satisfaction of their judgment of \$99.51, with interest for one year and four months, and costs, and the satisfaction of their judgment in exchange for the assignment of this policy for \$3,000.

Downey v. Hoffer, *supra*.

5. The receipt of the insurance provided for in the policy from the aid society.

With proof of these facts before the court, it erred in admitting the offer to prove that the speculative venture of the defendants would have proved disastrous to them if Bleistine had lived his expectancy of twenty-six more years. A disproportion so gross as 80 to 1 was not capable of excuse or justification.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601;

Cammack v. Lewis, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Gilbert v. Moose*, 104 Pa. 74; *Corson's App.* 4 Cent. Rep. 307, 118 Pa. 438.

The taking out of the policy and its assignment to defendants was the consideration with them for the satisfaction of the judgment. By this their debt was canceled, their lien was surrendered and priority was given to the subsequent lien-holders; and they by this substi-

shaw, 26 Pa. 189; *Cunningham v. Smith*, 70 Pa. 450; *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

An insurable interest, such as will take the contract out of the wager class, arises from the relation of the party taking the insurance to the insured, so that from such relation there may be some expectation of benefit or advantage in the continuance of the assured life. *Keystone Mut. Ben. Assn. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 446; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Cor-*

tution, by purchase, of the policy for their debt, placed themselves under the ban of holding for speculative purposes.

Downey v. Hoffer, supra; The Insurance Co. v. Hazzard, 2 Ins. L. J. 180; Bliss, L. Ins. 2d ed. p. 41.

The question of excessive disproportion being in plain view of the court, it was its duty, under *Cooper v. Shaeffer, supra*, to assert its rights and declare the transaction a wager as a matter of law.

Moore v. Small, 19 Pa. 468; *DeFrance v. DeFrance*, 34 Pa. 390.

It is a question of public policy and not of good intentions; and motives, however good, avail nothing.

Seigrist v. Schmaltz, 5 Cent. Rep. 280, 118 Pa. 326.

If I undertake to risk the payment of assessments which may run over a period of twenty-six years, and may with interest aggregate over \$4,300 for the bare chance of getting \$8,000—on the death of a man, perhaps on to-

morrow and perhaps only twenty-six years from now, I am playing for the stake resulting from the happening of the event upon which it depends. The entire game is one of chance and on the early or late happening of the man's death, as in the case of the bet on the life of Napoleon Bonaparte in *Phillips v. Ives*, 1 Rawle, 36, depends the extent of my loss or gain.

See *Gilbert v. Moore*, 104 Pa. 78.

Disproportionate insurance of this nature is against public policy and a gambling transaction.

Pritchett v. Insurance Co. of N. A. 3 Yeates, 458; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Corson's App.* 4 Cent. Rep. 407, 118 Pa. 438; *Gilbert v. Moore, supra; Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244.

The speculation is classed with one who should undertake to make a bet or wager for another and who advances the money staked, and would have no right of action against his principal in the event of loss.

Fareira v. Gabel, 89 Pa. 91, 92.

son v. Garnier and Baker v. Union Mut. L. Ins. Co. *supra*.

The sum insured must not be grossly disproportionate to the interest the holder of the policy has in the life insured, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 Mood. & R. 431; *Müller v. Eagle L. & H. Ins. Co.* 2 E. D. Smith, 238; *Grant v. Kline*, 7 Cent. Rep. 623, 115 Pa. 618.

The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception; and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 222; *Mowry v. Home L. Ins. Co.* 9 R. I. 346; *Hoyt v. New York L. Ins. Co.* 3 Bosw. 440; *Phoenix Mut. L. Ins. Co. v. Bailey*, 80 U. S. 13 Wall. 616, 20 L. ed. 501.

Creditor's policy on life of his debtor.

A creditor holding a policy on the life of his debtor as security for his debt is a trustee to the extent of the proceeds above the debt and expenses, and may be called on to account therefor by the personal representatives of the debtor. *Tateum v. Ross*, 150 Mass. 440.

In the absence of evidence that the policy was held in trust for the debtor, where the rights of the parties appear upon the face of the policy the presumption is against such trust. *Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

It has been said, however, on the authority of *Godsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid the insurance is at an end. But it is now settled that this case is not the law. It was directly drawn in question and was expressly overruled in *Dalby v. India & L. L. Assur. Co.*, decided in the exchequer chamber, 15 C. B. 365.

A policy in favor of a creditor is to be regarded as collateral security only where the debtor is under obligation to pay the premiums; but where the creditor pays the premiums, the right of the creditor is absolute. *Amick v. Butler*, 9 West. Rep. 845, 111 Ind. 578.

A creditor who insures the life of his debtor, which he is obliged to keep alive by paying premiums, may hold all he can recover on the policy, unless there is gross disproportion between the

debt and the amount of the policy. *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

A creditor who takes an assignment of a life policy as security for a loan can hold the proceeds of that policy only to the extent of the sums actually advanced by him. *Roller v. Beam* (Va.) 6 L. R. A. 136.

Wager policies void.

A policy of insurance taken out on the life of a third party by a beneficiary in the continuance of whose life the beneficiary has no pecuniary interest, is a wagering policy and as such is void. *Bloomington Mut. L. Ben. Asso. v. Blue*, 8 West. Rep. 642, 120 Ill. 121; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Gilbert v. Moore*, 104 Pa. 74; *Scott v. Dickson*, 108 Pa. 6.

A policy on the life of another for \$3,000, to cover a debt of \$70, is a mere wagering policy. *Cammack v. Lewis, supra*.

A policy taken out by a creditor on the life of his debtor in the sum of \$3,000, \$2,000 for his own benefit and \$1,000 for the benefit of his debtor, while the debtor in fact owed him only \$70, is a wagering policy. *Ibid.* See *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800.

So where he took out policies, on which he became liable to be assessed as a member of the association, and paid thereon, within about nine months thereafter, the sum of \$361.75, and the amount collected on which, on the debtor's death, was \$2,124.82, being an excess of \$474.53 over the amount of the debt, there was no such disproportion as would warrant a condemnation of the transaction as a speculation or wager. *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

Where a creditor had insured his debtor's life on two several occasions, and had to abandon the policies on account of insolvency of the companies, then took out a third policy for \$3,000, paying \$302 therefor, the debtor being sixty-five years old, it was held that there was no disproportion of which the debtor's administrators could take advantage. *Grant v. Kline*, 7 Cent. Rep. 623, 115 Pa. 618.

An insurance on the life of the debtor for \$2,000, where the indebtedness was uncertain, but was afterwards ascertained to be between \$500 and \$750, was held under the circumstances not a wager. *Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

No tabulations can purify or validate a speculative venture.

Grant v. Kline, 7 Cent. Rep. 626, 115 Pa. 625; *Downey v. Hoffer*, 110 Pa. 115.

Messrs. F. E. Melly and W. M. Derr, for appellees:

A wagering insurance contract is one where the person for whose benefit an insurance on the life of another is taken has no insurable interest in the continuance of that life at the time the contract is made. The disproportion between the debt of a creditor who insures the life of his debtor and the amount of insurance taken by itself determines nothing, unless the amount is so disproportionately great that one's eyes cannot be shut to the gross disparity.

Grant v. Kline, 7 Cent. Rep. 626, 115 Pa. 625; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601.

The good faith of the parties distinguishes this case from *Gilbert v. Moose*, 104 Pa. 78, and that line of cases. See *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 624.

Sir G. Jessel, M. R., in *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. Cas. 462, 465, says: "You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Under all the circumstances of this case, the judgment is well founded on the verdict; the facts justified the jury in its finding and the jury had the legal right to determine the question whether or not this was a wagering contract.

Ferreira v. Gabell, 89 Pa. 89; *Kirkpatrick v. Bonsall*, 72 Pa. 159; *Shaak v. Melly*, 136 Pa. 161.

Paxon, Ch. J., delivered the opinion of the court:

This case is not free from difficulty. It has been twice argued and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely. The facts are substantially as follows:

The defendants are doing a firm business at Lebanon, Pa., and hold a judgment against one Andrew Bleistine, in the Court of Common Pleas of Lebanon County, which, with interest and costs amounted to \$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some

manner. Not having the money he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties, and his wife's tears, to save their home. The evidence shows that Bleistine offered them an insurance of \$3,000, or \$5,000, or \$10,000, or any amount they wanted. The negotiation resulted in the defendants taking a policy of \$3,000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest, and premiums paid; the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction within the doctrine of *Gilbert v. Moose*, 104 Pa. 74, and the cases following it.

We may safely assume that the debt due by Bleistine to the defendants was bona fide; that so far from the latter having procured the former to insure his life for their benefit for speculative purposes, they entered into it with reluctance at the earnest request of Bleistine and his wife, to relieve them from financial embarrassment and to save their home. This takes out of the case the controlling element which existed in *Gilbert v. Moose*, and that line of cases. Yet if the defendants, even for an honest purpose, have transgressed the law, and made this a gambling transaction, they must suffer the penalty for such violation.

The first and second assignments present the main question in the case. Upon the trial below the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was forty-two years of age, and that his expectation of life, according to the Carlisle Tables, was twenty-six years; that had he lived that length of time the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to \$4,836.81, being \$1,836.81 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment.

In the second assignment, complaint is made that the learned judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount allowed and paid as the consideration of the transfer of the insurance, to wit the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs were grossly inadequate; and the disproportion between that amount and the amount of the insurance—\$3,000—is so great as to require the court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Menly have no right to retain

more of the insurance money received by them than the amount of their satisfied judgment with interest and costs, and the premiums and assessments paid by them, with interest thereon, and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest and costs, and assessments and premiums paid with interest." This point was refused.

Whether the question of excess of insurance is to be disposed of by the court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule.

We have none now. I felt the importance of this in delivering the opinion of the court in *Grant v. Kline*, 115 Pa. 618, 7 Cent. Rep. 626, where I said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of life, as shown by the Carlisle Tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601, our brother Sterrett, after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*. In that case there was an insurance of \$3,000 to cover a debt of \$100, and this court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of \$3,000 and the debt of \$100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law."

We have no doubt that in a proper case where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus in *Grant v. Kline*, *supra*, it was said: "To take out a policy of \$5,000 to secure a debt of \$5 would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and we only refer to it for that purpose now. *Cooper v. Shaeffer* decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz.: That an insurance of \$3,000 for a debt of \$100, unexplained, was a gambling policy. It may be asked why it does not rule this case where the amount of insurance was the same and a difference of a few dollars only in the amount of the debt? The answer is not difficult. *Cooper v. Shaeffer* was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained,

or shown to be justifiable. This appears by the report of the case as well as from the opinion of Judge Simonton, who tried that, as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said in reference to *Cooper v. Shaeffer*: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defense and required consideration. In our opinion they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of forty-two years in the sum of \$3,000 to protect a debt of \$100. If he had merely lived out his expectancy and no longer, they would have been obliged to pay for assessments and annual dues \$2,486.32, to which, if interest be added, the amount of their investment would have been \$4,386.31. In return they would have received \$3,000, thus suffering a considerable loss. Surely to call such a transaction speculation is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." I have quoted this extract at length because I could in no better way emphasize the distinction between *Cooper v. Shaeffer* and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance. Of all the forms of gambling, it is one of the most objectionable. The records of our own court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest either of a social or pecuniary nature has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which we have judicial knowledge.

All life insurance is in one sense speculative, yet within proper restrictions it has been found to be highly beneficent and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means and the only means by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured,

and resort to crime to procure it, but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest either as a creditor or a relative in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule, and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, as before observed, it was said the insurance was too large; in *Grant v. Kline*, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a court or a jury to arrive at a correct result.

Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that if my debtor owes me \$1,000 a policy for \$1,000 would be inadequate, for if my debtor dies within twenty-four hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man of twenty-five years of age and one of seventy-five is clear to the dullest understanding. The assured was only forty-two years of age; and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for twenty-six years added to the dues and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact I infer from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the pol-

icy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risk with the chances fairly balanced. Had these defendants taken out one hundred policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss.

Had the assured lived out his expectancy of life no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not then have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results, or the accident of death. If not lawful in its inception it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential, to an intelligent understanding of the case. It is just what was lacking in *Grant v. Kline*, and was one of the reasons why we avoided deciding the broad question in that case. But anyone who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle Tables.

The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not produce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case, otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial:

"With much respect it is suggested that the principle indicated in *Grant v. Kline*, 115 Pa. 625, 7 Cent. Rep. 626, and *Cooper v. Shaeffer*, *supra*, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual (monthly?) assessments, and where therefore allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the in-

dictated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy and thus entailing a loss upon the creditor. If we go beyond the expectancy where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year would be a retrograde step in our decisions. Under such a system the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death. Whereas at present, as I have endeavored to show, the risk of a debtor's exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot of course be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments even in a mutual company can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it. And where a policy has been taken out in good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof.

It may be that few men would take out a life policy to secure a debt of \$100, where there is an expectancy of life for twenty-six years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts; we only consider their legality, and care must be taken in the enforcement of an admittedly sound rule of public policy not to impinge upon the right of the citizen to contract. In this instance the contract was lawful, and the defendants appear to have entered into it not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results but by its surroundings at the time it was made.

We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with interest, 13 L. R. A.

and the cost of such insurance with interest thereon during the period of the expectancy of life of the assured according to the Carlisle Tables.

We find no error in the ruling of the court below.

Judgment affirmed.

CONESTOGA CIGAR CO.

v.

Charles FINKE *et al.*, Appts.,

(.....Pa.....)

1. In an action to enforce the alleged liability of a tobacco sampler to make good the loss resulting to a buyer because the tobacco in the cases was not as represented by the tags attached to the samples, evidence is admissible to show what meaning apparently ambiguous words and figures on the tags conveyed to the trade, and that by usage the sampler undertook to make good losses resulting from untrue statements on the tags.

2. A verdict against a tobacco sampler for the amount of loss resulting to a buyer because the tobacco in the cases was not as represented by the sample tags is supported by evidence that by usage of trade he undertook to make good such loss, and that he had promised to make it good after having been notified of it and had paid other losses resulting from the same cause, although there was no privity of contract between him and the person injured.

(October 5, 1891.)

NOTE.—Custom and usage, as law.

Usage or custom is a source of law in all governments. *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547.

A custom is an unwritten law established by long usage and the consent of our ancestors. Usage is the legal evidence of the custom. *Minis v. Nelson*, 48 Fed. Rep. 777.

Usages long established and followed have, to a great extent, the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments. *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321; *Mitchel v. United States*, 34 U. S. 9 Pet. 711, 9 L. ed. 233.

A custom, to have the force of law, must be universal, and its origin in point of time so far back "that the memory of man runneth not to the contrary." *Ulmer v. Farnsworth*, 6 New Eng. Rep. 335, 80 Me. 560.

A long and inveterate usage for half a century, under express sanction of law, should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption against it from mere silence, with no substituted rule on the subject. *Warren v. Board of Registration*, 2 L. R. A. 203, 72 Mich. 398.

Cannot be in conflict with rules of law.

A custom should not be in conflict with the rules and principles of law. *Turnbull v. Osborne*, 12 Abb. Pr. N. S. 203; *East Birmingham Land Co. v. Dennis*, 2 L. R. A. 836, 85 Ala. 565.

A mere custom or usage is without force, in opposition to a positive law. *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Randall v. Smith*, 63 Me. 105; *Cranwell v. The Fanny Fosdick*, 15 La. Ann. 436; *Winder v. Blake*, 49 N. C. 322; *Thompson v. Ashton*, 14 Johns. 316; *Greene v. Tyler*, 30 Pa. 361; *Delaplane v. Cren-*

A PPEAL by defendants from a judgment of the Court of Common Pleas for Lancaster County in favor of plaintiff in an action brought to recover the loss alleged to have resulted to plaintiff because tobacco purchased by it in reliance upon defendants' sample tags was not as represented by such tags. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Brown & Hensel*, for appellants:

A party cannot recover unless on a duty assumed to himself.

1 Wharton, Cont. § 506.

To support a contract a consideration must move from the promisee. "The plaintiff must unite in his person both the promise and the consideration of it, and if the action in such a case cannot be sustained on the foundation of the consideration by drawing the promise to it, it cannot be sustained at all."

Edmundson v. Penny, 1 Pa. 385.

To maintain an action against an alleged contracting party his privity of contract must be shown.

1 Wharton, Cont. § 507; Chitty, Pl. 1; *Campbell v. Lacock*, 40 Pa. 450; *Torrens v. Camp-*

bell, 74 Pa. 475. See *DeBolle v. Pennsylvania Ins. Co.* 4 Whart. 68.

In all cases, where a consideration is required, a party suing on a contract must show that the consideration flowed from him.

1 Wharton, Cont. § 506.

Messrs. E. K. Martin and T. B. Holahan, for appellee:

Custom makes law in the absence of more definite enactments, and appellee has proven what the custom has been for twenty years in this line of business, so exactly and unerringly that it cannot be mistaken. By this custom there was a subsisting valid contract running with the warranty into whosoever hands that warranty came, within six months from the time it was made. The universal custom of the trade is the purchase of leaf tobacco stripped, assorted and packed in boxes. By reason of not being able to inspect it in that shape, it is sold upon the guarantee of the inspector's sample.

Custom must be certain, uniform and notorious, so as to be known to the parties to the trade.

McMasters v. Pennsylvania R. Co. 69 Pa.

shaw, 15 Gratt. 457; *Piscataqua Exch. Bank v. Carter*, 20 N. H. 246; *Joyes v. Shadburn*, 11 Ky. L. Rep. 892; *Baltimore First Nat. Bank v. Taliaferro*, 72 Md. 164.

No one can escape the punishment of the law by proving a custom contrary to law. *Minaghan v. State*, 77 Wis. 643.

A custom making 2,240 pounds a ton of coal is not good when opposed to a statute (Act of April 15, 1834) making 2,000 pounds a legal ton. *Godcharles v. Wigeman*, 4 Cent. Rep. 887, 113 Pa. 431.

A custom of railroads not to receive for transportation any live-stock unless under certain conditions modifying their common-law liability would be contrary to law and public policy. *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127.

Usage will not control the legal interpretation of a statute. *Dwight v. Boston*, 12 Allen, 516.

A custom contrary to morality, religion, or the law of the land is void. *Holmes v. Johnson*, 42 Pa. 159.

Nor can custom deprive a person of a legal right. See *Atty-Gen. v. Tarr*, 2 L. R. A. 87, 148 Mass. 309; *East Birmingham Land Co. v. Dennis*, 2 L. R. A. 836, 85 Ala. 565.

A usage must not be in restraint of trade, nor in conflict with public policy or the law of the land. *Susquehanna Fertilizer Co. v. White*, 6 Cent. Rep. 434, 66 Md. 444.

Where the statute imposes an absolute liability to make highways safe for travel, a general custom and usage as to placing barriers is of no importance where barriers at a dangerous place were not provided. *Molloy v. Walker Twp.* 6 L. R. A. 695, 77 Mich. 448.

Must be reasonable.

A custom must be reasonable and not productive of injustice in its practical operation. *Susquehanna Fertilizer Co. v. White*, 6 Cent. Rep. 434, 66 Md. 444.

An absurd and unreasonable custom is not binding. *Tilley v. Chicago (Tilley v. Cook County)* 108 U. S. 155, 38 L. ed. 374; *United States v. Buchanan*, 49 U. S. 8, How. 83, 12 L. ed. 997; *Walker v. Western Transp. Co.* 70 U. S. 3, Wall. 150, 18 L. ed. 172.

A custom of railroad companies to leave all turntables unfastened is unreasonable. *Illwaco R. & Nav. Co. v. Hedrick* (Wash.) Dec. 10, 1890.

An unreasonable usage as to the operation of similar mills will not excuse the owners of a mill in 13 L. R. A.

operating it in a way that constitutes a nuisance. *Shepard v. Hill*, 151 Mass. 540.

A custom which would prevent a shipowner from vacating the agency of his agent is unreasonable and has no legal force. *Minis v. Nelson*, 48 Fed. Rep. 777.

Must be applicable to matter in controversy.

A usage is ineffectual unless established, known and applicable to the matter in controversy. *Janney v. Boyd*, 30 Minn. 319; *Taylor v. Mueller*, Id. 343; *Dunham v. Haggerty*, 1 Cent. Rep. 600, 110 Pa. 569; *Ruth v. Katterman*, 2 Cent. Rep. 776, 112 Pa. 251; *Cheraw & S. R. Co. v. Broadnax*, 1 Cent. Rep. 346, 109 Pa. 432.

Proof of custom cannot avail, unless shown to be applicable to the case. *Ruth v. Katterman*, *supra*.

The general usage of a foreign port in settling general average is binding. If, however, it is not a case for general average, it is not binding. *Cheraw & S. R. Co. v. Broadnax*, *supra*.

Must be actually known to the party sought to be bound.

A custom or usage, to be available against a party to a contract, must be so notorious as to affect him with knowledge of it, and raise the presumption that he dealt with reference to it, or he must be shown to have had actual knowledge of it. *Blake v. Stump*, 10 L. R. A. 103, 73 Md. 160.

A custom among brokers to deliver equal quantities of grain or its market value in fulfillment of contracts of purchase made by them for others, does not bind the seller, without evidence that he had knowledge of it. *Irwin v. Williar*, 110 U. S. 490, 23 L. ed. 225.

So the fact that a person dealt through brokers is not sufficient of itself to affect him with knowledge of a peculiar custom among them. *Blake v. Stump*, *supra*.

Usage and custom as part of contract.

In all contracts as to the subject matter of which known usages prevail, the parties proceed on the tacit assumption of such usages but commonly reduce into writing the particulars of their agreement, omitting to specify those known usages which are included as of course by mutual understanding. *MacCulsky v. Klosterman*, 10 L. R. A. 785, 20 Oreg. 106.

374; *Carter v. Philadelphia Coal Co.* 77 Pa. 286. *Reed v. Garvin*, 12 Serg. & R. 103, holds "that the guaranty ran with the bond, and into whosoever hands it came the beneficial interest in the bond carried with it the guaranty of payment."

Paxon, Ch. J., delivered the opinion of the court:

This case presents a novel question. It is whether a tag placed upon a bale of tobacco by the inspector or sampler is a warranty of the quality of the tobacco, and whether it inures to the benefit of subsequent purchasers thereof. The facts, briefly stated, are as follows: The Conestoga Cigar Company, plaintiff, is a corporation engaged in the manufacture of cigars in Lancaster, Pa. Charles Finke & Co., defendants, are engaged in what is known as "sampling" of leaf tobacco, with their main office in the City of New York, and an agency, or branch office in the City of Lancaster. In

the regular course of business the plaintiffs purchased two cases of tobacco from the firm of B. S. Kendig & Co. These cases were purchased by sample, each sample having on it one of defendants' tags containing such an inscription as the following—the number, weight and tare, varying with the different cases:

"Stripped and sample warranted, No. 408, Feb. 5th, 1887; 484 lbs. & 84 off. Not responsible for any change or damage occurring after inspection. Charles Finke & Co., Inspectors, 149 Water Street, New York; Frank Ruscher, John T. Mellon, Jr."

Shortly after the purchase of the tobacco a portion of it—1973 lbs.—was found to be injured. The plaintiffs immediately notified Kendig & Co., from whom they purchased it, and the latter notified the defendants, whose tag was on the samples. Shortly thereafter the agents of Finke & Co. called upon the plaintiff, examined the defective tobacco, and promised to make it all right, and pay for it.

A general custom is a general law, and forms the law of a contract on the subject matter; though at variance with its terms, it enters into and controls its stipulations, as an Act of Parliament or of a State Legislature. *United States v. Arredondo*, 31 U. S. 6 Pot. 691, 8 L. ed. 547.

Not admissible to vary written contract.

Oral testimony of a custom in trade, or of any other matter, is inadmissible to vary the terms of a written contract which is clear, precise and unambiguous, and which embraces the entire agreement of the parties. *Miller v. Dunlap*, 5 West. Rep. 91, 22 Mo. App. 97.

There must be ambiguity or uncertainty upon the face of a written instrument to justify extraneous evidence of usage, and it must be limited to the clearing up of the obscurity. It is not admissible for the purpose of adding to the contract new stipulations. *Oelricks v. Ford*, 64 U. S. 23 How. 49, 16 L. ed. 534; *Orient Mut. Ins. Co. v. Wright*, 68 U. S. 1 Wall. 456, 17 L. ed. 505; *Stagg v. Connecticut Mut. L. Ins. Co.* 77 U. S. 10 Wall. 599, 19 L. ed. 1038; *Hearne v. New Eng. Mut. Mar. Ins. Co.* 87 U. S. 20 Wall. 488, 22 L. ed. 395; *First Nat. Bank of Cincinnati v. Burkhardt*, 100 U. S. 688, 25 L. ed. 786.

Clear and explicit provisions cannot be varied by proof of a custom existing at the place and known to both parties. *Larroe v. Lewis*, 44 Hun, 226.

A contract is to be respected, not only in view of its terms, but of its legal effect; and that legal effect can no more be changed or contradicted by parol than its express terms may be. *Turnbull v. Osborne*, 12 Abb. Pr. N. S. 203.

Omissions may, in some cases, be supplied by the introduction of a custom, but it is not admitted to contradict or vary express stipulations or provisions of a contract. *Bliven v. New England Screw Co.* 64 U. S. 23 How. 420, 16 L. ed. 510.

Where the plaintiff agrees to deliver flour, in consideration of which the defendants agree to pay the price, parol evidence of usage to deposit a given sum of money in a bank as security is inadmissible. *Oelricks v. Ford*, *supra*.

A custom which is not pleaded cannot be considered as modifying an unambiguous written promise on which an action is based. *Lindley v. Waterloo First Nat. Bank*, 2 L. R. A. 709, 76 Iowa, 629.

A clear, certain and distinct contract cannot be modified by proof of custom inconsistent with it or which expressly or by necessary implication contradicts it. *Champion Mach. Co. v. Ervay* (Tex. App.) June 16, 1890.

The custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from compliance with his contract. *Bliven v. New England Screw Co.* *supra*.

A contract to pay a certain price for railroad ties cannot be modified by proof merely of a general custom to inspect such ties as firsts and seconds. *Larroe v. Lewis*, 33 N. Y. S. R. 769.

Evidence of a custom of most plasterers to alight their work, and do "drawn work" when three-coat work is contracted for, is inadmissible to excuse violation of a contract to build a house, calling for good three-coat plastering. *Cook v. Hawkins* (Ark.) April 18, 1891.

The rights of the parties under their contract cannot be changed by proof of a local custom different from the rule of law. *Weinstein v. Harrison*, 66 Tex. 546.

Evidence of custom or usage.

A custom or usage may be proved by parol evidence. *Bliven v. New England Screw Co.* 64 U. S. 23 How. 420, 16 L. ed. 510; *Oelricks v. Ford*, 64 U. S. 23 How. 49, 16 L. ed. 534.

The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country where it prevails. *Livingston v. Maryland Ins. Co.* 11 U. S. 7 Cranch, 506, 3 L. ed. 421.

So evidence is admissible to show that an established usage has been subsequently changed. *Cookendorfer v. Preston*, 45 U. S. 4 How. 317, 11 L. ed. 992.

Usage may be proved by a single witness who testifies explicitly to the antiquity, duration and universality of the usage, and who is uncontradicted. *Robinson v. United States*, 80 U. S. 13 Wall. 363, 20 L. ed. 653.

Where a question was objected to as calling for a custom instead of for facts, but the objection was overruled, and the witness proceeded to state facts and not a custom, the party objecting was not prejudiced. *Patterson v. Chicago, M. & St. P. R. Co.* 70 Iowa, 598.

Evidence of usage and custom is not admissible on the question of negligence. See note to *Standard Oil Co. v. Swan* (Tenn.) 10 L. R. A. 396.

As part of contract; usage of trade to aid interpretation. See notes to *Newhall v. Appleton* (N. Y.) 3 L. R. A. 859; *Smith v. Clews* (N. Y.) 4 L. R. A. 382; *MacCulsky v. Klosterman* (Or.) 10 L. R. A. 735, 20 Oreg. 108.

Effect on legal right. See note to *Atty-Gen. v. Tarr* (Mass.) 2 L. R. A. 87.

The defendants subsequently failed to make it all right, and this suit was brought to compel them to do so.

The plaintiffs were met at the very threshold of their case with the contention that there was no contract between the parties nor was there any privity. It may be conceded that no contract with the plaintiff appears upon the face of the tag, nor was there any evidence to show that the defendants had sampled the tobacco at the request of the plaintiffs, or that it had paid them for doing so. On the contrary it was evident that it had been sampled for some previous owner, and had passed, thus sampled, to the plaintiffs.

Had there been no ambiguity about the tag, its construction would have been for the court. As, however, it was unintelligible in some respects without explanation, the learned judge below permitted the plaintiffs to call a number of witnesses, inspectors, and persons in the tobacco trade, to testify to the meaning of certain words and figures on the tags as understood and acted upon by those engaged in the business in this country. The uncontradicted evidence upon this point was in substance that the tag or label on the sample means that the sampler guarantees the tobacco in the case to be identical with the tobacco in the sample, and unless the tag bears marks to the contrary, that the tobacco in the case is sound; that it is the custom in sampling tobacco, when any damaged tobacco is found in the case, to mark on the ticket the percentage of damage that the case contains; the absence of marks indicates that the tobacco is sound. It is inspected for the convenience and safety of both buyer and seller; the tobacco sold by these samples is frequently paid for long before it is delivered; that the label is not only a guarantee of the quality of the tobacco, at the time of inspection, but that the guarantee is good for six months, for the benefit of any person into whose possession the tobacco may come within that time; that if the tobacco thus inspected proves defective the sampler shall make it good by paying for so much as is injured or spoiled.

There is no doubt under the evidence that this is the usage of the trade, so general as to

be universal. Whether the usage has continued so long as to have grown into a custom such as the law would write into every such contract is a very serious question, which we are not called upon to rule in this case. As it is one of first impression, and at the same time of vast importance to this large industry, we prefer to decide only what is before us, and not anticipate cases which may arise in the future under other circumstances.

We are of opinion that the evidence explanatory of the tag and the usage of trade in connection therewith was properly received and submitted to the jury. Their verdict settles the matter so far as the facts are concerned. They have found the contract substantially in accordance with the plaintiff's construction of it. Was there evidence sufficient to justify this finding?

However much we might hesitate were there nothing in the case but the proof of the usage of the trade, there is evidence that the defendants' own construction was in harmony with that usage. It is in proof that defendants' agents when notified of the defect in the tobacco, called upon the plaintiffs, examined it, admitted the defect, and promised to make it good. There was also evidence that in other cases, when the same thing had occurred, they had "made it good" by paying for the defective tobacco. It is no answer to this to say that there was no proof of their agency, nor that the tags were placed on the samples by the defendants. It was not only shown that Irwin & Schroeder were acting as agents for the defendants, but there was direct proof of their agency by the admission of a member of defendants' firm. There was also the recognition of the sample tags by the agents, accompanied by the promise to pay for the defective tobacco. We have then the construction of the contract by the defendants themselves—a construction in entire harmony with that of the plaintiff, and the usage of trade which was offered in explanation of it.

The case was submitted to the jury with proper instructions, and the verdict was fully warranted by the evidence.

Judgment affirmed.

MISSOURI SUPREME COURT (2d Div.).

Sarah C. BLEVINS *et al.*, *Respts.*,
v.

Silas P. SMITH, *Appt.*

(....Mo....)

1. Nominal damages only can be recovered for breach of a covenant of warranty

NOTE.—Dower; bar of inchoate right.

A wife, in the lifetime of her husband, can bar her right of dower in no other mode than prescribed by statute; a conveyance thereof by deed signed by the husband will not operate against her by way of equitable estoppel. *Mason v. Mason*, 1 New Eng. Rep. 106, 140 Mass. 68.

It is not barred by seven years' adverse possession. 13 L. R. A.

by reason of an incumbrance consisting of a right of dower so long as it remains inchoate.

2. An inchoate right of dower is not cut off by a sale of the husband's land for taxes, since the tax proceeding is not strictly in rem, although the statutes do not permit any personal judgment for the tax, where they also provide that the wife's interest shall not be af-

fected by reason of an incumbrance consisting of a right of dower so long as it remains inchoate. *Miller v. Pence*, 132 Ill. 149; *Brian v. Melton*, 125 Ill. 647.

It is not a lien within the General Statutes, § 170, declaring that "taxes shall be a first lien," and therefore is not made by that section subordinate to the lien for taxes. *Shell v. Duncan*, 5 L. R. A. 821, 31 S. C. 547.

feeted by any act or laches of the husband or by any judgment against him.

(Thomas, J., *dissents from proposition 2.*)

(March 31, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Johnson County in favor of plaintiffs in an action brought to recover damages for an alleged breach of a covenant of warranty in a deed. *Reversed.*

The facts are stated in the opinions.

Mr. Samuel P. Sparks, for appellant:

The existence of an inchoate right of dower in Mrs. Collier at the time appellant entered into the covenants at most constituted only a technical breach of the covenants against incumbrances, and only nominal damages were recoverable.

Sedgwick, Dam. 4th ed. 195, *note*; 4 Kent, Com. art. 4; Rawle, Cov. Title, 541; *Collier v. Gamble*, 10 Mo. 487; *Walker v. Deaver*, 79 Mo. 664; *Priest v. Deaver*, 22 Mo. App. 276; *Dickson v. Desire*, 23 Mo. 151; *Wyatt v. Dunn*, 93 Mo. 459; *Runnels v. Webber*, 59 Me. 488; 2 Sutherland, Dam. 1st ed. p. 327; *Hazelig v. Hutson*, 18 Ind. 481; *Lewis v. Lewis*, 5 Rich. L. 12; *Nyce v. Obertz*, 17 Ohio, 71; *Bender v. Fromberger*, 4 U. S. 4 Dall. 440, 1 L. ed. 900; *Durrett v. Piper*, 58 Mo. 551.

The existence of this inchoate right of dower was not an act "done or suffered by appellant, nor those under whom he claimed," against the existence of which he covenanted.

Rev. Stat. 1879, § 675; *Walker v. Deaver, supra*; 4 Kent, Com. § 440; *Armstrong v. Darby*, 26 Mo. 517; *Bender v. Fromberger*, 4 U. S. 4 Dall. 436, 1 L. ed. 898; Rawle, Cov. Title, p. 541; *Alexander v. Schreiber*, 10 Mo. 480.

Until there had been an actual loss, eviction, or its equivalent consequent on the breach, only nominal damages could be recovered.

Walker v. Deaver, supra; *Hunt v. Marsh*, 80 Mo. 396; *Morgan v. Hannibal & St. J. R. Co.* 68 Mo. 129; *Matheny v. Mason*, 73 Mo. 677.

The sale for taxes barred the inchoate right of dower of Mrs. Collier.

It was within the power of the Legislature to pass laws which would defeat an inchoate right of dower.

Cooley, Const. Lim. p. 445; *Morrison v. Rice*, 35 Minn. 486; *Tiedeman, Pol. Powers*, § 117, pp. 341, 351.

The proceeding to enforce taxes by the State is always analogous to the exercise by it of the right of eminent domain, which it has always been held bars dower.

It is not defeated by a tax sale where the lien for taxes attached after the dower right had become fixed by the concurring facts of marriage and the husband's seisin. *Ibid.*

When dower once attaches the husband cannot, by any act or admission of his, defeat it, and no judgment recovered against him will prejudice the right and interest of the wife. See *Williams v. Courtney*, 77 Mo. 588; *Grady v. McCorkle*, 57 Mo. 172.

No judgment or decree confessed by or recovered against him, and no laches, default, or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter. *Grady v. McCorkle*, 57 Mo. 172; *Davis v. Green* (Mo.) 11 L. R. A. 90.

13 L. R. A.

Brown v. Austin, 41 Vi. 262; *Tiedeman, Real Prop.* § 132; *Robbins v. Barron*, 82 Mich. 36; 1 Washb. Real Prop. 220, ed. 1868; *Moore v. New York*, 8 N. Y. 110; *Finch v. Brown*, 8 Ill. 488; *Jones v. Devore*, 8 Ohio St. 430.

In partition proceedings her inchoate right of dower is barred.

Lee v. Lindell, 22 Mo. 202.

Messrs. A. B. Logan and W. W. Wood, for respondents:

When respondent discharged the incumbrance, the existence of the inchoate right of dower became a substantial breach, and she was entitled to recover the reasonable amount paid.

Durrett v. Piper, 58 Mo. 551; *Ward v. Ashbrook*, 78 Mo. 515; 2 Scribner, Dower, 2d ed. chap. 1, § 2, 4; *Prescott v. Trueman*, 4 Mass. 627; *Shearer v. Ranger*, 23 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Harrington v. Murphy*, 109 Mass. 299; *Porter v. Noyes*, 2 Me. 27; *Whisler v. Hicks*, 5 Blackf. 100; *Smith v. Ackerman*, Id. 542; *Fitts v. Hoitt*, 17 N. H. 530; *Kellogg v. Malin*, 62 Mo. loc. cit. 433; *Chambers v. Smith*, 28 Mo. 174.

Under a strict covenant of seisin it is necessary to prove an eviction, but under the covenant of indefeasible seisin or the covenant against incumbrances implied by the Statute as amended in 1879, it is not necessary to prove an eviction. It is only necessary to prove that the estate conveyed has been defeated, or the right to defeat it has been extinguished, or the incumbrance removed.

Collier v. Gamble, 10 Mo. 487, 472; *Sheiton v. Pease*, 10 Mo. 473, 482; *Mosely v. Hunter*, 15 Mo. 322, 330; *Dickson v. Desire*, 23 Mo. 151; *Walker v. Deaver*, 79 Mo. 664.

The tax sale did not convey the dower. There are two theories upon that subject: the one is, that it is a proceeding against the land itself, and has nothing to do with the previous chain of title; that it is a breaking up of all previous titles (*Jones v. Devore*, 8 Ohio St. 431); the other, that it is a derivative title; the purchaser taking only such title as the party to the proceedings had. This court, in construing the statutes, has adopted the latter theory.

Gitchell v. Kreidler, 84 Mo. 472; *Grandy v. Casey*, 12 West. Rep. 398, 93 Mo. 595.

Under a statute in almost the precise words of § 2197, Rev. Stat. 1879, it has been held by two eminent text-writers, that the laches of the husband in permitting his land to sell for taxes would not debar the wife of her dower.

Black, Tax Titles, 2d ed. 549; Scribner, Dower, 2d ed. 809, 820.

Her inchoate right attaches in subordination to a lien accompanying the seisin of her husband, and foreclosure of a purchase-money mortgage destroys the right. *Seibert v. Todd*, 4 L. R. A. 806, 31 S. C. 206.

It has been held in Ohio that a valid sale of property for nonpayment of taxes bars dower. *Jones v. Devore*, 8 Ohio St. 430.

So the exercise of the right of eminent domain bars dower. *Moore v. New York*, 8 N. Y. 110.

Dower rights of wife and widow. See *notes* to *Callahan v. Robinson* (S. C.) 3 L. R. A. 497; *Everson v. McMullen* (N. Y.) 4 L. R. A. 118; *Mandel v. McClave* (Ohio) 5 L. R. A. 519; *Shell v. Duncan* (S. C.) 5 L. R. A. 821; *Gore v. Townsend* (N. C.) 8 L. R. A. 448.

Gantt, P. J., filed the following opinion:

This is an action on a covenant of warranty, made by appellant to the respondent Mrs. Sarah C. Blevins. The land conveyed is the S. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 6, township 46, range 25, Johnson County, Mo. The evidence showed title in appellant, Smith, at the date of conveyance to respondent, except an outstanding inchoate right of dower in Mrs. Mary E. Collier, the wife of Daniel Collier. Appellant deduced his title from Daniel Collier by virtue of a tax sale and deed under the Act of 1877. It was admitted that Daniel Collier was still alive at the time of the commencement of the suit. After respondent obtained her deed from appellant, she attempted to mortgage the land, and failed because of this outstanding inchoate dower right in Mrs. Collier. She thereupon purchased this right for \$150, and brought this suit against appellant for that amount. Appellant assigns two grounds for reversal,—one, that the court erred in permitting respondent to recover more than nominal damages for the breach of the covenant by reason of the inchoate dower of Mrs. Collier, remaining outstanding; and, secondly, that the court erred in not holding that the tax sale and deed conveyed the land absolutely, and by it Mrs. Collier's inchoate right of dower was entirely barred, and, of course, could constitute no incumbrance.

We all agree that the first contention of appellant must be sustained. While an inchoate right of dower is an incumbrance, as it is a contingency founded upon a contingency, it is not susceptible of computation by any definite rule; hence the practice has been adopted in this State to allow only nominal damages until the dower becomes consummate. *Walker v. Deaver*, 79 Mo. 664.

2. In regard to the second assignment. We think the court committed no error in holding that the tax proceedings did not divest Mrs. Collier's dower right. We shall not attempt to discuss the power of the Legislature to collect taxes. We think it sufficient for the case in hand to ascertain, if we can, what the Legislature has determined shall be the policy of the State. In the first place, we have by statute adopted the common law in regard to dower. *Lord Coke* says: "There be three things highly favored in law,—life, liberty and dower." *Co. Litt.* *Chief Justice McKean*, in *Kennedy v. Nedrow*, 1 U. S. 1 Dall. 415, 1 L. ed. 202, asserts that "dower is a legal, equitable, and moral right, favored in a high degree by the law, and, next to life and liberty, held sacred." Strong as these terms are, they are strengthened by our Statute. Section 4525: "No act, deed, or conveyance, executed or performed by the husband without the assent of the wife, evidenced by her acknowledgment thereof in the manner required by law to pass the estate of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this chapter;" that is to say, the sections securing the widow her common-law and statutory dower. Now, at common law, and by our Statute reaffirming it, "the right of dower attaches whenever there is

a seisin by the husband, during the marriage, of an estate of inheritance; and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death." "It is a right in law fixed from the moment the facts of marriage and seisin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act." *Grady v. McCorkle*, 57 Mo. 172. This, then, is the character of the estate that is to be divested by this new construction of the Statute. It is conceded that our Statute requires "the owner" to be made a party before his or her interest in the lands can be affected by a tax proceeding under our Act of 1877, and this section has been uniformly construed so that *cestuis que trustent*, mortgagees, remaindermen, and incumbrancers, who are not made parties, are not affected by these suits. *Stafford v. Fizer*, 82 Mo. 393; *Corrigan v. Bell*, 78 Mo. 58; *Graves v. Ewart*, 99 Mo. 13. No lawyer will question that inchoate dower is an incumbrance. But it is sought to sustain this new doctrine on the ground that our tax proceeding, beginning with the assessment, is a proceeding strictly *in rem*, and we may remark here that only by sustaining this position can this new rule be maintained. Beginning with *Abbott v. Lindenbower*, 42 Mo. 162, under a statute requiring the lands in all cases to be assessed to the person appearing to be the owner at the time of assessment, this court said: "It is unnecessary for us to say further here what might be the effect of this last clause in any cases; but we may go so far as to declare now that an assessment in the name of a person who neither was, nor ever had been, the owner of the property, would be an utterly void assessment." Our present Statute requires the land to be listed and assessed in the name of the owner, if known. Under this Statute, in *Gitchell v. Kreidler*, 84 Mo. 472, *Judge Black*, speaking for the whole court, says: "While the judgment is against the property, and not personal, still the tax is assessed against the owner, if known. The law looks to him for payment of the tax. Such a proceeding cannot be said to be strictly *in rem*." *Blackw. Tax Titles*, 630.

It will serve no good purpose to cite authorities to the same effect. This has been the accepted construction of our tax laws for many years. Were it a proceeding strictly *in rem*, there would be no such thing as collecting the tax on real estate out of personal property, which it is conceded may be done. Indeed, the whole system is based on the idea that it is the duty of the husband to pay the taxes on his land; and a failure to pay the taxes is a default on his part. The wife is under no obligation to pay the tax. She does not own the fee; she does not reap the usufruct. Certainly no system based upon justice would exact of her tribute on property she might never enjoy, and rob her of her dower for failure to pay a tax she did not owe. If, then, taxes become delinquent, whose fault is it? Not the wife's, certainly.

But it is said that, because there can be no personal judgment for taxes, therefore section 2197, Rev. Stat. 1879, § 4525, Rev. Stat. 1889, cannot be invoked. It would be difficult to conceive of a statute that would protect a wife's

dower, if this is not sufficient. But we think this construction of this section too narrow. The injury is not confined to "judgment." The Statute says, in addition to "judgments or decrees confessed or suffered," "no laches, default, covin or crime of the husband shall prejudice the rights of the wife." Is it not laches in a citizen to neglect or refuse to pay his taxes? Is not the word "delinquent," used throughout the Statute, a synonym for "laches" and "default?" And could there be a sale of the land, and a divestiture of the wife's dower, but for this delinquency on his part? The proposition is too clear for argument.

But if it is held that this section does not protect the wife's dower against the laches and default of the husband, we will have an anomalous state of affairs. A husband cannot, by deed or mortgage, the most solemn and praiseworthy, for the most valuable consideration, alien or destroy her dower right. No judgment against him, willing or unwilling, can affect her dower,—no fraud, covin or crime; and yet he can suffer this new "fine and recovery," and successfully bar her dower, by simply refusing to pay his taxes, and let the land sell; and thus a result is reached, by this simple device, that could not be compassed by the most skillful conveyancer. We cannot believe the Legislature intended such result. On the contrary, the whole scope of the Tax Act clearly shows that the Tax Law of 1877 (Rev. Stat. 1879, chap. 145, art. 6), was designed to furnish a method for collecting taxes, in which notice was given to the delinquent of the amount of his taxes, and a day in court, if erroneous, to show the error. When the judgment is entered, an execution issues just as on other judgments, and it is intended to convey the right, title and interest of the defendant who owned the land, and whose duty it was to pay the taxes. Says Judge Black: "We have repeatedly held that the purchaser at these sales acquires, and acquires only, the title and interest of the parties who are made defendants." *Graves v. Ewart*, 99 Mo. 13; *Powell v. Greenstreet*, 95 Mo. 14, 14 West. Rep. 339.

An ordinary execution sale conveys to the purchaser all the right, title and interest of the defendant in execution, but it has no effect upon the inchoate dower of the wife. It was clearly the intention of the Legislature to give the same effect to a tax deed, under regular and valid proceedings, that a deed under a general judgment would have,—"no more, no less." "A tax title is a derivative title." *Gitchell v. Kreidler*, 84 Mo. 472. Says Judge Black again: "It must be taken as settled law that purchasers at these sheriff's sales, made on executions in tax suits, acquire only the right, title and interest of the defendant in the tax suits." *Powell v. Greenstreet*, 95 Mo. 13, 14 West. Rep. 339; *Evens v. Robberson*, 92 Mo. 192, 10 West. Rep. 393.

No inconvenience has been felt in Missouri, because, in ordinary execution sales, the wife's inchoate dower was not conveyed. Creditors and purchasers know her interest is fixed, and all business transactions are based upon that understanding. The State has adopted a most stringent policy in passing the fee-simple estate to the tax purchasers for the insignificant sum

of the tax; a *bagatelle*, usually, compared to the value of the lands sold. While the State has a right to its revenue, no reason appears why it should take the dower of the unoffending wife, and vest it in the tax speculator, thus giving him a vantage over all creditors and purchasers at all other execution sales. We do not so read the statute. We regard the dower right as of inestimable value to the homes of this State. The trend of public opinion is rather to enlarge, as our Homestead Laws clearly indicate, than to cut off this sustenance of the widow. Instead of being a "shadow," it has proved a "pearl of great price" in thousands of ruined homes. Between the tax speculator and the defenseless widow, section 4525 of our Statutes of 1893 stands as a monument to the wisdom and humanity of our Commonwealth.

Macfarlane, J., concurs in this opinion. **Thomas, J.**, files his separate opinion, holding a different view.

Thomas, J., dissenting:

Daniel Collier owned the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 6, township 46, range 25 W., in Johnson County, Mo., and at the time he so owned this land a suit was instituted against him for taxes due thereon, which culminated in a judgment and sale of the land. The sale occurred on the 18th day of February, 1880, and A. H. Tuttle was the purchaser. The sheriff executed the proper deed for the land to Tuttle under this sale. By a succession of conveyances the defendant acquired all the title to this property that Tuttle acquired by virtue of the tax deed. On the 12th day of September, 1882, defendant sold the land to Sarah C. Blevins for a consideration of \$1,000, and gave her a warranty deed therefor, by which he covenanted with said Sarah C. Blevins to warrant and defend the title to this land "against the claim of every person whomsoever." It was admitted that Mary E. Collier was the wife of Daniel Collier at the time of the assessment of the taxes and the institution of the suit which resulted in the sale of the land for taxes. Sarah C. Blevins is the wife of her co-plaintiff, W. R. Blevins. After she acquired the title to this property she attempted to mortgage and sell it, but was unable to do so on account of the supposed existence of an inchoate right of dower in Mrs. Collier in it. She, in conjunction with her husband, then bought Mrs. Collier's interest, and paid therefor \$150, taking a deed from her and her husband for it. They then sold the land to William L. Gaston for \$900; and they bring this suit against defendant upon his covenant of warranty, and in the circuit court they obtained judgment for the amount thus paid Mrs. Collier for her inchoate right of dower, and defendant appeals.

Two controlling questions arise in this case. (1) Is Mrs. Collier's inchoate right of dower in the land described cut off by the tax sale and deed? (2) Can there be any breach of a general covenant of warranty by the existence of an inchoate right of dower in the land?

The most important question is this: Did the tax deed made by the sheriff of Johnson County to Tuttle, in 1880, divest Mrs. Collier of her inchoate right of dower in the premises,

and will it operate to bar her dower in case she survive her husband, it being admitted that he is still alive? This question has never been passed upon in this State, and we have therefore given it a most careful consideration. We are unable to find any reliable guides in the adjudications of other States on this subject, for local statutes have almost wholly controlled the determination of the question. We are hence driven to our own statutes and adjudications on the subject of taxation and sale of land for taxes, in order to arrive at a correct conclusion. We can use only general conclusions reached by text-writers, and the decisions of the courts as illustrating the principles we announce. We will briefly refer to some of these. In the first place we will inquire into the general nature and extent of the power of taxation. "The power to levy taxes," says Judge Cooley, "is one so unlimited in force and so searching in extent that the courts scarcely venture to declare it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. . . . No attribute of the government affects more constantly and intimately all the relations of life than through the exactions made under it. 'Taxes' are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty." Cooley, Const. Lim. 3d ed. 479.

The power to tax is analogous to the right of eminent domain. The same author, in his work on Taxation, p. 237, uses this language: "When the State has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner, either under the power to tax or the right of eminent domain." Mr. Blackwell, on the same subject, says: "There is no difference in principle between the power of taking land for public use and the power to tax and enforce its collection by a sale of the land. In both cases the land is taken for the use of the public: they only differ in degree." 1 Blackw. Tax Titles, 5th ed. § 99. A tax, in legal contemplation, is not a debt due by the owner of property. It is a charge levied upon the person or property of the citizen for a public purpose, by the State. *Carondelet v. Picot*, 38 Mo. 125; Cooley, Taxn. 15; *Re Life Assn. of America*, 12 Mo. App. 40. And imprisonment for the nonpayment of taxes is not imprisonment for debt. Cooley, Taxn. 17.

We will, in the second place, inquire into the general rule in regard to the sale of land for taxes, and the title acquired by the purchaser at such sale. There are, in the several States of this Union, two methods of listing lands for taxation; one is to list the lands "as the summation of all interests," and the other is to list the interest of the owners of the land as set out in the assessment roll; and much depends on the method of the assessment as to the interest that passes to the purchaser at a tax sale. Indeed, when the principles underlying the exercise of the taxing power are examined, and the sale of lands for unpaid taxes, it will be found that the title conveyed at a tax sale depends almost wholly on the theory upon which the land is listed and valued

for taxation. On this subject, Mr. Blackwell, in his work on Tax Titles, 5th ed. § 954, says: "When the sale and deed are valid, and have their complete effect, . . . the interest conveyed depends upon the circumstances and the statutes. If a particular interest in the land is separately assessed as such, a sale of that does not pass the whole land, nor will a sale of the land pass such interest. If the land alone is assessed, as the summation of all interests, liens, incumbrances, etc., the general rule is that the deed carries a fee-simple absolute, a new and independent title, the land itself being conveyed; and all prior liens, incumbrances and interests in, to or upon the land, are extinguished. . . . In those States where the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion and remainder. . . . On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer pass only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment."

As we shall see later on, the method of listing lands for taxation and the sale of them for unpaid taxes in Missouri does not come under either of the categories mentioned by Mr. Blackwell, but partakes of the nature of both somewhat. Mr. Cooley, in his work on Taxation (2d ed. p. 464), on this same subject, says: "The usual method of enforcing the payment of taxes upon property is by putting the property up at public sale. No one questions the right to do this, and no one doubts that the sale, if fair and made in compliance with the law, and after all preliminary steps have been taken, vests a perfect title in the purchaser to the full extent that the Statute has declared."

With these general rules as lights to guide us, let us examine the statutes and decisions in Missouri in reference to this question. The tax sale involved in this case was made under the Revenue Law first enacted in 1877, and which has substantially continued in force to this time. The title to the property was vested in fee in Daniel Collier, and he alone was made a party to the tax suit. Mrs. Collier not being made a party, the question is whether her contingent right of dower is barred by the tax proceeding, sale and deed. If it is, there can be no recovery in this case for breach of warranty. The Statute in force at the time the tax suit was instituted required the suit to

be brought against the "owner" of the property. § 6837, Rev. Stat. 1879. Was Mrs. Collier an "owner of the property" within the meaning of that Statute? Her right of dower at the time of these proceedings was, and is yet, inchoate only. McClean, J., in *Johnston v. Vandyke*, 6 McLean, 422, says: "It is not easy to define the right of dower before the death of the husband. It is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her husband can she give it any form of property to her advantage. . . . So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right, if it may be called a right, is shadowy and fictitious, and, like all rights that are contingent, may never be vested."

In *Moore v. New York*, 8 N. Y. 110, the court says, in speaking of the inchoate right to a claim for dower, that it is a right "contingent upon the death of the husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment. It is not of itself property, the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the land." Mr. Scribner, in his work on Dower, says: "Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor indeed a vested interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may nevertheless be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such." 2 Scribner, Dower, 8.

If we understand the rulings of this court, however, on the subject, it is not conceded that this contingent right of the wife is capable of being estimated and valued. In *Hinds v. Stevens*, 45 Mo. 209, Judge Bliss, in discussing the effect of a partition proceeding on this right, says: "If the land be divided *in specie*, her inchoate right attaches at once to the land thus set apart to the husband in severalty; and, if it be sold, I know not how it would be possible to so estimate the value of that shadowy right, or to pay her or invest for her any portion of the proceeds of the sale." And in *Durrett v. Piper*, 58 Mo. 551, the court, through Wagner, J., says: "A dower interest upon the part of the wife, while the husband is living, is an inchoate and contingent right. Its value depends wholly upon the death of the husband. . . . It is a mere possibility, which may be released, but cannot be the subject of grant or assignment. The covenant being for an indemnity against a claim of dower, it is obvious that no breach could happen till the contingency arose which would legally vest in the wife a valid or substantial claim." From all the authorities, we conclude that the wife is not the owner of any estate or vested right in the property of which her husband is seised. But she is the owner of a con-

tingent interest to dower, however; and the question is whether the owner of such a contingency in real estate is an owner of property in such a sense as to require that she be made a party to a tax suit in order to bar that right. In our Revenue Laws the word "owner" is used several times. Section 6706, Rev. Stat. 1879, provides that the assessor shall list land in numerical order, "with the owner's name, if known, and, if not, then the name of the original patentee," etc.; and, if the land cannot be listed numerically, then he shall describe it as briefly as he can, giving the "owner's name, if known," etc. By section 6834 the clerk of the county court is required to make a "back tax book," and insert therein "a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due, . . . setting forth opposite each tract of land or town lot the name of the owner, if known, and, if the owner thereof be not known, then to whom the same was last assessed." It is provided by section 6837, *supra*, that "all actions commenced under the provisions of this chapter shall be prosecuted in the name of the State of Missouri, at the relation and to use of the collector, and against the owner of the property; and all lands owned by the same person or persons may be included in one petition." Section 6853 provides that "each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed or advertised."

We have thus set out in detail the provisions of the Revenue Laws in which the word "owner" occurs, to enable us to determine what was meant by it; for it is a well-established canon of statutory construction that, where the same word is used more than once and in different connections, it must be held to have the same meaning in all, unless it be manifest it is used in different senses. Now, what did the General Assembly mean when it required the assessor to place the name of the "owner" opposite each tract of land or lot on the assessment roll? It will scarcely be claimed that the wife of the owner is included in that term as used in this connection. And the same may be said of the provision in regard to the making of "the back-tax book." The word "owner," as used in that connection, would not include the wife of a man who held the legal title. If the word "owner" does not include the wife having simply an inchoate right of dower, when applied to the assessment roll and the "back-tax book," neither will it include her when applied to a section of the same statute requiring suit for taxes to be brought against the "owner." She cannot be regarded as an owner of property of which her husband is seised, within the meaning of any of the provisions of the Revenue Laws quoted, and hence for that reason she is not a necessary or proper party to an action to collect taxes on the land of her husband. But she was not a necessary party for another reason. This court has frequently held that the word "owner," as used in these laws, does not necessarily mean the actual owner. The collector is not bound to go beyond the record to ascertain the owner of property against whom to bring suit, and a purchaser, at a sale for

taxes against the person appearing from the record to be the owner, will take the title in fee, as against the true owner whose deed or title is not of record, if such purchaser has no knowledge of the unrecorded title. *Vance v. Corrigan*, 78 Mo. 94; *State v. Sack*, 79 Mo. 661; *Evans v. Roberson*, 92 Mo. 192, 10 West. Rep. 398; *Allen v. Ray*, 96 Mo. 542.

The records of the county in which the land is situated do not always nor usually give the name of the wife, and the revenue officers cannot get the names of the wives in making assessments or in instituting proceedings for the enforcement of the state's lien for taxes. Hence if the Statute in terms required the collector to make the wives of the owners of land parties to the proceedings to collect the taxes, it would be impracticable, in a very large proportion of cases, for him to comply with the requisition.

Having determined that the wife is not an owner of the property of her husband; in such a sense as to require her to be made a party to an action to enforce the lien for taxes against his land, it seems this ought to dispose of the case; for when the suit is brought against the owner, and the proceeding is regular, the purchaser gets a title "in fee" to the land sold. And as to the meaning of an estate in "fee," Mr. Tiedeman, in his work on Real Property, § 36, says: "The word 'fee,' without any qualifying adjective, implies an unlimited estate of inheritance. Such is also the case with the term 'fee simple' and 'fee simple absolute.' The three terms 'fee,' 'fee simple,' and 'fee simple absolute' may be used interchangeably; the adjectives in the last two are surplusage." See also *Allen v. McCabe*, 93 Mo. 138, 12 West. Rep. 113. The lien of the State for taxes is a "first lien on the land." This lien attaches to the *res*, and is paramount to every interest and estate in the land, as well as to all other incumbrances, whether prior or subsequent. *Gitchell v. Kreidler*, 84 Mo. 472. And a sale to foreclose this lien, in an action where all owners of the land, within the meaning of the statute, have been regularly made parties, "digs up," as it were, the "fee," and vests it in the purchaser. *Jones v. Devore*, 8 Ohio St. 430; *Osterberg v. Union Trust Co. of N. Y.* 93 U. S. 424, 23 L. ed. 964; Cooley, Taxn. 2d ed. 445, and cases cited. We have not lost sight of the doctrine laid down by this court in the case of *Gitchell v. Kreidler*, 84 Mo. 472, that the title acquired by a purchaser at a tax sale under our Statute is a derivative one. This we do not deny, but we hold that when all of the owners of the land taxed, within the meaning of our Revenue Laws, are made parties to the suit, a perfect title passes to the purchasers under these laws, because it is provided that a title "in fee" shall pass. Cooley, Taxn. 2d ed. 464. In the same case in which Judge Black declares that a tax title under our statutes is a derivative one, he is careful to say, also, that the judgment in these cases is *in rem*.

But it is contended that a judgment against the husband for the taxes cannot affect the wife's inchoate right of dower, and § 2197, Rev. Stat. 1879, is quoted in support of this contention. That section is as follows: "No act, deed, or conveyance, executed or per-

formed by the husband, without the assent of the wife, evidenced by her acknowledgment thereof, . . . and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter." This is chapter 29, entitled "Of Dower." Plaintiffs denominate the failure of Collier to pay the taxes on the land, and permitting judgment to go against it for them, "laches" on his part, within the meaning of the word as used in the section quoted. Mr. Blackwell, in his work on Tax Titles (5th ed. § 961), holds that a sale for taxes does not cut off the inchoate right of dower under a similar statute in Illinois, and he quotes several cases as authority for that position; but, on examination, it will be found that not a single case he quotes involved the sale of land for taxes. In the most of them it was held that an execution sale, under a judgment against the husband for debt, did not bar dower either consummate or inchoate. There is no doubt about the soundness of that position. That is the unquestioned law in Missouri. This writer announces the same doctrine again in section 954, but his reference is to section 961 of his own work above, as authority for it. It is not easy to determine Mr. Blackwell's meaning when it is a recognized principle, even by himself, that the State can sell the property of the citizen for the payment of taxes, either by a direct proceeding against the owner, or against the *rem*, or against both, and convey a title in fee to the purchaser. Blackw. Tax Titles, 5th ed. §§ 75 et seq. 954; Cooley, Const. Lim. 3d ed. 402; Cooley, Taxn. 672.

We presume he does not intend to announce the doctrine that the State cannot sell the inchoate right of the wife to dower in her husband's real estate by any process whatever. He intended, no doubt, to simply state the rule to be that, in order to bar this right, the wife must in some way be made a party to the proceeding. We can hardly conceive that the "shadowy" right of dower of the wife, while her husband is living, can be regarded as any more sacred than the vested estate of the husband. In section 954, *supra*, he states the doctrine to be that where the State assesses and sells the land, irrespective of any particular owner's interest in it, "the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent." And Mr. Cooley says, in the extract above quoted, that "no one doubts that the sale, if in compliance with law, vests a perfect title to the purchaser, to the full extent that the Statute shall declare." That the Legislature has the power to divest, by a proceeding of this character, the wife's inchoate right of dower is well settled upon principle and authority. Cooley, Taxn. 2d ed. 444; Blackw. Tax Titles, §§ 138, 954; Cooley, Const. Lim. 3d ed. 360; 2 Scribner, Dower, p. 8 et seq.; Woerner, Administration, § 112; *Morrison v. Rice*, 35 Minn. 436; *Jones v. Devore*, 8 Ohio St. 430.

Let us examine section 2197, *supra*, and see if a judgment for taxes, where the husband alone is made a party to the action, is within its scope and meaning. That section provides

that "no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right of the wife" to dower. The decree or judgment here referred to does not apply to a judgment for taxes. There can be no personal judgment for taxes. The judgment must be against the land. *State v. Sargeant*, 76 Mo. 557; section 6838, Rev. Stat. 1879. Hence the judgment in this case was not "confessed by nor recovered against" Collier. The judgment was rendered against the land, and a special execution ordered for the sale of that. The state obtained judgment, and sold the land against the will of Collier. The judgment did not grow out of any contract of Collier. The section quoted was intended to prevent the husband doing anything, either actively or passively, to bar dower, without the consent of his wife. A tax proceeding is a proceeding *in invitum*. The Revenue Laws of Missouri require that the land itself, and not the interest of any particular owner, be valued for taxation, and that taxes be levied on the land. *Allen v. McCabe*, 98 Mo. 138, 12 West. Rep. 118. In the first place, the assessor is required to list the land, and set opposite each tract or town lot the name of the owner, if known. In the second place, "the back-tax book" must contain a list of the tracts of land and town lots, with the names of the owners, if known, set opposite to them. In the third place, the judgment must state the amount of taxes due on each tract of land or lot, and "shall decree that the lien of the state be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest, and costs, be sold, and a special *feri facias* shall be issued thereon, which shall be executed as in other cases of special judgment and execution; and said judgment shall be a first lien upon said land." Section 6838, *supra*. Here it is required that the judgment shall not only be against the land, but the taxes must be decreed against the tract or lot on which they have been levied. "The State has no lien upon one lot for taxes charged against another, although both lots are owned by the same person." *State v. Sargeant*, 76 Mo. 557. In the fourth place, the Statute provides that the land is chargeable with the taxes levied thereon, "no matter who is the owner nor in whose name it is or was assessed." Section 6853. And in the fifth place, the sheriff shall, after the sale of land for taxes, make a deed, "which shall convey a title in fee to the purchaser of the real estate therein named."

Construing all these provisions together, it is manifest that the proceeding under our laws for the sale of lands for taxes is essentially a proceeding *in rem*. 2 Blackw. Tax Titles, § 954; Cooley, Taxn. 2d ed. 527. It is true the tax when levied is made a personal charge against the owner of the property assessed, and may be collected by the seizure and sale of his personal property, and the owner must be made a party to the action for the recovery of taxes due on land; yet when it is sought to sell the land itself the proceeding is confined strictly to the establishment of a lien against it, and no personal judgment is permitted against the owner, not even for costs, though known, and a party to the suit. *Milner v. Shipley*, 94 Mo. 18 L. R. A.

109, 18 West. Rep. 199; *State v. Sargeant, supra*. It seems anomalous, too, that the collector can seize and sell the personal property of the person he supposes is the owner, but that no personal judgment can be rendered against the owner when he is brought before the court, and it has been judicially determined who the owner is; but this is nevertheless true, as is apparent from the plain letter of the statute and the adjudications of this court. In *Watt v. Donnell*, 80 Mo. 195, it was held that the tax books were not evidence to show, even *prima facie*, who the owner of the land is. Under this ruling, it would appear difficult for the collector to make any demand, and especially any seizure, of personal property for a land tax. It is clear that the judgment or decree referred to in section 2197, *supra*, means a judgment or decree against the husband founded upon some act, contract, tort, or fraud of his, and does not embrace a judgment obtained by the State *in rem*, in the exercise of its paramount power of taxation or eminent domain. It seems to have been uniformly held by the courts of this country, when this question came before them, that, where lands are appropriated by the exercise of eminent domain, the dower of the wife, though not a party to the proceeding, is barred. *Moore v. New York, supra*. In this case the land had been condemned for public use, and the full value paid to the husband, the wife not being made a party to the proceeding. The court said: "The question which is here presented is whether a wife has such an interest in the premises owned by the husband, while her right of dower is inchoate, as can be divested by this Act of the Legislature and the proceedings under it. . . . The right being merely an incident to the marriage relation, it seems to us that, while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the Legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the Legislature to modify or even abolish. The power of the State to take private property for public use results from its right of eminent domain, and that power is not restricted, except by constitutional provision that just compensation shall be made to the owner. In this case the husband was deemed to be the owner of the entire estate in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as the subject of estimate as to its value separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest." We see no reason to doubt that the commissioners were right in considering the entire estate in these lands as vested in the husband, and, he having been paid the full value for them, the corporation, by force of the act, became seised of the lands in fee simple absolute, discharged of any claim of dower of the wife therein." The case went to the Court of Appeals of New York, and was there affirmed (8 N. Y. 110). Gardiner, J., who delivered the opinion of the latter court, said: "The estate of the widow, after assignment of dower, is a continuation of the estate of her deceased husband. It follows that, while liv-

ing, he, as owner, is entitled to and represents the entire fee. This the statute vests on confirmation of the report of the commissioners, and concludes all those entitled to the land, and all other persons whomsoever. Mrs. Moore, at the time of the proceedings to appropriate the real estate, was not, as we have seen, entitled to it, but her husband; and she was concluded by the general language of the Act. . . . Dower is not the result of contract, but a positive institution of the State, founded on reasons of public policy. In the case under consideration the land was taken, against the consent of the husband, by an act of sovereignty for the public benefit. The only person owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy."

The inchoate right of dower may be barred, not only by the State in its exercise of the right of eminent domain, without consulting the wife, but the husband also can, by his own act, bar this right by a dedication of his property to public use when the dedication is complete, or when the public accepts the dedication. This point was ruled by the Supreme Court of Indiana in *Duncan v. Terre Haute*, 85 Ind. 108. Judge Dillon, in his treatise on Municipal Corporations (2d ed. § 459) says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the Legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisal and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title, divested of any inchoate right of dower. Nor is the widow dowerable in lands dedicated by her husband in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities." On the same subject, Mr. Washburn, in his work on Real Property (4th ed. 269), uses this language: "One mode in which dower may be defeated remains to be mentioned, and that is by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use."

In *Gwynne v. Cincinnati*, 3 Ohio, 24, the husband gave the city a square for a market-house and a street opening to it. His wife did not join in this dedication. The city ordinance accepted this dedication. The supreme court held that the wife was barred. It is there said: "The counsel for the complainants insist that it is a case to be distinguished from that of public grounds for public uses, but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this

State, but also, as far as we are informed, in other States also."

Mr. Scribner, in his work on Dower, after reviewing the adjudged cases in England and America, and after an examination of the principle involved, concludes the discussion of this question thus: "The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated by virtue of the right of eminent domain. The reasoning of the courts appears to apply as well where lands are granted and used for public parks, public libraries, or other public use of a like character, as where they are devoted to the purposes of a market-place or a public highway." Scribner, Dower, chap. 27.

Let us examine this question, now, in the light of the Missouri Statutes and decisions. We have a chapter, and have had for many years, providing for the dedication of streets and grounds to the public. Chapter 127, Rev. Stat. 1889. The Statute authorizes the proprietor of land to make, acknowledge, and file a plat, on which shall be designated the streets and grounds dedicated to the public, and that such plat, when acknowledged by the proprietor and recorded, "shall be a sufficient conveyance to vest the fee of such parcels of land as therein named, described or intended for public uses in such city, town, or village, when incorporated, in trust for the uses therein named." Section 7813, Id. No provision whatever is made for the concurrence of the wife in the dedication; but the authorities we have quoted would seem to indicate that such dedication, when accepted by the public, would operate to bar the inchoate right of dower of the wife of the "proprietor," where she does not join in the dedication. Our Road Laws and laws in regard to eminent domain provided for the appropriation of land for the public use, but no provision is anywhere made to obtain the inchoate right of dower of the wife of the owner of the land which is appropriated. The statutes on these subjects do not look beyond the husband, when he is seised of the fee. Though the question has never been directly involved in any case determined by this court, yet Judge Bliss, in *Maguire v. Riffin*, 44 Mo. 512 (*loc. cit.* 515), quotes and approves the doctrine of *Moore v. New York*, *supra*. By common consent among the people and members of the bar of this State, it has not been deemed necessary to make the wife a party to a proceeding to condemn her husband's land for a public road, or a railroad, in order to cut off her inchoate right of dower. This common opinion in this instance has so long prevailed in Missouri, and has been so universally acted upon, that its overthrow now would introduce great confusion in the titles to estates. It is not merely speculative and theoretical, but has been made the ground-work and substance of practice. The presumption is that this practice is founded upon the rule announced by Scribner and Washburn, and the cases quoted above.

Again, it has been held in this State that, where the wife joins with her husband in a mortgage of his real estate, she is not a neces-

sary party to a suit to foreclose the mortgage, and that a foreclosure against the husband alone bars her inchoate right of dower. *Riddick v. Walsh*, 15 Mo. 519; *Thornton v. Pigg*, 24 Mo. 249; *Hoyt v. Oliver*, 69 Mo. 188. It is true that in the *Riddick-Walsh Case*, the foreclosure occurred at a time when our statute provided that a sale under a general execution against the husband carried the wife's dower, yet Judge Scott did not rest the determination of the case wholly upon the Statute, but held that the foreclosure carried the dower without regard to the Statute. He uses this language: "On the one hand it was argued that, as the land out of which this right of dower is claimed had been sold under a special *feri facias* on the judgment in the mortgage proceedings, that was a sale under execution, within the meaning of the Act, and therefore the right of dower was barred. On the other hand, it was contended that the wife was a necessary party to the proceedings to foreclose the equity of redemption, and, not being joined, she could not be affected by the judgment in a suit to which she was not a party. There is a marked distinction throughout the books between cases where a suit affects a wife's interest in real estate which is claimed in her own right, and those in which she has only an inchoate right of dower. In the former class of cases no instance is to be found in which it is not maintained that a wife is a necessary party to the proceedings in order to divest her right. In the latter class the husband alone is deemed the proper party to defend a proceeding instituted to divest the title to land to which a mere inchoate right of dower has attached. . . . The execution of the mortgage, with the wife's acknowledgment and relinquishment of dower, the proceedings to foreclose the equity of redemption, the judgment, execution, and sale by the sheriff, taken with his deed, are the links in the chain of title of the purchaser at the sheriff's sale. The wife having given her assent to the deed, and having a mere inchoate right in her husband's estate, who was still in existence, and he being competent to defend such interests of the wife in all other proceedings against him, no reason is perceived why the wife should have been made a party to this suit. So, in either point of view, the wife is barred of her dower." The doctrine laid down in this case was directly involved in the case of *Thornton v. Pigg*, *supra*, decided in 1857, and was approved by this court; and again, in 1875, the same doctrine received the sanction of this court in *Hoyt v. Oliver*, *supra*. In 1885 the question arose in *Lee v. Lindell*, 22 Mo. 202, whether a judgment of partition against the husband divested the wife's inchoate right of dower, and it was distinctly held by a majority of the court that it did; and it was also held that section 2197, which was then in force, did not affect the question. In other words, it was held that a judgment in partition against the husband was not included in that section. Judge Scott, who delivered the opinion of the court, said: "There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding which without it would not affect her. Nothing seems clearer than that, if the law does not re-

quire a married woman to be made a party to a proceeding, the making her one arbitrarily cannot affect her rights. If the proceeding is such as does not bind her, the use of her name without authority of law cannot produce such a consequence. Under our law, the wife of the husband, who owns an interest in the land to be divided, is not required to be made a party in partition, any more than such wife is required to be plaintiff or defendant in an action of ejectment for lands claimed by the husband, and in which she may have a right of dower. If the husband alone is competent to protect her interests in this action, why not in other actions in which her interests are the same?" And *Riddick v. Walsh*, *supra*, is cited as authority. The general principle upon which this decision proceeded was that the wife's interest was subordinate and subject to the right of partition, and for that reason she was not a necessary party. The same question arose again, and was again determined the same way, in 1870, in *Hinds v. Stevens*, 45 Mo. 209. The opinion this time was unanimous. This case goes further, however, than that of *Lee v. Lindell*. The judgment of the *Hinds-Stevens Case* was rendered against the husband in his lifetime, but the sale did not occur till after his death, when his widow applied for her dower, she not having been made a party to the proceeding. Judge Bliss, delivering the opinion of the court, said: "Since the decision of this court in *Lee v. Lindell*, 22 Mo. 202, it has never been deemed necessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition. The Statute does not expressly require it, and I cannot conceive of any interest she can have in the result, more than in any other suit touching the realty. . . ." The broad language in relation to parties to proceedings in partition was substantially the same in 1885, under which *Lee v. Lindell* was decided, as in that of 1855, covering the proceedings in question. Since this decision the question has not been mooted in this State. In 1875, in the case of *Hoyt v. Oliver*, *supra*, it was held that a wife was not a necessary party to a suit to correct a deed of trust given on the land of the husband. In the case of *Bailey v. Winn*, 101 Mo. 649, it was held that a wife was not a necessary party to an action to foreclose a vendor's lien in order to bar her dower. See also *Fontaine v. Boatmens' Sav. Inst.* 57 Mo. 552; *Duke v. Brandt*, 51 Mo. 221. Where the husband has taken a title bond for land, and paid part of the purchase money, his wife has an inchoate right of dower in the land thus held (*Hart v. Logan*, 49 Mo. 47); and yet, in such case, if the husband's interest be sold under a general execution, the inchoate right of dower is barred (*Worsham v. Callison*, 49 Mo. 206); and the husband alone, in such case, can transfer the property, and bar his wife's right to dower (*Duke v. Brandt*, 51 Mo. 221). It seems clear that the reason of the rule applicable to the exercise of eminent domain, and the dedication of land to public use, to the foreclosure of mortgages and vendors' liens, and to partition proceedings, applies to the case at bar with great force. When the State appropriates the land of a private citizen for public use, it does it against his will. So when the State enforces

its lien against the land of the citizen it does it against his will. If one proceeding cuts off the inchoate right of dower, why does not the other? In case of foreclosure of a mortgage or vendor's lien, the husband and wife both are interested, first, to show that nothing is due; and, in the second place, they have a right to receive the surplus. This court has said that the husband is competent in that case to protect the interests of his wife. In the case at bar the husband and wife were interested, first, to show that no tax was due on the land; and, in the second place, they had a right to receive the surplus arising from the sale after the satisfaction of the lien. In the proceeding instituted against him to enforce the State's lien for the taxes, was he not competent to protect his wife's interests? Was he not, as remarked by Gardiner, J., in *Moore v. New York*, *supra*, "the only person owning and representing the fee?" If a judgment in partition against the husband bars the wife's dower, *a fortiori* will not a judgment enforcing the State's lien for taxes, when the husband is made a party, bar her dower? In a partition proceeding, the wife is peculiarly interested. It is said her dower will attach at once to the land allotted to her husband in severalty, but may not land be allotted to him that is unimproved, and hence be utterly valueless to the widow? She has no right to be heard in regard to whether partition shall be made at all, or in regard to what land shall be allotted to her husband; and, if the land be sold, the proceeds go to her husband, and she is cut off entirely. But still this court has held, and the rule is now firmly established, that the husband is competent to protect his wife's interests in such a proceeding. If that be the rule where the husband may, on his own motion, commence the proceeding, with how much greater force will it apply in a case where the State sells the land against the will of the husband as well as the wife. It is true, no one shall be deprived of his property without "due process of law." But a proceeding *in rem*, in which no named person is served with notice, is due process of law. Cooley, Const. Lim. 8d ed. 402; Cooley, Taxn. 2d ed. 51. A proceeding defended by one person, who represents another, is due process of law. This was held in the cases we have cited, not probably in so many words, but in effect. A good illustration of this principle is to be found in the administration of estates. The administrator or executor is the only necessary party to establish a debt against the estate of the testator or intestate, though the debt thus established may finally operate to deprive the heir of the property he would otherwise take. Yet he is bound by the judgment against the administrator or executor; and, where the mortgagor dies, the administrator or executor is the only necessary party defendant in a proceeding of foreclosure, and a judgment against him not only bars the widow, but the heir also. *Tierney v. Spiva*, 97 Mo. 98. "The owner in fee of land represents his heirs as well as creditors in all actions involving the title to the land. In such actions he represents the fee, and this includes everyone who will derive title through him. If he is competent to protect those who will be his heirs, as also his creditors, whose interests

are vastly superior, as a rule, to the wife's inchoate right of dower, is he not competent to protect his wife's interests? The dower right of a widow is a continuation of the husband's estate. Her dower interest, whether inchoate or consummate, is part of the fee." *Doty v. Baker*, 11 Hun, 222; *Moore v. New York*, *supra*. There is no provision in the Revenue Laws for making the wife a party to the action against the land of her husband, and as was said in *Lee v. Lindell*, in the absence of such a provision, making her a party arbitrarily cannot affect her interests. It being provided that the "title in fee" shall pass to the purchaser under a tax judgment, and no provision being made for bringing in the wife, it is the plain intent of these laws to pass not only the husband's interest, but the wife's also, where he alone issued. Cooley, Taxn. 464. The courts, in all the instances named, where the wife's inchoate right of dower was held to have been cut off by a proceeding to which she was not a party, have proceeded upon the general principle that this contingent right was subordinate to other rights; that the wife's right attached subject to a superior claim. So, a tax lien in our State being paramount to all interests and claims, the wife's inchoate right of dower attaches subject to that lien, and she is no more a necessary party to a proceeding to foreclose it in order to bar the right than she is a necessary party in the instances referred to.

From the authorities cited, and from what has been said in this opinion, we deduce these propositions: (1) that when an action is brought against the "owner" of land, within the meaning of that word as used in our Revenue Laws, to establish and enforce the State's lien thereon for taxes, a valid judgment rendered, the land sold thereunder, and the sheriff executes a deed to the purchaser, the whole title in fee is conveyed, as the statute declares; (2) that the wife is not an "owner," within the meaning of the statute, by virtue of her inchoate right of dower in her husband's land, in such a sense as to require her to be made a party to a tax suit against her husband, in order to bar her contingent interest; (3) that the husband in such a case represents the fee, and is competent to protect his wife's interests; and hence (4) that a valid tax sale of the husband's fee-simple estate cuts off the wife's inchoate right of dower.

2. This is the conclusion we have reached upon an examination of the authorities, but we are equally well satisfied that this conclusion is sound upon principle also. It is to the interest of the State, of course, that it should have the power to collect its taxes by the sale of land, and to thereby convey the title in fee; but it is of vastly more importance to property owners that the proceeding to sell lands for taxes should, in the first place, be as inexpensive as practicable, and, in the second place, that the interest and title offered for sale should be definitely known. Suits for taxes are expensive, at best; but to require the wife to be made a party with the husband would add to that expense. Frequently the tax is only a dollar or two, and it would cost that much or more to make the wife a party, and when she is made a party, what can she accomplish more than her husband can accomplish?

Nothing. His interests are identical with hers. The State, in its efforts to enforce the collection of the tax, is the common enemy of both. The proceeding is *in invitum* as to both. But when lands are offered for sale against the will of the owner, it is important to the owner that the estate offered should be definitely known; otherwise it will be sacrificed. If the title and estate offered for sale be known with certainty the land will probably bring its value. If the collector be required to make the wife as well as the husband party to the suit in order to bar her dower, in ninety-nine hundredths of the tax sales it will not—it cannot—be known whether there be a wife at all or not, and hence there will be a doubt as to the extent of the title conveyed. Sacrifices of land must follow necessarily, and these sacrifices will largely exceed the value of the "shadowy" right of inchoate dower. It is a well-known fact that nearly all tax suits are against non-resident owners, and in such cases it is utterly impracticable to learn the name of the wife of the owner, or to know that the owner is married. Sacrifices of property must result from the enforcement of such a requirement, and these sacrifices will generally exceed the value of the contingent right of inchoate dower. It is said the sale of land for taxes is against common right, and is not, therefore, favored in law. That is true. But it is a common saying that "taxes and death" are certain. Every property owner knows that an annual tax will be levied on his property. He knows, or ought to know, when it becomes due in each year, and the sooner it is known that if the taxes be not paid within the prescribed time the property will be sold and the owner will lose his property the better. This rule would be better for the State and better for the taxpayer. Better for the State, because it would be sure to collect its taxes; and better for the owner, because, when he knows payment will be enforced certainly he will be

more apt to pay, and if for any reason he should fail to pay the taxes due by him, and his property be sold to pay them, it would bring its full value, when it is known that a good title in fee is to be conveyed. Hence all embarrassments thrown in the way of tax sales simply operate to make taxpayers careless, in the first place, about the payment of their just share of the expenses of the State; and, in the second place, to sacrifice the property sold, because no one can know definitely what is offered for sale. It should be the policy of the State to create competition at these sales, so that there may be a surplus left, after the payment of costs and taxes, to go to the owner. *Cooley, Taxn. 2d ed. 464.*

The second contention on the part of the appellant is that there was no breach of the covenant of general warranty in this case at the institution of this suit, nor now, because there existed only a right of inchoate dower in Mrs. Collier, and no breach could occur till this right became consummate, and vested by the death of her husband. It is universally held that inchoate dower constitutes an incumbrance of land, and the rule is that the covenant is broken as soon as made, in such case. This breach, however, is technical only, and the trial court committed error in giving judgment for substantial damages. *Walker v. Deaver, 79 Mo. 664, and cases cited.*

Enough has been said in the former part of this opinion to show that this right of inchoate dower is too shadowy and unsubstantial to be valued or estimated.

The judgment will be reversed, and cause remanded for new trial, it being the opinion of a majority of Division No. 2 that the tax sale and deed did not cut off Mrs. Collier's inchoate right of dower and that there was a technical breach of the covenant in the case, for which plaintiffs are entitled to recover nominal damages only.

Motion to transfer to court in banc denied.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles COOK, Conservator of Sarah A. Bostwick,

Uri P. BARTHOLOMEW *et al.*

(....Conn.....)

1. A deed granting land for a certain money consideration, with a condition that, if the grantor shall support the grantee during her natural life and give her decent burial the deed shall be void, otherwise it shall remain of full force and effect, constitutes a mortgage which may be foreclosed on failure to fulfill the condition.
2. No entry for breach of the condition is necessary to enable a mortgagee to maintain an action to foreclose the mortgagor's right of redemption although the mortgage is in form a deed absolute with a condition annexed.

NOTE.—Deed on consideration of support for life. See note to *Dreisbach v. Serfass* (Pa.) 3 L. R. A. 836.

13 L. R. A.

(January 7, 1891.)

RESERVATION from the Court of Common Pleas for Litchfield County for the opinion of the Supreme Court of an action brought to foreclose a mortgage. *Judgment for plaintiff advised.*

The facts sufficiently appear in the opinion. *Mr. R. E. Hall*, for plaintiff:

The instrument executed by Ammon Bostwick to Charles Cook is a mortgage.

The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act.

2 Swift, Dig. 183; Robinson, *Elementary Law*, § 102; 2 Washb. *Real Prop.* 4th ed. *475; Tiedeman, *Real Prop.* § 296; *Lanfair v. Lanfair*, 18 Pick. 304; *Erskine v. Townsend*, 2 Mass. 493; *Mitchell v. Burnham*, 44 Me. 299; *Wing v. Cooper*, 37 Vt. 179; *Lund v. Lund*, 1 N. H. 41.

Courts treat as mortgages conveyances conditioned for the support and maintenance of mortgagees or others.

1 Jones, Mort. § 388; *Austin v. Austin*, 9 Vt. 420; *Fiske v. Fiske*, 20 Pick. 499; *Flanders v. Lamphear*, 9 N. H. 201; *Daniels v. Eisenlord*, 10 Mich. 454; *Bresnahan v. Bresnahan*, 46 Wis. 386; *Hiatt v. Parker*, 29 Kan. 765; *Bryant v. Erskine*, 55 Me. 153.

They are at all events so far mortgages that they can be foreclosed.

1 Jones, Mort. § 393; *Lanfair v. Lanfair*, 18 Pick. 299-304; *Marsh v. Austin*, 1 Allen, 235; *Gilson v. Gilson*, 2 Allen, 115; *Pettee v. Case*, Id. 546; *Wilder v. Whittemore*, 15 Mass. 262; *Gibson v. Taylor*, 6 Gray, 810; *Austin v. Austin and Flanders v. Lamphear*, *supra*; *Rhoades v. Parker*, 10 N. H. 88; *Eastman v. Batchelder*, 36 N. H. 141; *Hawkins v. Clermont*, 15 Mich. 511; *Wright v. Wright*, 49 Mich. 624; *Hiatt v. Parker and Bresnahan v. Bresnahan*, *supra*.

Our Connecticut courts have repeatedly recognized mortgages to secure the performance of other acts than the payment of money.

See *Crane v. Deming*, 7 Conn. 387; *Harding v. Mill River Woolen Mfg. Co.* 34 Conn. 458; *Lewis v. Hartford Silk Mfg. Co.* 5 New Eng. Rep. 608, 56 Conn. 25.

There is no analogy to a deed upon condition.

See 2 Swift, Dig. *169.

In all doubtful cases a court of equity will construe a conveyance, a mortgage, rather than a deed upon condition.

Boone, Real Prop. § 225.

If the deed is a mortgage it may be redeemed.

1 Jones, Mort. 395, and cases.

Mortgages for support may be redeemed unless the condition be so far a personal covenant that a breach cannot be satisfied by money payment.

Jones, Mort. 395; *Henry v. Tupper*, 29 Vt. 358-375; *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34-43.

If the court judge that compensation in money damages can be made for the breach, then a decree limiting a time for redemption may be granted.

Henry v. Tupper, 29 Vt. 359.

Otherwise an absolute decree of foreclosure without privilege to redeem should be given.

Bresnahan v. Bresnahan, 46 Wis. 386.

Messrs. **Henry B. Graves and D. C. Kilbourn**, for defendants:

The instrument in question is not a mortgage.

Anderson, Law Dict.; Bouvier, Law Dict.; *Bacon v. Brown*, 19 Conn. 34; *Jarvis v. Woodruff*, 22 Conn. 550; *Ansonia Bank's App.* 58 Conn. 261.

The amount of the debt cannot be ascertained, which is an essential requisite of foreclosure.

Goodrich v. Stanley, 23 Conn. 83.

There is a distinction between the breach of a covenant or condition to pay money and one requiring acts to be done.

Hill v. Barclay, 18 Ves. Jr. 56; 4 Kent, Com. 180.

When an estate is granted upon condition in a deed, and there is a breach of the condition, an actual entry or claim by the grantor is necessary in order to revest the estate (*Chalker v. Chalker*, 1 Conn. 79); and this entry for the purpose of taking advantage of a condition is 13 L. R. A.

a thing of substance (*Bowen v. Bowen*, 18 Conn. 541; *Warner v. Bennett*, 31 Conn. 468), and must be pleaded.

Gould, Pl. chap. 4, § 7.

Carpenter, J., delivered the opinion of the court:

This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts,—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook, as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life; that he will provide for all her wants in a reasonable and proper way: will provide her with all needed food, drink, and clothing; have a room and fire when needed; lodging and every necessary comfort, both in sickness and health; and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void; otherwise to remain in full force and effect in law." The complaint also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved. Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift, Dig. 182, 183. "To constitute a mortgage, the conveyance must be made to secure the payment of a debt." *Bacon v. Brown*, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." *Jarvis v. Woodruff*, 22 Conn. 548. What is a debt? "That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation, liability." Webster, Dict.

What is this case? Ammon Bostwick re-

ceived \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her, and to erect a tombstone to her memory. To secure the performance of this agreement, he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty,—the payment of that debt. The obligation falls within an approved definition of "debt," and the conveyance is within the legal definition of a "mortgage." There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course, there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done, and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents. In this case the age, health, general condition, and expectation of life of Sarah

A. Bostwick must be known. Add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved 14 years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit, beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer. Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The court of common pleas is advised to overrule the demurrer.

The other Judges concur.

NEW YORK COURT OF APPEALS.

AMERICAN RAPID TELEGRAPH CO.,

Appt.,

v.

Jacob HESS *et al.*, *Respts.*

(....N. Y.)

1. Legislative authority to a telegraph company to construct its lines along and upon any public roads and highways grants to it no interest in the streets of the city but must be construed as conferring a license

which although acted on may be revoked by the Legislature whenever the public interest requires or as an exercise of the police power, and therefore not beyond the control of future legislation.

2. Granting a telegraph company the franchise to construct its line along and upon city streets will not be construed as an abdication of the police power over such streets, but if the poles and wires become a serious obstruction or nuisance therein provisions may be made for their removal; and for that

NOTE.—Telegraphs subject to the police power of municipalities.

A franchise granted to a telephone company, of constructing and operating its lines along and upon streets, is subordinate to the rights of the public in the street for the purpose of travel. Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Asso. (Ohio) 12 L. R. A. 541; Cincinnati & S. G. A. St. R. Co. v. Cummins, 14 Ohio St. 523.

A telephone company having a franchise to erect poles and wires upon the streets of a municipality has not such a vested interest and exclusive right in the ground circuit of electricity as to authorize it to enjoin the operation of an electric street railway subsequently constructed on the same streets and using the ground circuit for the return current of electricity. Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Asso. *supra*.

Telegraph companies, like all other corporations which occupy the highway of municipalities, are subject to proper police regulation. Philadelphia v. Western U. Teleg. Co. 2 W. N. C. 455; Philadelphia Steam Supply Co. v. City, 17 Phila. 110.

And such regulations are presumed to be reasonable. Van Hook v. Selma, 70 Ala. 361; Com. v. Patch, 97 Mass. 221; St. Louis v. Weber, 44 Mo. 550. 13 L. R. A.

So a charge per annum imposed upon all poles erected by a telegraph company is a proper exercise of the police power of a city, where its charter confers upon it police power. Western U. Teleg. Co. v. Philadelphia (Pa.) 11 Cent. Rep. 192.

State legislation compelling electric wires in the streets of a city to be placed under the surface of the streets is an exercise of the police power, and not an unlawful attempt to regulate commerce or an invasion of the rights of a telegraph company (Western U. Teleg. Co. v. New York, 3 L. R. A. 449, 2 Inters. Com. Rep. 538, 38 Fed. Rep. 552); nor is it an unwarranted interference through state legislation with its operations, an Act of Congress giving such companies their dual capacity as agents of the general government and instruments of interstate and foreign commerce. Pensacola Teleg. Co. v. Western U. Teleg. Co. 98 U. S. 1, 24 L. ed. 708.

State legislation strictly and legitimately for police purposes does not, in the sense of the Constitution, necessarily trench upon any authority which has been confided expressly or by implication to the national government. Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.

Corporate rights subject to the police power. See note to People v. North River Sugar Ref. Co. (N. Y.) 9 L. R. A. 85.

purpose the company may lawfully be directed to place its wires under ground, commissioners may be appointed to see that the work is done, and a contract made for the construction of conduits in which the wires can be placed, and, if after due notice they are not removed, they may be cut down.

3. That under the Acts of Congress telegraph companies have the right to erect and maintain their lines along and upon the public streets of a city will not prevent the State in which such city is located from requiring the wires to be placed under ground.

(February 24, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County in favor of defendants in an action brought to restrain defendants from taking down or otherwise interfering with any of the poles or wires belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. William G. Wilson, for appellant:

The State has the right to take or destroy property without making compensation only when there is an immediate and urgent necessity, and continues to have that right only so long as the pressing necessity continues. It may be called the right of necessity.

American Print Works v. Lawrence, 28 N. J. L. 590; *Re Jacobs*, 98 N. Y. 107; *Mills*, Em. Dom. § 7.

The right of eminent domain differs from the above in that it is exercised with deliberation and according to well fixed rules and courses of procedure and with that due regard to private and vested rights which is impossible in the case of a sudden and overwhelming necessity.

If any scheme for the benefit of the general welfare of the community involves as an incident or as an essential to its accomplishment the appropriation or destruction of private property, the right to take or destroy such property must be exercised through this right or power of eminent domain.

The Constitution protects such property and says it shall not be taken without due process of law and just compensation.

Baker v. Boston, 12 Pick. 193; *Wynehamer v. People*, 13 N. Y. 385.

The police power is, so far as it affects property, the right of the State to prescribe and regulate the use of property so that the public at large or other individuals shall not be injured by its use.

There is in principle a broad line of demarcation between this and the above powers. This power is used to enforce the maxim, *sic utere tuo ut alienum non ledas*.

Com. v. Alger, 7 Cush. 85.

The limitation which controls the exercise of this power is that which is supplied by the Constitution. When alleged regulations either expressly or by necessary effect take away the property itself, or the substantial right of its enjoyment, then they contravene the constitutional protection of property and property rights, and must be held nugatory and void.

Wynehamer v. People, 13 N. Y. 385.

13 L. R. A.

Nothing is a public nuisance which is authorized by law.

Miller v. New York, 13 Blatchf. 469; *People v. Metropolitan Teleph. & Tele. Co.* 11 Abb. N. C. 304; *Davis v. New York*, 14 N. Y. 506; *Atty-Gen. v. New York*, & *L. B. R. Co.* 24 N. J. Eq. 49.

The State may not pass any Act impairing the obligations of its contract with the plaintiff.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *The Binghampton Bridge*, 70 U. S. 3 Wall. 51, 18 L. ed. 187; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 45.

The legislation by Congress upon this subject was a valid execution of its constitutional power to regulate commerce between the States.

Pensacola Tele. Co. v. Western U. Tele. Co. 96 U. S. 1, 24 L. ed. 708.

The laws of the United States upon the subject are supreme and controlling, for the protection as well as the control of the plaintiff's lines.

Leloup v. Port of Mobile, 127 U. S. 645, 32 L. ed. 813; *Hannibal & St. J. R. Co. v. Ilusen*, 95 U. S. 473, 24 L. ed. 531; *Henderson v. New York*, 92 U. S. 271, 23 L. ed. 548; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 672, 29 L. ed. 524; *Baker v. Boston*, 12 Pick. 193.

Mr. David J. Dean, with **Mr. William H. Clark**, for respondents:

The acts in question are a valid exercise of the police power of the State, to which the plaintiff is subject.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 593; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149; *People v. Morris*, 13 Wend. 325; *Wynehamer v. People*, 13 N. Y. 421; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883.

The action of the public authorities is the removal of a public nuisance, not the confiscation of private property.

People v. Squires, 1 N. Y. S. R. 633; *United States Illum. Co. v. Grant*, 55 Hun, 222.

Earl, J., delivered the opinion of the court:

Prior to 1833, the plaintiff was incorporated under Act 265 of the Laws of 1848, the General Act for the incorporation and regulation of telegraph companies, and the Acts amendatory thereof; and prior to that year it had erected its lines of telegraph poles and wires in the streets of the City of New York, described in the complaint. It also had extensive connecting lines in other States, and throughout this State, which constituted a system of telegraphy then in active use and operation. Section 5 of the Act of 1848 provides as follows: "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; provided, the same shall not be so constructed as to incommode the public use of said road or highways, or injuriously interrupt the naviga-

tion of said waters; nor shall this Act be so construed as to authorize the construction of any bridge across any of the waters of this State." The Act (chap. 471, Laws 1858) amends the Act of 1848, and section 2 thereof provides as follows: "Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over, or under any of the public roads, streets, and highways, and through, across, or under any of the waters within the limits of this State, subject to the restrictions in the said recited Act contained." The plaintiff constructed its telegraph lines in the streets of the City of New York under the Acts referred to, without any special grant or authority from the city.

The claim of the plaintiff is that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the Federal Constitution, and hence that neither the State nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it ascertained in the manner prescribed by the Constitution and laws for cases where private property is condemned for public use. We think the Act of 1848, as amended in 1858, can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the State do not own the streets, and the only authority the Legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphy, and that that was a public use, not inconsistent with the use of the streets for general street purposes. These were general public legislative Acts, in the exercise of the police power of the State, and therefore they were not beyond the reach or touch of future legislation. The Legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiff, the Legislature could revoke the license, or modify it in any way, or at any time, when the public interests might require it.

But in this case it is not necessary to hold that the plaintiff did not, by the Acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these Acts as constituting, in some sense, grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail. In the exercise of its rights under

the assumed grant and contract, this corporation was subject to the regulation and control of the Legislature. By giving the franchise, the State did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people; nor did the State absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. The State could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action, and make such provisions by law, as were needful to remove the nuisance, and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the State. The State, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

Now, what has the Legislature attempted to do in this case? By the Act (chap. 534, Laws 1884), it was provided that all telegraph, telephonic, and electric light wires and cables, in all cities of the State having a population of 500,000 or over, "shall hereafter be placed under the surface of the streets, lanes, and avenues" of the city, and that it should be accomplished before the 1st day of November, 1885. It was further provided that, in case the owners of the property specified should fail to comply with the Act within the time specified, the local governments of the cities should remove, without delay, all such wires, cables, and poles, wherever found in their respective cities. Under that Act, no property was or could be taken from any of the owners specified. They were simply required to remove their poles and wires from the surface of the streets, and place the wires under ground. Their property was not taken, but the use of their franchise was regulated. In 1885, chapter 499 was enacted, which provided for the appointment of a board of commissioners of electrical subways, and that board was charged with the duty of enforcing the provisions of the Act of 1884. It was made the duty of that board to cause to be removed from the surface of the streets, and put and maintained under ground, wherever practicable, all electrical wires and cables, so as to enable and require all duly authorized companies operating the same to transact their business with under-ground conductors, where-

ever practicable. All subways for underground conductors of electricity were required to be built under the direction and control of that board, and no electrical wires or cables were to be allowed above the surface of the streets without the permission of the board. Commissioners were duly appointed under that Act, and in 1886, the Consolidated Telegraph & Electrical Subway Company of New York having been incorporated under the laws of this State, the commissioners entered into a contract with it, whereby it contracted to build, with its own capital, the necessary subways for the electrical conductors, the subways to be constructed in all respects subject to the approval of the commissioners. It was also provided in the contract that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways, under certain conditions specified. In 1887 the Legislature enacted chapter 716, entitled "An Act in Relation to Electrical Conductors in the City of New York." By that Act the agreement made between the subway commissioners and the Consolidated Telegraph & Electrical Subway Company, above referred to, was ratified and confirmed; and the Act provided that whenever, in the opinion of the board of electrical control constituted by that Act, sufficient conduits or subways under ground shall have been made ready, the board shall notify the owners or operators of the electrical conductors above ground in such streets or locality to make such electrical connections in such under-ground conduits or subways as shall be determined by the board, and to remove their poles and wires from the street within ninety days after such notice. This provision was made a police regulation in and for the City of New York, and, in case it was not complied with by the telegraph and other companies referred to, it was made the duty of the commissioner of public works to cause the poles, wires, etc., to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor to that effect. Subways having been constructed in certain of the streets of the City of New York, by the Consolidated Telegraph & Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff, as provided in the Act, to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice, and with the provisions of the Act, the commissioner of public works of the city caused the poles to be cut down, and the wires to be removed from the streets, and this is what the plaintiff complains of.

Its property was not taken for public use. It was simply removed from the streets, where it had become a nuisance, and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that it had to remove any other incumbrance therefrom. After the passage of the Acts referred to, and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority, and thus became a nuisance, and

hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense, but the same is true of railroads occupying streets. They cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations. If the authority did not otherwise exist to require these poles and wires to be removed from the streets, it could be found in section 5 of the Act of 1848, in which is contained the authority to construct telegraphic lines upon public roads and highways, with the proviso that the same shall not be "so constructed as to incommode the public use of such roads or highways." Who shall judge whether they incommode the public use of the streets? It is unquestioned that they do, and the Legislature has determined that fact, and when the plaintiff maintained its wires and poles in the streets in such a manner as to incommode the public use of the streets, the Legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended. The plaintiff seeks to strengthen its position, in reference to the use of the streets of the City of New York, under the laws of the United States, to which we will make brief reference. It is provided in section 5263 of the Revised Statutes of the United States that "any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads." Section 5268 provides that, "before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the post-master general of the restrictions and obligations required by law." Section 3964 provides that all the letter-carrier routes established in any city or town for the collection and delivery of mail matter are post-roads; and by the Act approved March 1, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post-roads." The plaintiff filed the written acceptance with the postmaster-general required by section 5268. The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations pre-

scribed for the control of all telegraph companies within the State, nor could such companies interfere with streets and highways in the State so as materially to impair their usefulness as ordinary highways. Nor could these congressional Acts deprive the State of its control over its highways, and its right to regulate their use, under the police power, for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets. We have carefully scrutinized the contract entered into by the board of electrical control with the defendant, the Consolidated Telegraph & Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical, and the power of the Legislature to authorize such a contract, and to confirm it when made, is beyond doubt. These Acts of 1884, 1885, and 1887 have been under consideration in several cases, and have uniformly been upheld and enforced. *People v. Squire*, 107 N. Y. 593, 10 Cent. Rep. 437, 14 Daly, 154; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *United States Illum. Co. v. Grant*, 55 Hun, 222; *Western U. Teleg. Co. v. New York*, 88 Fed. Rep. 552, opinion by Wallace, J., in United States circuit court, 3 L. R. A. 449, 2 Inters. Com. Rep. 533.

We are therefore of opinion that the judgment should be affirmed, with costs.
All concur.

Laura WOODEN, *Respt.*,
v.

WESTERN NEW YORK & PENNSYLVANIA R. CO., *Appt.*

(..... N. Y.)

1. The mere fact of a difference as to the one designated to bring the action

NOTE.—When personal representatives of a deceased party may bring action.

When the statute of a State gives a remedy for the death of a person caused by the negligence of another, and provides that the action shall be brought by the personal representative of such deceased person, the personal representative appointed in a State other than that wherein the death occurred may bring such action in the courts of the State in which he was so appointed. *Dennick v. New Jersey Cent. R. Co.* 103 U. S. 11, 26 L. ed. 439.

When *lex fori* governs.

In New York State the party suffering the pecuniary loss must bring the action. This relates only to the form of the remedy, and the *lex fori* governs in all matters relating to the remedy itself. *Thornton v. Western Reserve Farmers Ins. Co.* 31 Pa. 531; *Dennick v. New Jersey Cent. R. Co.* 103 U. S. 11, 24 L. ed. 439; *Knight v. West Jersey R. Co.* 103 Pa. 250; *Lodge v. Phelps*, 1 Johns. Cas. 139; *Foss v. Nutting*, 14 Gray, 484.

The *lex fori* governs the nature, extent and character of remedies; who shall be proper parties to a suit, the mode of procedure and the execution of judgments. These matters are regulated solely and exclusively by the law of the place where the

in the provisions of the statutes of two States providing for the recovery of damages for the benefit of those injured by the negligent killing of a person is not sufficient to prevent the maintenance of the action in the State where the accident did not occur if the statutes are otherwise substantially the same.

2. The plaintiff in an action to recover damages for the benefit of those injured by the negligent killing of a person which is brought outside of the State where the accident occurred in the courts of a State which enforce the liability because of the similarity of its statutes to those of the former State, must be the person designated by the statutes of the State where the injury occurred.

3. The fact that the amount of recovery for the negligent killing of a person is limited in the *lex fori* and unlimited in the *lex loci* does not make the statutes of the two States so dissimilar that the remedy will not be enforced in the former State; but the amount that can be recovered will be governed by the *lex fori*, at least where the killing was done by one of its corporations.

(March 10, 1891.)

APPPEAL by defendant from a judgment of the General Term of the Superior Court of Buffalo overruling a demurrer to the complaint in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. John G. Milburn, for appellant:

The death of the plaintiff's husband having occurred in Pennsylvania an action will only lie in this State if the legislation of Pennsylvania imposes a liability for negligently causing the death of a person similar to the liability imposed by the Statute of this State.

Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377.

It was incumbent upon the plaintiff to allege

action is instituted. *Story, Conf. L.* §§ 242, 263, 556, 558.

Questions as to who are the proper parties to suits relate rather to the form of the remedy than to the right and merit of the claim, and are therefore to be determined by the law of the forum. *Kirkland v. Lowe*, 33 Miss. 423; *Orr v. Amory*, 11 Mass. 25; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. R. Cas. 171; *Selma R. Co. v. Lacey*, 49 Ga. 106; *Bank of the United States v. Donnelly*, 33 U. S. 8 Pet. 381, 8 L. ed. 974; *McClees v. Burt*, 5 Met. 138.

The construction given by the courts of another State to the statutes of that State should control in the tribunals of a sister State. *Jessup v. Carnegie*, 80 N. Y. 441, 10 N. Y. Week Dig. 150; *Hunt v. Hunt*, 72 N. Y. 218; *Hoyt v. Sheldon*, 3 Bosw. 267, 5 Bosw. 172.

In determining the interpretation to be placed upon a statute, it is important to ascertain whether the courts of the enacting State have considered the subject and the construction which has been placed upon it. Ordinarily the courts of a sister State would feel bound to respect the decision thus made and should not reconsider the subject. This course has been substantially pursued in the state and federal courts, and any other rule would lead

and prove a statutory right in Pennsylvania to maintain this action similar to the statutory right in this State.

Debevoise v. New York, L. E. & W. R. Co. supra.

If the Pennsylvania Statute is similar in its import and character to our Statute then only the executor or administrator of the decedent can maintain this action.

Code Civ. Proc. § 1902.

Plaintiff must show by clear and unequivocal allegations her right to maintain this action in the capacity in which she brings it.

Clark v. Dillon, 97 N. Y. 870.

The widow of the decedent cannot maintain an action of this nature in this State though she may be the party designated by the Pennsylvania Statute, and the court holds that the complaint sufficiently shows this.

If the action can be maintained at all, the *lex fori* must govern as to the proper party to bring the suit.

The cause of action created by these Statutes is an entirely new one; the Statute in each State is its original source.

Hegerich v. Keddle, 99 N. Y. 258.

There are two possible views of first importance which may be taken: (1) that the designation of the party to bring the action is an integral part of the right created by the statute, or (2) that it is a matter pertaining merely to the remedy, the right created being vested in the beneficiaries named.

If the first view be the true one and the right

of action is given to the widow, though the recovery is for the benefit of herself and children, we do not see how she can enforce it in a State whose legislation gives the right of action to the executor or administrator.

Usher v. West Jersey R. Co. 4 L. R. A. 261, 126 Pa. 206, 41 Am. & Eng. R. R. Cas. 508, *note*.

If the view that the designation of the party to bring the suit for the beneficiaries is a matter pertaining to the remedy merely be deemed to be the true one, then it would seem to follow that the *lex fori* must govern and this action should have been brought by the plaintiff in her capacity as administratrix.

Whitford v. Panama R. Co. 23 N. Y. 465; Story, Conf. L. §§ 558, 565 *et seq.*; Wharton, Conf. L. § 719; *Stoneman v. Erie R. Co.* 52 N. Y. 429; *Andrews v. Herriot*, 4 Cow. 508, *note 10*; *Bank of United States v. Donnelly*, 33 U. S. 8 Pet. 872, 8 L. ed. 978; *Smith v. Spinolla*, 2 Johns. 198.

In our State the recovery is limited to the pecuniary damages resulting from the decedent's death, not exceeding \$5,000, whilst the recovery in Pennsylvania is unlimited.

This is such a radical difference that the two Statutes cannot be said to be similar within the meaning of *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48.

Ash v. Baltimore R. Co. 72 Md. 144; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46; *Vauter v. Missouri Pac. R. Co.* 34 Mo. 679; *Davis v. New York & N. E. R. Co.*

to confusion, operate injuriously, in many cases, and would be in direct hostility to the comity which is due to the authority which is conferred upon the lawfully constituted tribunals of a sovereign State. *Jessup v. Carnegie*, *supra*.

The statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was committed in another State, unless it is proved that the laws of that State were similar in character with the law of the State where the action is brought. *Whitford v. Panama R. Co.* 23 N. Y. 465; *Beach v. Bay State S. B. Co.* 30 Barb. 438; *Crowley v. Panama R. Co. Id.* 99; *McDonald v. Mallory*, 77 N. Y. 547.

Actions for damages for causing death are creations of Statute. 2 Wait, Act. & Def. 471; 2 Thomp. Neg. 1272, *note*.

Our statutes giving a right of action in such cases have no extraterritorial effect, nor can our courts infer or presume that a similar statute exists in the State or country where the death was caused and occurred. The only presumption that can be indulged is that the common law exists there. *Whitford v. Panama R. Co.*, *Crowley v. Panama R. Co.* and *Beach v. Bay State Steamboat Co. supra*; *McDonald v. Mallory*, 77 N. Y. 546; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Wilcox Silver Plate Co. v. Green*, 9 Hun, 347; *White v. Knapp*, 47 Barb. 549; *Holmes v. Broughton*, 10 Wend. 75; *Harris v. White*, 81 N. Y. 532; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *People v. Chase*, 28 Hun, 310; *Abell v. Douglass*, 4 Denio, 305; *Starr v. Peck*, 1 Hill, 270.

The doctrine that an action will lie when the common law or the statutes of different States or countries correspond is sustained by numerous authorities. *Madrazo v. Willes*, 3 Barn. & Ald. 358; *Melan v. Duke de Fitzjames*, 1 Bos. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161, 2 Smith, Lead. Cas. 9th Am. ed. 963; *Shipp v. McCraw*, 7 N. C. 463; *Wall v. Hoskins*, 27 N. C. 177; *Stout v. Wood*, 1 Blackf. 71. 13 L. R. A.

Real party in interest must bring suit.

The immediate and in some respects the most important consequence of the rule that "every action must be prosecuted in the name of the real party in interest," is this: Whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name. Pom. Remedies, § 126.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. N. Y. Code Civ. Proc. § 449.

The former chancery practice is now adopted as to making parties. *Wallace v. Eaton*, 5 How. Pr. 90; *Hollenbeck v. Van Valkenburgh*, Id. 234; *Voorhis v. Childs*, 17 N. Y. 354.

An action is properly brought in the name by which the party is generally known. *Cooper v. Burr*, 45 Barb. 2.

Rule governing the survivability of things in action.

The rules of the common law still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action. *Hegerich v. Keddle*, 99 N. Y. 261, 262.

The qualities of assignability and survivability are tests of each other, and have been declared by the court of appeals to be convertible terms. *Blake v. Griswold*, 6 Cent. Rep. 771, 104 N. Y. 618, 616.

The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests survive, as it is possible to lay down. *Hegerich v. Keddle*, 99 N. Y. 258.

3 New Eng. Rep. 1408, 148 Mass. 301; *O'Reilly v. New York & N. E. R. Co.* (R. I.) 42 Am. & Eng. R. R. Cas. 50; *The Alaska*, 130 U. S. 201, 32 L. ed. 923.

Mr. Harlow C. Curtiss, for respondent:

The Statutes of the State of Pennsylvania have created a cause of action in favor of the widow, as trustee for the benefit of herself and of the children of her deceased husband, whenever the death of said husband shall have been occasioned by unlawful violence or negligence, the proceeds to be distributed when recovered, as in cases of intestacy.

Huntington & B. T. R. Co. v. Decker, 84 Pa. 419.

A cause of action for wrongfully causing the death of a person, accruing and given by the statute of one State or country, may be enforced in any other State or country where jurisdiction of the parties can be obtained, provided that the laws of both countries correspond or substantially concur in giving a right of action for the injury complained of.

Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48; *Dennick v. New Jersey Cent. R. Co.* 103 U. S. 11, 26 L. ed. 439; *Stallknecht v. Pennsylvania R. Co.* 13 Hun, 451; *Burns v. Grand Rapids & I. R. Co.* 12 West. Rep. 688, 118 Ind. 169; *McDonald v. Mallory*, 77 N. Y. 546; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377; *Knight v. West Jersey R. Co.* 108 Pa. 250; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Beach v. Bay State S. B. Co.* 30 Barb. 483; *Crouley v. Panama R. Co.* 30 Barb. 99.

Where a cause of action given by a foreign statute is transitory, and there is an existing statute in this State to the same general purport, an action to recover on such cause of action may be maintained in a court of this State.

Curanagh v. Ocean Steam Nav. Co. 19 N. Y. Civ. Proc. 391; *Robinson v. Ocean Steam Nav. Co.* 2 L. R. A. 636, 112 N. Y. 321, 16 N. Y. Civ. Proc. 255; *The Harrisburg v. Rickards*, 119 U. S. 199, 30 L. ed. 358; *McDonald v. Mallory*, 77 N. Y. 546; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48.

Comity will enforce rights not in their nature local and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common-law or statutory origin.

Usher v. West Jersey R. Co. 4 L. R. A. 261, 126 Pa. 206; *Patton v. Pittsburgh, C. & St. L. R. Co.* 96 Pa. 169; *Knight v. West Jersey R. Co.* 108 Pa. 250.

Wherever by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

Dennick v. New Jersey Cent. R. Co. 103 U. S. 11, 26 L. ed. 439.

The cause of action arose where the tort was committed which caused the death. The decisions of the Pennsylvania courts and the provisions of the Pennsylvania statutes are the laws governing this cause of action, to enforce the remedy given by the Pennsylvania statute.

Hunt v. Hunt, 72 N. Y. 236; *Jessup v. Carr*, 13 L. R. A.

negie, 80 N. Y. 440; *Robinson v. Oceanic Steam Nav. Co.* 2 L. R. A. 636, 112 N. Y. 321; *Leonard v. Columbia Steam Nav. Co.* supra; *Vandewater v. New York & N. H. R. Co.* 27 Barb. 244; *Curanagh v. Ocean Steam Nav. Co.* supra.

The statutes of the States of New York and Pennsylvania in regard to such actions are certainly of similar import and character, and the similarity is such as to authorize the conclusion that they are founded upon the same principles and possess the same general attributes and purpose and aim.

Books v. Danville Borough, 95 Pa. 153; *Hege-rich v. Keddie*, 99 N. Y. 267; *Dickins v. New York Cent. R. Co.* 23 N. Y. 158; *Yertore v. Wiswall*, 16 How. Pr. 8.

Absence, in the foreign Statute of Limitation, as to amount of damages recoverable for death caused by negligence is not a dissimilarity.

Dennick v. New Jersey Cent. R. Co. 103 U. S. 11, 26 L. ed. 439.

Finch, J., delivered the opinion of the court:

This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this State, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant Company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such Statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of \$20,000. The demurrer interposed raised two objections: *first*, that the statutes of the two States were not similar, but different; and *second*, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this State because that is contrary to our Statute, and that the administratrix could not because that is contrary to the Pennsylvania Statute; and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci*, because they are permitted by the common law which is presumed to exist in the foreign State; that such

presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action, and are similar to our own. Upon the question of similarity we have also held that the two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 58. It is quite evident that the two Statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two Statutes is not affected by the differences of detail which the demurrer points out. The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow; while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddie*, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest,—those whose injury is redressed, whose right is vindicated, to whom all damages go,—are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two Statutes dissimilar under the rule.

It is claimed, however, that, even in that event, the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as widow, but as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 58, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our Statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons,—one, that the party defendant may not be subjected to different and varying responsibilities; and the other, that we may

know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity; and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. *Usher v. West Jersey R. Co.* 126 Pa. 207, 4 L. R. A. 261.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed \$5,000. That restriction pertains to the remedy, rather than the right. *Dennick v. West Jersey Cent. R. Co.* 103 U. S. 11, 26 L. ed. 439. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be—there very possibly is—an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two Statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted; and so the causes of action in the two forums are not thereby made dissimilar.

These views lead to an affirmance of the interlocutory judgment. *That judgment should be affirmed*, with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remititur*, and upon payment of the costs of the action from the interposition of the demurrer to that date.

All concur.

MINNESOTA SUPREME COURT.

John L. MACDONALD, Assignee of J. H. Mahler Co., Insolvent, *Rept.*,

v.

FIRST NATIONAL BANK of Corunna, Mich., *Appt.*

(.....Minn.....)

***Our State Insolvent Law is effectual as to nonresidents** of the State, so far as to control the disposition of property within our jurisdiction. A preferential conveyance of property here situate, by contract made here, may be avoided under that law, notwithstanding the nonresidence of the creditor preferred.

(July 28, 1891.)

APPEAL by defendant from a judgment of the District Court for Ramsey County setting aside a transfer to it by the J. H. Mahler Company of property as security for a debt. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. A. Sperry and Lewis L. Wheelock, for appellant:

Our Insolvent Laws cannot be made applicable to a contract made between a citizen of this State and a citizen of another State.

Wendell v. Lebon, 30 Minn. 284; *Gilman v. Lockwood*, 71 U. S. 4 Wall. 409, 18 L. ed. 432; *Donnelly v. Corbett*, 7 N. Y. 500; *Brighton Market Bank v. Merick*, 11 Mich. 405; *Anderson v. Wheeler*, 25 Conn. 608; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606.

Mr. J. L. McDonald, for respondent:

The law of the place where the contract is made governs the rights and liabilities of the parties.

Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334; *Brown v. American F. Co.* 31 Fed. Rep. 516; *Central Trust Co. v. Burton*, 74 Wis. 329; Addison, Cont. 4th ed. § 241, note 1.

The contract in controversy was executed in this State, and in this city.

Our Insolvent Law is constitutional, and it makes void preferences made by insolvent debtors, as was done in the case at bar.

Weston v. Loyhed, 80 Minn. 221.

Where the point at issue in any case was analogous to the one at bar, it supports our contention here, and we have not found any that hold to the contrary.

In *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529, State Insolvent Laws were adjudged invalid as to pre existing contracts.

Ogden v. Saunders, 25 U. S. 12 Wheat. 213, 6 L. ed. 606, held that such laws were not unconstitutional as respects subsequent contracts

*Head note by DICKINSON, J.

between persons of the same State, but that a discharge under them did not affect nonresident creditors.

This result was reached as said in *Von Glahn v. Varrenne*, 1 Dill. 515, upon the ground, largely, if not wholly, that every contract made in the State has relation to the existing law of the State, which, so to speak, becomes part of the contract, and since the Insolvent Law declares a right on the part of the debtor to be discharged from contracts thereafter made, on certain terms, the exercise of such right cannot be said to impair the obligation of the contract.

As against citizens of other States, as well as those of the State where the assignment is made, an assignment valid by the laws of the State in which it is made is valid everywhere.

Re Paige & S. Lumber Co. 31 Minn. 136; *Greene v. Sprague Mfg. Co.* 52 Conn. 380; *Train v. Kendall*, 137 Mass. 366; *Faulkner v. Hyman*, 2 New Eng. Rep. 181, 142 Mass. 53; *Re Waile's Accounting*, 99 N. Y. 433; *Ockerman v. Cross*, 54 N. Y. 29; *Smith's App.* 104 Pa. 381; *Zuppann v. Bauer*, 17 Mo. App. 678; *Holmes v. Remsen*, 4 Johns. Ch. 460, 1 L. ed. 902; *Hoyt v. Thompson*, 5 N. Y. 320; *Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Van Winkle v. Armstrong*, 41 N. J. Eq. 402; *Varnum v. Camp*, 13 N. J. L. 826.

The *lex loci rei sitæ* governs the construction. Story, Conf. L. § 428.

Here the *lex loci contractus* and *lex loci rei sitæ* are all in favor of respondent.

See *Forward v. Harris*, 30 Barb. 338; *Arnold v. Shade*, 8 Phila. 82; 3 Am. & Eng. Encyclop. Law, 621, and note 6.

In this case the *lex loci contractus* must prevail.

Wharton, Conf. L. § 371.

The validity of an assignment for the benefit of creditors is governed by the laws of the State of the debtor's domicile, though it embraces real and personal property situate in other States.

D'Ivernois v. Leavitt, 23 Barb. 63; *Livermore v. Jenches*, 62 U. S. 21 How. 126, 16 L. ed. 55; *Wickham v. Dillon*, 2 West. L. Mo. 511. See also *Parkinson v. Scoville*, 19 Wend. 150; *Van Raugh v. Van Arsdale*, 3 Cal. 154.

Dickinson, J., delivered the opinion of the court:

This action by the assignee (under our Insolvent Law) of an insolvent debtor is for the purpose of avoiding the transfer of personal property executed in writing by the insolvent to the defendant, a creditor, as security for the debt. The conditions under which this was

NOTE.—When the *lex loci* governs the contract.

The rule regulating the construction of contracts has long since declared that the law of the country where the contract is made, called the *lex loci*, must govern in its construction and determine its validity. *Bradshaw v. Newman*, 1 Ill. 94; *Boundtree v. Baker*, 52 Ill. 241; *Haines*, Treatise, 13th ed. 142.

The place of the contract is the place where it is delivered or the bargain consummated. *Hawley* 18 L. R. A.

v. Keeler, 58 N. Y. 114; *Commercial Bank v. Warren*, 15 N. Y. 577; *Wharton*, Ag. § 76, 77; *Addison*, Cont. 15; *Kingston on Hull v. Petch*, 24 L. J. Exch. 23; *Honeyman v. Marryatt*, 26 L. J. Ch. 619; *Brown v. New York Cent. R. Co.* 44 N. Y. 79; *Aikin v. Davis*, 45 Barb. 44; *Smith v. Smith*, 27 N. H. 244; *Real Estate Mut. F. Ins. Co. v. Roessle*, 1 Gray, 334; *Weatherby v. Covington*, 3 Strobb. L. 27; *Jack v. Nichols*, 5 N. Y. 178. See note to *Osgood v. Bauder* (Iowa) 1 L. R. A. 665.

were made were such that, by force of the Insolvent Law, it was avoided by the insolvency proceedings, as an unlawful preference, unless that result is affected by the fact that the defendant, thus preferred, was a nonresident of the State. The contract was made in this State, and the property in question was, and still remains, here. The defendant (appellant) disclaims making any attack upon the validity of the law, or of the assignment; but relies upon the proposition that, by reason merely of its nonresidence, the Insolvent Law had no effect to avoid its contract. This position of the defendant cannot be sustained. The contract in question, made in this State concerning property here, and to be executed here, was subject to the law under which it was made. Its legal effect in no respect depended upon the residence of the parties. The law under which it was made declared that, under certain specified conditions (which are found to have existed), such a contract should be void, legally ineffectual as a transfer of the property. The legal effect of invalidity followed from the conditions specified in the law, and which the parties must be deemed to have had in contemplation. That law makes no exception in favor of nonresidents entering into such contracts here. The property is still here, subject to our jurisdiction. As to that property, the court is exercising its jurisdiction in the enforcement of the law under which the contract was made. This enforcement of the law, by the legal appropriation of the property within our jurisdiction to the payment of the debts of the insolvent, does not involve the giving of an extraterritorial effect to the Statute.

The appellant relies in support of its contention upon *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606, and other decisions of the same court, and upon what is said in *Wendell v. Lebon*, 30 Minn. 234. But a later decision of the Supreme Court of the United States removes whatever seeming support the language of prior decisions may have afforded for such a proposition as that here contended for. *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491. That was an action for conversion prosecuted by the assignee of an insolvent debtor against the United States marshal, who, after the assignment under our Insolvent Law, and after the assignee had acquired actual or constructive possession of certain personal property embraced in the assignment, seized the same by virtue of an attachment issued out of the circuit court of the United States in an action against the insolvent by nonresidents of this State. The plaintiff recovered judgment in this court, which was affirmed in the Supreme Court of the United States. That court stated the principal question to be decided as being whether our Insolvent Law was repugnant to the Constitution of the United States, so far as it affects citizens of other States. The argument of the plaintiff in error was to the point (aside from that based on the doctrine of the inviolability of contracts) that such a statute can have no extraterritorial operation, and cannot, therefore, be binding on creditors living in a different State from that of the debtor, and of the *situs* of his property; and that is the point of the appellant's argument in this case. The court, referring to its former decisions, in-

cluding *Ogden v. Saunders*, said: "The proposition lying at the foundation of all these decisions is that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State. . . . The substance of the restrictive principle goes no further than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another State than that where the court is sitting, who does not appear and take part or is not otherwise brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State who is not personally subjected to the jurisdiction of the court. Anyone who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a State Insolvent Law is that it cannot, like the Bankrupt Law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all Bankrupt Laws, does not belong to the Legislature, where the creditor is not within the control of the court. The Minnesota Statute makes no provision for any such release. The creditor who became such after the Statute was passed cannot complain that the obligation of his contract is impaired because the law was a part of the contract at the time he made it. . . ."

This decision recognizes our Insolvent Law as being effectual as to nonresidents as well as to residents of the State, so far as it controls the disposition of property within our jurisdiction. The decision in *Wendell v. Lebon* is to the same effect, and is an authority opposed to the contention of the appellant here.

Judgment affirmed.

Jacob TABERT, *Resp't.*,

v.

G.'C. COOLEY, *Appt.*

(...Minn....)

***Upon the trial of an action for malicious prosecution the plaintiff, when at-**

***Head note by COLLINS, J.**

NOTE.—Malicious prosecution; what must be shown.

To sustain an action on the case for a malicious prosecution, four points must concur, the absence of either of which will be fatal to the right of the plaintiff to recover: (1) falsehood in the demand; (2) want of probable cause; (3) malice in the defendant; (4) damage to the plaintiff. 3 Bl. Com. (Chitty's ed.) *123, note 13.

This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting; in which event it is the duty of the court to instruct the jury what facts, if

tempting to establish a want of probable cause, is not confined to proof of such facts as he can affirmatively show were actually known to defendant, but may also prove the existence of such open and notorious facts as would or should have been ascertained by the latter, had he, before instituting the proceedings, made such inquiry and investigation as anyone with honest motives, and not actuated by malice, would have made.

(June 22, 1891.)

APPEAL by defendant from an order of the District Court for Jackson County overruling his motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for an alleged malicious prosecution. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. L. F. Lammers and T. J. Knox* for appellant.

Mr. J. G. Redding, for respondent:

If defendant did not himself believe that the act of plaintiff in taking the horse was larceny, in other words, if he did not believe the horse was stolen, he had, of course, no probable cause for making the complaint.

Wetmore v. Mellinger, 64 Iowa, 741.

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.

2 Greenl. Ev. § 454; *Gilbertson v. Fuller*, 40 Minn. 413.

The prosecution of an innocent person without using reasonable care to ascertain the facts is certainly not justified.

Walker v. Camp, 63 Iowa, 627.

A person's belief in a charge made by him, when arising from his own negligence in examining the evidence within his reach, does not constitute probable cause for such charge.

Grinnell v. Stewart, 12 Abb. Pr. 220.

A groundless suspicion unwarranted by the conduct of the accused or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest.

Carl v. Ayers, 58 N. Y. 14.

Merely belief that the plaintiff was guilty is not probable cause for the prosecution if the prosecutor acted negligently or irrationally and upon suspicion not warranted by facts, or by appearances which would not lead a prudent man to suppose the plaintiff guilty.

Farnham v. Feeley, 66 N. Y. 451; *Hamilton v. Smith*, 39 Mich. 222; *Spencer v. Anness*, 33 N. J. L. 100.

There is no question as to the manner in which plaintiff went away with the horse and what he was doing with it when he was found by the officer, and surely there was no error in allowing these facts to go to the jury that the jury might pass upon the question as to whether defendant was negligent in not knowing of their existence.

Patterson v. Garlock, 39 Mich. 447.

Defendant acted maliciously in making the complaint against plaintiff. Malice may be inferred from want of probable cause.

Wertheim v. Altschuler, 12 Neb. 591; *Carson v. Edgeworth*, 43 Mich. 241.

Defendant was bound to have that horse back and he took the shortest, quickest and least expensive means to the end, to wit, have

established, will constitute probable cause, and submit to them only the question as to such facts. *Bulkeley v. Keteltas*, 6 N. Y. 384.

Burden of proof.

In actions of this nature the *onus probandi* is always upon the plaintiff, and mere failure of the prosecution does not establish a want of probable cause; plaintiff having alleged malice, must show it. *Dietz v. Langfitt*, 63 Pa. 234; *McKown v. Hunter*, 30 N. Y. 625; *Frowman v. Smith*, Litt. Sel. Cas. 7; *Thaule v. Krekeler*, 81 N. Y. 428; *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 585; *Boyd v. Cross*, 35 Md. 194; *Besson v. Southard*, 10 N. Y. 236; *Israel v. Brooks*, 23 Ill. 575; *Purcell v. Macnamara*, 9 East. 361; *Flickinger v. Wagner*, 46 Md. 581; *Levy v. Brannan*, 39 Cal. 485; *Sappington v. Watson*, 50 Mo. 83.

Malice must be shown.

Evidence that no previous demand was ever made for a debt before instituting a prosecution therefor in which the debtor was arrested, is admissible to show malice in instituting the prosecution. *Tucker v. Wilkins*, 105 N. C. 272.

The existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice, from the want of probable cause, is one which the jury alone can draw. *Wheeler v. Nesbitt*, 65 U. S. 24 How. 545, 16 L. ed. 765; *Newell v. Downs*, 8 Blackf. 523; *Johnson v. Chambers*, 32 N. 13 L. R. A.

C. 237; Van Voorhees v. Leonard, 1 Thomp. & C. 148; *Schofield v. Ferrers*, 47 Pa. 194.

Slight evidence of malice was held insufficient in *Mitchinson v. Cross*, 58 Ill. 866; and sufficient in *Williams v. Vanmeter*, 8 Mo. 339; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Davie v. Wisner*, 72 Ill. 262; *Palmer v. Richardson*, 70 Ill. 544; *Stewart v. Cole*, 46 Ala. 646; *McFarland v. Washburn*, 14 Ill. App. 369; *Sutton v. Anderson*, 103 Pa. 151; *Thaule v. Krekeler*, 81 N. Y. 428; *Thompson v. Lumley*, 50 How. Pr. 105; *Ames v. Snider*, 69 Ill. 378; *Wilkinson v. Arnold*, 11 Ind. 45; *Good v. French*, 115 Mass. 201; *Heyne v. Blair*, 62 N. Y. 19; *Calef v. Thomas*, 81 Ill. 478; *McCormick v. Sisson*, 7 Cow. 715; *Boyd v. Cross*, 35 Md. 194.

The existence of a want of probable cause is essential to every suit for a malicious prosecution. Both that and malice must concur. Malice may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. *Sutton v. Johnstone*, 1 T. R. 493; *Foshay v. Ferguson*, 2 Denio, 617; *Murray v. Long*, 1 Wend. 140; *Wood v. Weir*, 5 B. Mon. 544.

What amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone*, *supra*, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause is a question of law." This is the doctrine generally adopted. *McCormick v. Sisson*, 7 Cow. 715; *Besson v. Southard*, 10 N. Y. 236. See notes to *Pope v. Pollock* (Ohio) 4 L. R. A. 255; *Antcliff v. June* (Mich.) 10 L. R. A. 621.

him arrested and have the officer bring the horse at the same time. This was malice, pure, clean-cut malice.

Ross v. Langworthy, 13 Neb. 492.

Collins, J., delivered the opinion of the court:

This was an action for malicious prosecution, and under the issues as presented by the pleadings, defendant having admitted a criminal prosecution by him which terminated in plaintiff's acquittal or discharge, it was incumbent upon the latter to show that the prosecution was without probable cause, and originated in defendant's malice. The proof of this want of probable cause, although a negative proposition, was on the plaintiff, as is always the case with such issues. He had been prosecuted for the crime of the larceny of a horse, which he had taken from defendant's possession under a claim of title. To establish want of probable cause on defendant's part, the plaintiff had shown that about noon of a certain day he proceeded to defendant's barn in a small village, where he was well known, took the animal out, rode it through the public streets, passing and speaking with several acquaintances, and from thence to his farm, about fourteen miles distant. The defendant knew where he resided, and had been personally acquainted with him for years. Defendant immediately made complaint to a justice of the peace, charging a larceny of the horse, procured a warrant, placed it in the hands of a deputy-sheriff, and before night the deputy had reached the farm, arrested the plaintiff, and with him and the horse was on his return to the village. The officer was one of plaintiff's witnesses, and, notwithstanding defendant's objection, was permitted to testify that he found the plaintiff openly at work in his field, hauling flax upon a wagon drawn by a pair of horses, that in dispute being one. The defendant contends that in admitting this testimony the trial court erred, greatly to his prejudice, because, as he insists, his acts and conduct were to be weighed in view of what appeared to him when he made the complaint,

and not in the light of facts appearing subsequently,—citing *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116. Even if this evidence was inadmissible, its reception was error without prejudice, for all that it tended to prove was a fact already established by the testimony, and which was not controverted on the trial, viz., that the taking and appropriation of the horse by the plaintiff was open and public, without stealth or concealment. But in our opinion the evidence was properly admitted, conceding the rule to be, as it doubtless is, that, in determining whether defendant acted without probable cause, his conduct is to be weighed in view of what appeared to him when he made the complaint, and not in the light of subsequently appearing facts, yet, when establishing want of probable cause, the plaintiff is not confined to the proof of such facts as he can affirmatively show were actually known to the defendant, but may also prove the existence of such open and notorious facts as the defendant would or should have ascertained had he, before instituting the proceedings, made such inquiry and investigation as any man with honest motives, and not actuated by malice, would have made. Now, the importance of the officer's testimony consisted, not in the particular fact that the plaintiff was hauling flax with the animal, but in the general fact that he was keeping and using it openly, and without any attempt at concealment. While the particular time of which the sheriff testified was subsequent to the making of the complaint by defendant, yet the manner and conduct of the plaintiff at that time constituted, under all the circumstances, a legal basis for the inference that it was but a continuation of the same open and unconcealed manner and course of conduct which he had previously pursued, and which the defendant should and would have ascertained had he made the investigation which he ought to have made, instead of shutting his eyes to facts easily to be discovered. The remaining assignments of error need no special consideration.

Order affirmed.

NORTH DAKOTA SUPREME COURT.

George A. BENNETT, *Respt.*,

v.

NORTHERN PACIFIC R. CO., *Appt.*

(...N. Dak....)

*1. Plaintiff was injured while coupling an engine to a car because there was

*Head notes by CORLISS, Ch. J.

NOTE.—Declarations of pain and suffering admissible in evidence.

A formidable array of authorities establish the proposition that all declarations of pain, suffering, actions, groans, outcries, expressions of pain and distress at the time of such suffering, may be given in evidence of the injured person's favor, even though after the commencement of the action. *Matteson v. New York Cent. R. Co.* 35 N. Y. 487, 62 18 L. R. A.

not sufficient space for his body between them. The draw-bars of the engine and of the car were unusually short, leaving a space of only about ten inches between the end of the car and of the engine when the draw-bars came together, whereas the usual space is from twenty-four to thirty inches. *Held*, sufficient to justify a verdict that defendant's negligence was one of the proximate causes of the injury. It appearing that plaintiff was injured in consequence of his failure to obey

Barb. 384; *Murphy v. New York Cent. R. Co.* 66 Barb. 125; *Barber v. Merriam*, 11 Allen, 322; *Kent v. Lincoln*, 32 Vt. 591; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Phillips v. Kelly*, 29 Ala. 628; *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344; *Baker v. Griffin*, 10 Bosw. 140; *Brown v. New York Cent. R. Co.* 32 N. Y. 597; *Gray v. McLaughlin*, 26 Iowa, 279.

Evidence of exclamations of pain made by a per-

the rule of defendant that he must examine so as to know the kind and condition of the coupling apparatus, the rule giving him sufficient time to make such examination in all cases.—*Held*, that he could not recover.

2. Exclamations and expressions of present pain may be proved by anyone who hears them, although made subsequently to the injury.

(July 27, 1891.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed*.

The facts sufficiently appear in the opinion. *Messrs. W. F. Ball and John S. Watson*, for appellant:

No negligence can be inferred from the fact that a railroad track is constructed on a curve at the place of an accident to a servant.

Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114.

Testimony as to exclamations and expressions of pain is admissible only when it relates to expressions and exclamations made at or about the time of the injury.

Reed v. New York Cent. R. Co. 45 N. Y. 575; *Grand Rapids & I. R. Co. v. Huntley*, 88 Mich. 587; *Wharton, Ev.* § 268, and cases cited; *Laughlin v. Grand Rapids St. R. Co.* 80 Mich. 154.

It is not for the employé to judge of the reasonableness of the Company's rules.

Wolsey v. Lake Shore & M. S. R. Co. 33 Ohio St. 227; *Hulett v. St. Louis, K. C. & N. R. Co.* 67 Mo. 289.

It was contributory negligence upon plaintiff's part to place himself in such a situation as to incur the danger and suffer the injury complained of.

son immediately on returning home an hour or two after receiving personal injuries is admissible on the question of damages. *Smith v. Dittman*, 34 N. Y. S. R. 308.

Declarations of the injured party, though plaintiff, at time of disaster, explaining the occurrence and its effects upon him, are competent in his own favor, if part of the *res gestæ*. *Brownwell v. Pacific R. Co.* 47 Mo. 239; *Frink v. Coe*, 4 G. Greene, 555.

Declarations subsequent to the act are also deemed admissible. *Com. v. M'Pike*, 3 Cush. 181; *Harriman v. Stowe*, 57 Mo. 98. *Contra*, see *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185.

As a corollary of the propositions above established, we may infer that complaints and indications of suffering by injured parties on a physical examination requested by the opposite party, are admissible (*Quaife v. Chicago & N.W. R. Co.* 48 Wis. 513, 38 Am. Rep. 821); or to his attending physician. *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372.

The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. *Barber v. Merriam*, 11 Allen, 324.

When such declarations are evidence, they may be proved by any witness who heard them; they 13 L. R. A.

Tuttle v. Detroit, G. H. & M. R. Co. supra; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505, 11 Am. & Eng. R. R. Cas. 188.

Bennett entered upon the service of defendant under a written contract and he cannot escape strict compliance with the terms to which he there consented.

Pennsylvania Co. v. Whitcomb, 9 West. Rep. 823, 111 Ind. 212, 31 Am. & Eng. R. R. Cas. 149; *Darracott v. Chesapeake & O. R. Co.* 83 Va. 288; *Wolsey v. Lake Shore & M. S. R. Co. supra*; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Sloan v. Georgia Pac. R. Co.* (Ga.) 44 Am. & Eng. R. R. Cas. 558.

It appeared that prior to the accident, plaintiff was warned that the engine by which he was injured was not as safe to switch with as the regular switch engines, and he was given special caution to exercise care in working with such engine. With warning of the increased danger, he saw fit to continue in the service, and if he was injured in consequence he cannot complain.

Beach, Contrib. Neg. 366, 367, and cases cited.

There was no negligence imputable to defendant for receiving and hauling over its road the union tank line car, because it had a shorter dead wood and draft iron than those in use upon appellants' car.

Whitman v. Wisconsin & M. R. Co. 58 Wis. 408, 12 Am. & Eng. R. R. Cas. 214; *Kelly v. Wisconsin Cent. R. Co.* (Wis.) 21 Am. & Eng. R. R. Cas. 638; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140.

The servant not only assumes risks ordinarily incident to the service, but assumes that he has capacity to understand the nature of the service and ability to perform it.

International & G. N. R. Co. v. Hester, 64 Tex. 401, 21 Am. & Eng. R. R. Cas. 535.

Mr. S. L. Glaspell, for respondent:

are of greater weight if made to and proved by a medical attendant. *Howe v. Plainfield*, 41 N. H. 135; *Perkins v. Concord R. Co.* 44 N. H. 222.

In all instances where it is pertinent to show the bodily or mental feelings of a person, the natural expressions of such feelings made at the time in question are, as to the facts in issue, regarded as original evidence. Such expressions usually furnish satisfactory evidence, and it is the province of the jury to determine what degree of credence should be accorded them. *Phillips v. Kelly*, 29 Ala. 623; *Hyatt v. Adams*, 16 Mich. 180; *Caldwell v. Murphy*, 11 N. Y. 416.

It is one of the natural concomitants of illness and of physical injuries, for the sick or injured person to complain of pain and distress. A complaint may be simulated, but it is generally real. Such evidence is admissible from the necessity of the case, and it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition. *Caldwell v. Murphy, supra*.

What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of things. *Aveson v. Kinnaird*, 6 East, 128.

For an extended argument in favor of the contrary view, see *Sullivan v. Oregon R. & Nav. Co.* 13 Or. 302.

Where cars standing on a curve require additional and safer appliances than when on a straight track it is negligence not to provide them.

Cincinnati, I. St. L. & C. R. Co. v. Roesch, 126 Ind. 445.

Whether Bennett should have known and appreciated the danger was a question of fact properly submitted to the jury.

Hungerford v. Chicago, M. & St. P. R. Co. 41 Minn. 444, 41 Am. & Eng. R. R. Cas. 269; *Lawless v. Connecticut River R. Co.* 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398; *Kane v. Northern Cent. R. Co.* 128 U. S. 91, 32 L. ed. 839; *Thomp. Neg. pp.* 1015, 1239; *Williams v. Northern Pac. R. Co.* 3 Dak. 168; *Dorsey v. Phillips*, 42 Wis. 583, 599; *Mares v. Northern Pac. R. Co.* 3 Dak. 336, 341, 123 U. S. 710, 31 L. ed. 296; *Herbert v. Northern Pac. R. Co.* 3 Dak. 38, 55, 56, 116 U. S. 642, 29 L. ed. 755.

The testimony as to exclamations of pain was admissible.

Matleson v. New York Cent. R. Co. 35 N. Y. 487; *Perkins v. Concord R. Co.* 44 N. H. 223; *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 641, 6 Am. & Eng. R. R. Cas. 421; *Cleveland, C. C. & I. R. Co. v. Newell*, 1 West. Rep. 890, 104 Ind. 264; *Yeatman v. Hart*, 6 Humph. 375; *Eckles v. Bates*, 26 Ala. 655; *Kent v. Lincoln*, 33 Vt. 592; *State v. Geddicke*, 43 N. J. L. 86. See note to *Louisville & N. R. Co. v. Brice* (Ky.) 28 Am. & Eng. R. R. Cas. 563.

A rule must be promulgated in good faith and must be practicable.

Pennsylvania Co. v. Whitcomb, 9 West. Rep. 823, 111 Ind. 212.

Promptness and celerity in the discharge of his duty is expected and required of a switchman, and it is generally held that he has a right to assume that the master has supplied safe cars and coupling appliances.

Goodrich v. New York Cent. & H. R. R. Co. 5 L. R. A. 750, 116 N. Y. 398, 41 Am. & Eng. R. R. Cas. 259; *King v. Ohio & M. R. Co.* 9 Biss. 278, 8 Am. & Eng. R. R. Cas. 118.

The rule says: "Coupling by hand is strictly prohibited. Use for guiding the link, a stick or pin."

The testimony showed without contradiction that a stick could not be used in setting a pin, and that even where a stick is used in guiding the link that it is necessary for the brakeman to get between the ends of the cars. The ostensible object of the rule is to save the hands of the men from being caught between the draw-bars, and where as in this case the injury results from the man's body being caught between the cars the rule is immaterial.

Reed v. Burlington, C. R. & N. R. Co. 73 Iowa, 176.

Again, the rule was never observed in the yard and its constant violation must have been known to defendant. Under such circumstances silence gives consent.

Sloan v. Georgia Pac. R. Co. (Ga.) 44 Am. & Eng. R. R. Cas. 553; *Thomp. Neg. p.* 989.

Care must be taken to note the distinction between a vice common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a 13 L. R. A.

particular car, such as a defective draw-bar, of which the brakeman may have had no knowledge.

Where the coupling apparatus of a particular car is too short the company is liable.

Toledo, W. & W. R. Co. v. Fredericks, 71 Ill. 294; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 300; *Missouri Pac. R. Co. v. Calbreath*, 66 Tex. 526.

The duty of inspection applies to foreign cars as well as to those owned by the railroad company and the use of such cars with defective coupling apparatus is negligence.

Shearm. & Redf. Neg. § 196; *Gottlieb v. New York, L. E. & W. R. Co.* 1 Cent. Rep. 728, 100 N. Y. 462; *O'Neil v. St. Louis, I. M. & S. R. Co.* 9 Fed. Rep. 387; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 213, 11 Am. & Eng. R. R. Cas. 193; *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398, 41 Am. & Eng. R. R. Cas. 259; *Bomar v. Louisville, N. & S. R. Co.* 42 La. Ann. 983; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 44 Am. & Eng. R. R. Cas. 523.

It was the duty of the defendant to discover and remedy the defect in the car.

Herbert v. Northern Pac. R. Co. 116 U. S. 654, 29 L. ed. 760.

Bennett was not familiar with engine 29. It had only been in use by him part of two days. He was used to the switch engines with round corners. It is negligence to use for freight trains an engine with a goose-neck equipment for passenger service.

Galveston, H. & S. A. R. Co. v. Garrett, 73 Tex. 262; *Hungerford v. Chicago, M. & St. P. R. Co.* 41 Minn. 444, 41 Am. & Eng. R. R. Cas. 269.

Whether the use of an engine for switching with a draw-bar so low that it would pass under the draw-bar on a car is negligence or not is a question for the jury.

Lawless v. Connecticut River R. Co. 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96.

Corliss, Ch. J., delivered the opinion of the court:

The circumstances under which plaintiff was injured we think warranted the jury in finding that the defendant's negligence was one of the proximate causes of the damage which the plaintiff suffered. He was an employé of the defendant, acting as switchman. The first important fact in the history of the accident was the stepping of the plaintiff upon the foot-board of a switch-engine to ride down upon it to a flat-car standing upon a curved switch, for the purpose of aiding in coupling the engine to the car in order to transfer it to another track. The car did not belong to defendant, but was owned by the Union Tank-Line Company. This fact is of no moment, however, as the defendant was bound to inspect this foreign car the same as one of its own cars. *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398; *Gottlieb v. New York, L. E. & W. R. Co.* 100 N. Y. 462, 1 Cent. Rep. 728; *International & G. N. R. Co. v. Kernan*, 78 Tex. 294, 9 L. R. A. 703; *Bomar v. Louisiana, N. & S. R. Co.* 42 La. Ann. 983; *Fay v. Minneapolis & St. L.*

R. Co. 30 Minn. 231; *O'Neil v. St. Louis, I. M. & S. R. Co.* 9 Fed. Rep. 337; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 44 Am. & Eng. R. R. Cas. 523; *Gutridge v. Missouri Pac. R. Co.* 94 Mo. 468, 18 West. Rep. 644.

It was defendant's duty to make this inspection before incorporating the car into one of its trains. More than sufficient time had elapsed since receiving the car to enable it to perform this duty, as the accident occurred in Jamestown, in this State, a considerable distance beyond the point where the car must have first come into its possession. It had been long enough in its custody to be carried to its destination and unloaded, as it was standing empty upon the switch at the time plaintiff was injured. There is no proof that the car was ever inspected. The defect was of such a nature that the exercise of reasonable care in making an inspection must have disclosed the defect. Therefore, whether the car was or was not inspected, there was sufficient to justify a verdict that the defendant had been careless in the discharge of its duty to use reasonable care to furnish its employes with safe appliances of every kind, and keep them in safe condition. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755. This is one of the master's duties, and the servant upon whom the master devolves its performance represents the master in that respect, and is not in the discharge thereof a fellow servant of the employé injured. *Northern Pac. R. Co. v. Herbert, International & G. N. R. Co. v. Kernan*, and *Fay v. Minneapolis & St. L. R. Co. supra*; *Condon v. Missouri Pac. R. Co.* 78 Mo. 567; *Busby v. New York, L. E. & W. R. Co.* 107 N. Y. 374, 10 Cent. Rep. 238; *Ell v. Northern Pac. R. Co.* (N. Dak.) 48 N. W. Rep. 222.

When plaintiff stepped upon the foot-board of the engine, it appears to have been a short distance from the car, and was backing down towards it slowly. Plaintiff stood upon that portion of the foot-board which was on the short side of the curve of the switch. On the other side, standing also on the foot-board, was the foreman of the switching crew. He guided the link into the opening, while plaintiff reached over to the flat-car to pick up a pin lying there, for the purpose of using this pin to complete the coupling. While in this position he was squeezed between the locomotive and the car, and injured, because, as the evidence demonstrated, there was too little space between them, owing to the undue shortness of the draw-bars both of the car and of the engine. He rests his right to indemnity upon this conduct of defendant in permitting a car with so short a draw-bar to be placed upon its track for use, and in augmenting the danger by bringing it into connection with an engine whose draw-bar was likewise, as appears from some of the evidence, much shorter than the draw-bars in ordinary use. Each of these draw-bars was, according to some of the evidence, so much shorter than those in common use that we are inclined to the view that the jury were justified in holding the defendant negligent on this account. Nor can it be said that the 13 L. R. A.

risk attending the use of such short draw-bars—particularly their use in connection with each other—was one of the ordinary risks of the employment, in the usual sense of that phrase. The evidence discloses that they were so short that when their ends came together there was only about ten inches between the end of the car and of the locomotive, whereas the usual space, according to the evidence, is from about twenty-four to thirty inches. To so diminish this usual standing room that an employé is almost sure to be caught when in the discharge of his duty between a heavy standing car and an engine whose momentum, because of its weight, is tremendous, however slow its speed, would seem to be some evidence of negligence. If the space is too narrow for the body, serious injury is almost inevitable in case the servant is caught. There is respectable authority for the proposition that these facts warrant a finding of negligence. *Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill. 294; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 662; *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 800; *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 526.

Assuming that the jury were justified in finding the defendant guilty of negligence, it remains to be considered whether the plaintiff was not guilty of contributory negligence as a matter of law. The question arises not under ordinary circumstances. The defendant appears expressly to have imposed upon plaintiff duties in addition to those which the law would imply from an ordinary contract of employment of a switchman. At the time the plaintiff entered into the service of the defendant, the latter presented to plaintiff for signature certain regulations, and plaintiff, in answer to the question printed thereon, "Have you read and do you understand the following extract from the book of rules of the Northern Pacific Railroad Company?" replied in his own handwriting: "I have read and understand them." So far as they are here material, these rules are as follows: "Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars and engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employes are enjoined before coupling cars or engines to examine so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yard-master or conductor. Sufficient time is allowed, and may be taken by employes, in all cases to make the examination required." Our first concern is to ascertain the true scope of this regulation. It will hardly be claimed that it was the purpose of defendant to impose upon the plaintiff all the duties of a car inspector, so far as the proper discharge of such duties were essential to the protection of the plaintiff. Such an interpre-

tation would in effect exempt the defendant from liability for its own negligence, however gross. The same facts which would convict the defendant of carelessness would, under such a view of the rule, likewise convict the plaintiff of contributory negligence in every instance. The employer would thus save itself from liability, although negligent in the discharge of the duties of a master. It is an elementary rule of construction that the courts shrink from so interpreting the language employed by a common carrier as to exempt it from the consequences of its own negligence. No such interpretation will be adopted, unless by the use of the word "negligence," or by other explicit language, the court is driven to such view. Then the provision so exempting from negligence is often struck down as opposed to public policy. (Whether the doctrine relates to an employé as well as to the public it is not necessary to decide.) It would be unreasonable to give the rule this construction. It would not be practicable for one employed in coupling cars to devote the same amount of time to and exercise the same degree of care in the inspection of the apparatus employed in the coupling of cars, and of such parts of the car as are immediately connected therewith, as a car inspector must. To exempt the Company from liability, something more than a short examination must be made by the car inspector. There may be obscure defects which the exercise of due care renders it imperative he should discover, and for his failure to discover and remedy which the Company would be responsible; and yet for the master to insist that a trainman or a switchman should be held to the obligation of making such an investigation as would result in their disclosure would seriously cripple the power of the Company to handle and ship the freight intrusted to it. It would be an unreasonable and impracticable requirement that all the dangers to an employé which a proper car inspection should bring to light should be discovered every time two cars are coupled together, or one car is coupled to a locomotive. It would be exacting of the trainman or the switchman more onerous duties than those imposed upon the expert car inspector. The company would require the less expert servant to discover at his peril a defect which the more expert employé had failed to detect. With less skill in such matters, and less time to investigate, it would be a gross wrong to allow the master to dictate to his servant the condition that he would have no redress for injury occasioned by the master's carelessness because he, the servant, had not complied with a regulation which it would be impossible for him to observe. But it is within the domain of possibility for the employé to obey this rule, when reasonably construed. There are defects which will appear when extra care is used. We think the reasonable construction of this rule is that more than ordinary care must be exercised by the employé; that he may not rely implicitly upon the uniform discharge by the master, through his servants, of the duty of using ordinary care in furnishing proper and safe appliances

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and machinery, and in keeping them in repair, and that he must in some measure be on his guard against injury from the occasional negligence of those who are charged with the performance of the master's duties to his employés. No matter what degree of care is exercised in the selection of the servants by whom these master's duties are to be discharged, negligence will sometimes characterize their conduct. Said the court in *Smith v. Potter*, 46 Mich. 258: "When a brakeman handles any car, he knows that there is at least a possibility that he may be injured unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy of the persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur. And he is also bound to know, as all men know, that it is impossible for employés to completely guard against it."

It would be contrary to sound policy to suffer the master to exonerate himself from liability in all cases, even by agreement with the servant. But there are defects resulting from the careless performance of the master's duties, so patent that it is very reasonable for the master to charge an employé with the duty of discovering such defects at his peril. Even in the absence of any regulation, the servant is often held accountable for his failure to guard against such defects. In this case the regulation but augmented this obligation. It called the servant's attention to the fact that the very difficulty which occasioned the injury sometimes existed. It notified him that the coupling apparatus of cars and engines were not uniform in size; this embraces differences in length. It apprised him of the dangers of the work; enjoined upon him the duty of examining so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus; prohibited him from placing in the train any car with a defective coupling; and, that the rule might be faithfully obeyed by the servant, it explicitly granted to him ample time to observe its behests. The language is unmistakable: "Sufficient time is allowed, and may be taken by employés in all cases, to make the examination required." It was insisted at the bar of this court that this rule was not ordained in good faith; that it was never expected that an employé would observe it; and that any servant who took sufficient time to follow and obey its requirements must inevitably look for discharge.

On what principle this court is asked to attribute a Machiavellian policy to the defendant, we are at a loss to determine; and, should we find that only grasping self-interest without one touch of humanity was the motive for this rule, still we must adjudge that its grant of sufficient time to make the examination enjoined was written in good faith, when the rule receives, as we believe it was the purpose of the defendant that it should receive, a reasonable construction. In the light of such an interpretation of it, it is obvious that the use of this time by the

servant will not seriously discommode the master or delay the shipment of its freight. And, on the other hand, the master has a deep interest in the safety of the servant; for, no matter how perfect the former's defense to a claim for damage, the making of that defense is always attended with expense. Unadulterated selfishness would prompt the adoption of a regulation, the observance of which would save such expense, while not materially reducing the servant's efficiency or affecting the volume of work he can perform. It is without force to assert that the master would discharge an employé who would take the necessary time to make the required examination. Should he discharge the servant before his term of employment had expired, for no other reason, the law would give the servant redress; and, if no time of employment is prescribed, it is the master's legal right, as it is the legal right of the employé, to terminate the relation at any time, without any excuse at all, or for any reason, however unjustifiable in ethics. We would not, however, be understood as asserting that the master could insist upon a rule when the master's conduct in the discharge of its employés, or in any other manner, indicated a purpose not to accord to the latter the necessary time without which the master's command to the exercise of a higher degree of care could not be obeyed. Its actions must not belie its words. This record discloses no such condition of affairs. Neither the plaintiff nor any other employé of the defendant has been discharged, or threatened with discharge, because he sought in good faith to comply with this regulation, and took the necessary time for that purpose. Nor are we confronted with the difficult question as to the rights of the plaintiff, had someone in superior authority commanded a disregard of the rule; neither was the press of business such that a full observance of its behests was not practicable. There was no exigency. The plaintiff, with the defects in full view,—one immediately beneath his gaze, and one before his eyes only a short distance away,—moved slowly towards his fate, oblivious of danger, because, as is conceded, he took no precautions to discover an open peril. He seeks to excuse his omission to examine the length of the draw-bar by his statement, upon which the verdict of the jury has set the seal of truth, that he was engaged in looking for a pin with which to make the coupling. The pin could have been found as well after he had observed the defendant's rule, that he must examine to ascertain whether there was any danger from the size of the draw-bars of the engine and of the car. The same argument would exonerate him from blame had the coupling apparatus and the dead-woods been entirely wanting. He testified that he knew every road had different cars, with different length draw-heads; that prior to the accident he did not notice the length of the draw-heads of the car and of the engine; that, if he had known of the undue shortness of these draw-heads, he could have escaped injury, as there was plenty of time for him to have stepped down and out from the end of the foot-board 18 L. R. A.

upon the ground, so as to clear himself from the flat-car before he was hurt; and that he knew that, if two cars met upon a curve, the distance between them would be shorter on the inside than on the outside of the curve. It is clear that plaintiff made no effort to obey the rule requiring him to make an examination of the coupling apparatus. He does not pretend to have obeyed it. He disavows any such obedience. That an observance of its requests, giving it a reasonable interpretation, would have saved him from injury, cannot admit of doubt. The defects were patent: the difference between the combined lengths of these draw-bars and the combined lengths of those in ordinary use was fourteen to twenty inches. The ratio was about ten to thirty. One was directly beneath his gaze; the other was almost directly before his eyes. There was time for inspection while the engine was moving slowly backwards. Further time might have been taken, if necessary, under the rule. To fail to discover, under these circumstances, that these draw-bars were only about one-third the usual length, must be negligence, particularly in view of the express warning contained in the rule, the injunction to examine so as to know the kind and condition of the coupling apparatus, and the granting of sufficient time for that purpose. When warned of the danger generally, and afforded time to pause and examine whether it existed in the particular case, the servant may not, with thoughtless imprudence, rush headlong upon peril at the expense of his master.

Said the court in *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400, after quoting a regulation of the defendant very similar to the one in the case at bar: "It was plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to anyone looking, one or two seconds would have furnished all the time needed to satisfy himself had he been acting under anyone else's orders; but, as he had personal direction of the engineer's movements and could move when he pleased, the case, as he presents it, was an aggravated one, of the grossest carelessness, for which he, and no one else, was responsible."

Said the court in *Darracott v. Chesapeake & O. R. Co.*, 83 Va. 288: "At all events, the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune: that is to say his negligence, or what is the same thing, his failure to use reasonable and proper care and caution was the proximate cause of the injury complained of. The action is not therefore maintainable."

In *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, there was no rule giving warning, enjoining examination and according

sufficient time for that purpose; and yet it was held fatal to recovery that the plaintiff, a brakeman, had failed to notice that there were double dead-woods on the cars he was coupling, instead of a single dead-wood on each, it being contended that it was negligence for the defendant to receive and transport cars equipped with double dead-woods. Said Judge Cooley: "If, therefore, a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. The best notice is that which a man must of necessity see, and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it."

In a similar case, *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253, the court said: "In this case the danger consisted in the brakeman being caught between the two dead-woods as they came together. The dead-woods were in plain sight. They were really the most prominent objects on the end of the cars. The plaintiff had a full opportunity of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the draw-bar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car, at a distance of twenty feet, with its dead-wood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the dead-woods and draw-bar thereon as well as if he had made the coupling a thousand times before. He could not fail to see it, if he looked at all." See also *Kelley v. Wisconsin Cent. R. Co.* (Wis.) 21 Am. & Eng. R. Cas. 633; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Brewer v. Flint & P. M. R. Co.* 56 Mich. 620; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173.

In several of the cases referred to, the master had not, as in the case at bar, imposed upon the servant the duty of extra care, nor had he expressly granted to him sufficient time to enable him to examine the coupling apparatus before making the coupling. It must further be remembered that plaintiff was on the short side of the switch. He testified that he knew that the distance would be shorter on the inside than on the outside of the curve. But he seems to have paid no attention to this obvious law. Being upon the shorter side, it was all the more important for him to ascertain whether there would be sufficient room between the car and the engine for him to stand with safety on the foot-board in making the coupling. It does not seem to be strenuously insisted that a charge of negligence can be predicated upon the curve of the switch. There is no evidence of the degree of the curve, and there is eminent authority for the proposition that,

unless the curve is abnormally sharp, the courts will not regard it as evidence of carelessness. *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114. The language of the court in this case, both on this point and on the further point of contributory negligence, because the injured servant stood upon the inside of the curve in making the coupling, is very applicable here: "The perils in the present case arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars passing each other when the cars were brought together. It was his duty to look out for this, and avoid it. The danger existed only on the inside of the curve, and this must have been known to him." On the question whether it was negligent to build a switch with so sharp a curve, the court observed: "We have carefully read the evidence presented by the bill of exceptions, and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved, much less that it should be left to the varying opinion of juries to determine such an engineering question." It is true that in the *Tuttle Case* there was no one standing on the foot-board on the outside of the curve, as in the case at bar; but, if the brakeman was bound in the *Tuttle Case* to know that it was dangerous to stand on the inside when there was no one on the outside, surely the plaintiff in this case was bound to know that his position was one of danger, although there was someone standing on the outside. The fact that another stood in one of the places of safety did not render the place occupied by plaintiff any less dangerous or obscure his sense of that danger. The other place of safety was outside of the space between the car and the engine, upon the ground. Perhaps he might not have found room with the foreman on the outside of the curve on the foot-board, but he might have gone ahead, and set the pin, and, if the jar of the collision had not been sufficient to cause the pin to fall down into its place, then, he could have inserted it in the aperture with his hands without the slightest danger, or, at least, he then would have plainly seen the danger of going between the engine and the car on the short side of the curve, and could have completed the coupling on the long side. The plaintiff has sustained severe, and perhaps permanent, injuries. His case appeals to our sympathy, and he may be a not unworthy object of charity, but justice will not seize his master's property to compensate him for the consequences of his own imprudence. There seems to be marked una-

nimity on the point that, where disobedience to or disregard of a reasonable rule or regulation of the master contributes to the injury, there can be no recovery. *Sloan v. Georgia Pac. R. Co.* (Ga.) 44 Am. & Eng. R. R. Cas. 553; *Cahill v. Hilton*, 106 N. Y. 512, 9 Cent. Rep. 255; *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400; *San Antonio & A. P. R. Co. v. Wallace*, 76 Tex. 636; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 640; *Deeds v. Chicago, R. I. & P. R. Co.* 74 Iowa, 154; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 487, 4 L. R. A. 173; *Sedgwick v. Illinois Cent. R. Co.* 73 Iowa, 158; *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 227; *Pennsylvania R. Co. v. Whitcomb*, 111 Ind. 212, 9 West. Rep. 823, 31 Am. & Eng. R. R. Cas. 149.

Plaintiff may not ask us to speculate whether, by the exercise of due care, he would have discovered the peril, and avoided the danger, had he made the examination which the rules of the company required. We think an observance of this reasonable rule would have saved him from injury. If he had stopped and looked, and then failed to discover the peril that menaced him, possibly a different case might have been presented. But this is doubtful. The exercise of proper care must have revealed the danger. We hold that this record discloses the fact that plaintiff's own negligence contributed to his injury, and the judgment and order denying the motion for a new trial must therefore be reversed, and a new trial granted.

A single question as to the admissibility of certain evidence remains to be considered. The wife of plaintiff was allowed, against the defendant's objection, to testify to exclamations of pain made by the plaintiff on waking up during the night. She said: "Well, he has more than once woke up,—more than once in the night,—groaning; and I asked him what was the matter." The record discloses nothing further on this point. It does not appear that she testified touching his answer to her inquiry as to what was the matter with him. We are very clearly of the opinion that this evidence was admissible, both on principle and under the great weight of the adjudications. There was no attempt to prove a narration by him of a

past transaction. He was not stating that the night before he had suffered pain. He was making no communication whatever to her. It was only the involuntary expression of suffering. True, it might have been simulated, but that was a question for the jury. The evidence of the physician relating to the extent of his injuries must have rested in some degree upon statements of the plaintiff to him, and therefore upon what is more truly hearsay than exclamations of pain. The testimony of the medical expert may often be founded mainly upon such interested declarations of the patient, and yet its competency cannot be seriously questioned. On the other hand, the rule allowing the proof of the expression of present pain will rarely result in imposition upon juries or other triers of questions of fact. Other facts in the case will generally aid them in determining how much of real and how much of fictitious pain the expression of suffering shadows forth. We think the true rule is stated in *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264-269, 1 West. Rep. 890: "Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of an inquiry as to its severity, effect, and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received or subsequently to it, are admissible in evidence [citing many authorities]. Expressions of present existing pain, and of its locality, are exceptions to the general rule, which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not, is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made." See also cases cited in opinion, and *State v. Geddicke*, 43 N. J. L. 86; *Eckles v. Bates*, 26 Ala. 655; *Yeatman v. Hart*, 6 Humph. 374; *Hagenlocher v. Coney Island & B. R. Co.* 99 N. Y. 136.

Reversed, and new trial ordered.

All concur.

NEW YORK COURT OF APPEALS.

Philo L. MILLS *et al.*

v.

J. Foster PARKHURST, Assignee, etc., of
Henry W. Perine *et al.*

Reuben O. SMITH *et al.*, Appts.

(.....N. Y.)

**Bringing and prosecuting an action to
set aside as fraudulent his debtor's**

assignment for the benefit of creditors, is not such an election of remedies as will debar a creditor from sharing in a distribution of the assigned estate made pending such suit.

(March 20, 1891.)

APPEAL by Reuben O. Smith and the First National Bank of Towanda, Pennsylvania, from a judgment of the General Term of the Supreme Court, First Department, affirm-

NOTE.—*Election of remedy.*

The doctrine of election means that where two inconsistent rights are presented to the choice of a party, by a person who manifests a clear intention that he should not enjoy both, he must accept or
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reject one or the other; and so one cannot take a benefit under an instrument and then repudiate it. *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 686.

Separate remedies, one legal and the other equitable, are inconsistent and cannot be pursued, being against the policy of the law. One party will not

ing a judgment of the Special Term for New York County denying their right to share in the distribution of the insolvent estate of Henry W. Perine. *Reversed.*

Statement by Gray, J.:

The appellants, being creditors of Henry W. Perine, an insolvent debtor, upon judgments against him, brought an action to set aside an assignment made by Perine for the benefit of his creditors, as fraudulent, in which they were eventually defeated. Before the action was commenced they had made proof of their claims before the assignee. The deed of assignment provided for certain preferences in payments from the assigned estate, but these appellants were not among the creditors preferred. The present action was brought on behalf of the creditors to compel the assignee to account and for a distribution of the assets in his hands. A reference was therein ordered to a referee to ascertain and to report the amount due each of the creditors who should come in under the order and seek the benefit of this action. Appellants appeared by counsel before the referee, but protesting and giving notice that they waived no rights or remedies theretofore exercised, or that might thereafter be insisted upon. At that time an appeal was pending to this court from the judgment in their action, which upheld the validity of the assignment, and objections were made by other creditors to the allowance by the referee of the appellants' claims, upon the ground that they were proceeding in hostility to the assignment in prosecuting their other action. The referee, however, allowed the claims, on the theory that by appearing and refusing to withdraw their claims there was an election to participate in the accounting. Upon the coming in of the referee's report the court, at special term, sustained the exceptions of the creditors to the allowance of the appellants' claims, on the ground stated, and the court at general term affirmed that decision. From the judgment of affirmance the appellants have appealed to this court.

Mr. Benjamin S. Harmon, for appellants:

The doctrine of election is not applicable in the premises.

The action brought by Reuben O. Smith to set aside the assignment herein was not in disregard of the assignment, but distinctly recognized its existence, while seeking, by judicial proceedings, to establish its invalidity.

be allowed to vex and harass another, with two different and inconsistent proceedings, but will be put to his election. *Livingston v. Kane*, 3 Johns. Ch. 224, 1 L. ed. 600; *Butler v. Wehle*, 6 Thomp. & C. 242, 4 Hun, 56.

If the plaintiff institute separate actions he cannot carry both to judgment and satisfaction; but may be compelled by order of the court, at any stage of the proceedings, to elect which he will further prosecute. *Connihan v. Thompson*, 111 Mass. 272; *Rogers v. Vosburgh*, 4 Johns. Ch. 84, 1 L. ed. 772. See note to *Terry v. Munger* (N. Y.) 8 L. R. A. 216.

A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. See note to *Crossman v. Universal Rubber Co.* (N. Y.) 13 L. R. A. 91.

13 L. R. A.

See *Woodward v. Harlow*, 28 Vt. 338; *Jewett v. Woodward*, 1 Edw. Ch. 195, 6 L. ed. 103; *Sternfeld v. Simonson*, 44 Hun, 429.

The bringing of an action to set aside the assignment herein, either was, or was not, an election at the time, upon the part of appellants, such as to preclude them from ever after sharing thereunder in the assigned estate.

Fowler v. Bowery Sav. Bank, 4 L. R. A. 145, 118 N. Y. 450.

That it was not such an election at the time is conceded, and if not, then how can the mere pendency of the action, its nature remaining the same and no substantial benefit having been derived therefrom afterwards have that effect.

If any election became necessary at the time of the proceedings before the referee herein, then appellants elected to share under the assignment.

Creditors may elect to share even under a void assignment, the assignment as to them being, in such case, merely voidable.

Hone v. Henriquez, 18 Wend. 240.

This being so, it follows that merely asserting the invalidity of an assignment, or bringing an action to have its validity or invalidity judicially determined, will not preclude a creditor from sharing under the assignment when the question as to whether or not he will so share thereafter squarely presents itself.

Woodward v. Harlow, *supra*. See *Swanson v. Tarkington*, 7 Heisk. 612; *Busby v. Finn*, 1 Ohio St. 409; *Maynard v. Maynard*, 4 Edw. Ch. 711, 6 L. ed. 1029; *Loney v. Bayly*, 45 Md. 447; *Pratt v. Adams*, 7 Paige, 615, 4 L. ed. 800.

The appellants elected to share under the assignment before the bringing of the action to set that assignment aside, and all subsequent acts upon the part of said appellants, inconsistent with said elections, are of no effect.

The proofs of claims never having been withdrawn from before the assignee, nor the dividend declared and paid by him refunded, there was a conclusive election upon the part of appellants to become parties to, and to ratify and accept, said assignment.

Rupalee v. Stewart, 27 N. Y. 310; *Hone v. Henriquez*, *supra*.

An election once made is made forever, and if appellants elected to claim under the assignment before the bringing of proceedings hostile to that assignment, then the latter proceedings were without effect, and the said election, with all its advantages or disadvantages, remains unchanged.

An action to set aside an insolvency discharge is not the proper remedy of a creditor seeking to enforce his right to the agreed percentage under a compromise agreement of creditors, but he should sue for the agreed percentage. *Drake v. McQuade* (N. H.) July 25, 1890.

A creditor who has availed himself in any mode of an assignment made by his debtor, or of the benefits to be derived therefrom, bars himself from taking any action to defeat the purpose of the assignment as a transfer of the property of the assignor. *Thompson v. Fry*, 51 Hun, 236.

A party should not enjoy an advantage under an instrument and at the same time insist on its invalidity. *Babcock v. Dill*, 43 Barb. 577; *Haydock v. Coope*, 58 N. Y. 68. See note to *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 145.

Morris v. Rexford, 18 N. Y. 552; *Moller v. Tuska*, 87 N. Y. 166; *Fowler v. Bowery Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450; *Kinney v. Kiernan*, 49 N. Y. 164.

Mr. Humphrey McMaster, for respondents:

The appellants, by bringing and prosecuting to judgment their action to set aside the assignment as fraudulent, have elected to repudiate the assignment, and cannot share in the distribution under it.

Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting remedies.

Fowler v. Bowery Sav. Bank, 4 L. R. A. 145, 118 N. Y. 457; *Morris v. Rexford*, 18 N. Y. 552; *Bunker Fertilizer Co. v. Cor*, 9 Cent. Rep. 160, 106 N. Y. 555; *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387; *Terry v. Munger*, 8 L. R. A. 216, 121 N. Y. 161.

There would seem to be no good reason why a party should not be held as strictly to an election to accept or repudiate an assignment as in any other case calling for an election between inconsistent remedies.

See *Sternfeld v. Simonson*, 44 Hun, 490; *Iselin v. Henlein*, 16 Abb. N. C. 78; *New England Bank v. Lewis*, 8 Pick. 113.

When a creditor by an attachment suit takes property from the assignee and sells it, on giving bonds to the assignee, such creditor is precluded from claiming any benefit under the assignment.

Valentine v. Decker, 48 Mo. 583; *Geisse v. Beall*, 8 Wis. 367.

Having made his election, he is bound by it. *Moller v. Tuska*, 87 N. Y. 166; *Strong v. Strong*, 3 Cent. Rep. 48, 102 N. Y. 69; *Kennedy v. Thorp*, 51 N. Y. 174; *Iselin v. Cowee*, 52 N. Y. 90; *Iselin v. Henlein*, *supra*; *Acer v. Hotchkiss*, 97 N. Y. 397; *Terry v. Munger*, *supra*.

And if one makes an election between two inconsistent remedies, his failure to secure satisfaction, by means of the one he adopts, forms no legal reason for permitting him to resort to the other.

New York Firemen Ins. Co. v. Lawrence, 14 Johns. 55; *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Hughes v. Vermont Copper Min. Co.* 7 Hun, 678; *Goss v. Mather*, 2 Lans. 283, 46 N. Y. 689.

Gray, J., delivered the opinion of the court:

The first of the two questions which were presented relates to the right of the appellants to come in and share in the distribution of the assigned estate, and the argument against their right is that, in bringing and prosecuting the action to set aside the assignment as fraudulent, they had thereby elected to repudiate the assignment. The doctrine of election, which has been thus far successfully invoked in support of the argument, does not seem to be applicable to such a case, and no authority is found warranting its application. The learned justices, who considered the question at the special and general terms, were influenced in their conclusions by the supposition that these appellants were pursuing two remedies upon their claims against their debtor Perine, and that, though direct authority might be want-

ing upon precisely such a case, yet analogy with adjudged cases, which hold that inconsistent remedies may not be availed of or concurrently pursued, required the application of the doctrine of election in this instance. If the definition of the legal position taken by these appellants was correctly assumed below, we should have nothing to say, and could not add to their opinion. But we cannot agree with them in their view of the situation of the parties. The elements required to make out a case of election were wanting. The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. An extended citation of authorities illustrating the principle, in cases of breaches of contract, or of a duty imposed by the law, would be unprofitable here, because of many recent decisions of this court, and because not needed in the present discussion. Where parties are under some contract, or the case is one of a deed or of a will, an election is deemed to be made where there has been an acceptance of a benefit, under the one or the other, and the party benefited will not be heard to raise the question of validity, nor to insist upon some other, but inconsistent, legal rights, however well founded. So it is conceivable that the rule may be so extended as to apply to the case where a creditor comes in under an assignment by his debtor for the benefit of creditors, in such way and with such attitude as should preclude him from thereafter assailing its validity. But how can the converse of the proposition be sustained? The assignment by an insolvent debtor is involuntary as to creditors in the application of his assets to their claims, and, it may be, unequal as well as unjust as to some, and it is of no effect if fraudulently made, within the meaning of the law. Shall the creditor, for endeavoring to set it aside on legal grounds, if unsuccessful, be held incapable of receiving his share of the debtor's assets? Such a rule could not be based upon equitable principles. It would come so near to lending aid and encouragement to attempts at fraudulent assignments as to render its adoption impossible. The assignment is not like a gift of property upon conditions open to the acceptance or rejection of the donee. It is a payment by the assignor of his debts after his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity in law upon their assent. It is a means or mode which the Statute permits to be adopted by an insolvent debtor for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the prescriptions of the Act, his conveyance to an assignee, for the purposes stated

therein, will stand and be effective. If the distribution is to be made unequally among the creditors, and some are preferred to others in payment, the assignment is not viewed by the courts with any favor, and is only tolerated and upheld when all conditions are met for the prevention of fraud. *Nichols v. McEwen*, 17 N. Y. 22.

The debtor's proceeding sets at naught whatever elements of superiority the non-preferred creditor's claim may possess, as it may nullify the results of any diligent effort on his part to secure his debt. It compels him to submit to inequality in payment, and to take his *pro rata* share of the estate, unless he discovers and can establish its invalidity. But if he believes himself possessed of proof invalidating the assignment he is not debarred from attacking it, and endeavoring to set it aside. He is then but insisting upon his general right to be paid his judgment in the order of its priority, and on what principle should his endeavor in that direction prevent him from proving and establishing his right, in any event, to his share in the assigned estate, which the assignee must be deemed to be holding in trust for him and all other creditors under the debtor's deed? The creditor may not feel any more hostility to the debtor's proposed distribution of his estate when he sues to annul it than he did before. The bringing of the suit is merely the hostility on his part pronounced in legal proceedings. The learned justice delivering the opinion at the general term conceded that, where an action to set aside the assignment had been brought, and was unsuccessful and terminated, an election would not be held to have taken place. How does the mere pendency of the action affect and change the situation? What is the attitude of the parties? The debtor has transferred his estate to another, upon the trust that he distribute it, in the manner provided in the deed, to and among his creditors. The assignee is a trustee, whose duty it is to make that distribution. A creditor's only alterna-

tive, if he is not contented to take what would thus come to him, is to endeavor to set aside the deed of assignment, if he deems himself possessed of the requisite evidence of its invalidity at law. If there is any election for him to make, it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignor and to avoid the assignment. We think, therefore, that this was not a case of election of remedies, and that, in endeavoring to set aside the deed of assignment, in order to render their judgments effective, the appellants were testing and contesting the legality and validity of their debtor's act and disputing its binding force upon them, as they had a legal right to do, and which was a course that recognized the debtor's deed, but alleged the existence of grounds for holding it voidable, and therefore not compulsory upon the creditor. It in no wise militated against the right of the appellants, if defeated upon that issue, to share in the assigned estate, on the basis of distribution provided in the debtor's deed to his assignee. The second question argued was whether the appellants, if entitled to share in the distribution of the assigned estate, could claim preference in payment under the assignment, as being individual creditors of Perline. With respect to that question, we agree with the decision of the court below denying that right. The indebtedness represented by their claims was clearly excepted by the terms of the deed of assignment, and they could only claim to share ratably with other creditors, after the payments previously directed.

So much of the judgment appealed from as affirmed the judgment disallowing the right of these appellants to share in the distribution of the funds in the assignor's hands should be reversed, and these appellants adjudged entitled to share with other creditors not preferred in the assignment. Costs to the appellants to be paid out of the estate in the assignee's hands.

All concur.

CALIFORNIA SUPREME COURT.

Franklin H. SMITH *et al.*, *Respts.*,
v.

PHOENIX INSURANCE CO. of Brooklyn,
New York, *Appl.*

(.....Cal.....)

1. One in possession of property under a contract to lease it at a fixed monthly

NOTE.—Contract; on whom loss falls in case of destruction by fire.

The question, On whom does the advantage or loss fall, resulting from events happening in the case of private contracts? is to be decided by the question whether or not the title had been actually accepted. *Wyvill v. Exeter*, 1 Price, 292; *Paine v. Meller*, 6 Ves. Jr. 349.

The whole question is, Who shall bear the loss occasioned by a *vis major*? And that depends much upon the question, Who was the proprietor when that loss was occasioned? *Mittelholzer v. Fullarton*, 6 Q. B. 689.

If all the buildings upon leasehold premises be destroyed by fire, the lessee is at the common law, nevertheless, liable for the full amount of the 13 L. R. A.

rental for five years and at the end of that time to purchase it at a designated price will not, before the expiration of the five years, be held to have entered under his contract to purchase for the purpose of enforcing specific performance against him, and in case the building is destroyed by fire within that time his obligation to purchase is at an end.

2. Letting a tenant into possession of

rent during the residue of the term (*Baker v. Holtzaffell*, 4 Taunt. 45); and if he has covenanted to repair, he must also rebuild. *Phillips v. Stevens*, 16 Mass. 238.

So if a fire occur after contract of sale, but before the conveyance is executed, the loss must be borne by the buyer. *Surd. Vend.* 291.

The seller is not bound to warrant the buyer against acts of mere force, violence and casualties, nor against the acts of the sovereign, and this was the rule under the French and Roman law. 1 *Domat*, Civil Law, pt. 1, bk. 1, title 2, § 10, art. 4.

"After the bargain is completed, the purchaser stands to all losses." *Digest*, 2, 14, 77; *Cooper's Justinian*, 615.

In such case, the maxim *Res perit suo domino* ap

property under an agreement to rent the same for five years and then to buy it is not prior to the expiration of the five years, a violation of the condition of an insurance policy thereon, making the policy void in case of a transfer of title or possession of the property, where provision is made in the application for occupancy by a tenant.

(September 21, 1890.)*

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Haggin, Van Ness & Dibble, for appellant:

If the agreement between the plaintiff and Stewart, and Stewart's entry and possession thereunder, operated as a change of either title or possession, the policy is void.

Title is the "means whereby the owner of lands hath the just possession of his property, and a perfect title consists of actual possession under a right thereto based upon a right to the property."

2 Bl. Com. chap. 18.

The manner of acquiring title is by descent or purchase.

Id. pp. 199, 200.

The term "purchase" includes every mode of acquisition of estate known to the law, except that by which an heir, on the death of his ancestor, becomes substituted in his place as owner by operation of law.

2 Bouvier, L. Dict. title *Purchase*.

The term "deed" includes an agreement.

1 Bouvier, L. Dict. title *Deed*.

The possession of Stewart was more than that of tenant; he was in possession under a contract to convey, and this made him the equitable owner of the premises.

Fry, Spec. Perf. 3d ed. p. 633, § 635, and note 2.

The contract between plaintiff and Stewart operated as a change of title and consequent vitiation of the policy.

*A decision was reached and an opinion handed down in this case on March 10, 1890, which reversed the judgment of the court below. A rehearing was subsequently granted, and after deliberation the court reached the opposite conclusion and handed down the opinion given herewith, which makes the former opinion immaterial. [Rep.]

plies. *Meredith's Emérigon*, 418; *Paine v. Meller*, 6 Ves. Jr. 349, cited in *Osborn v. Nicholson*, 80 U. S. 18 Wall. 664, 20 L. ed. 665.

It is the established doctrine of equity that if a contract to purchase is to be completed at a given period, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to him from the date of the contract, and the money from that time as belonging to the vendor. *Harford v. Purrier*, 1 Madd. 533.

When the contract has been completely made, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains. *Inst. 1, iii, title 24, § 3; Pothier, Traité de Contrat de Vente*, pt. IV.

But where the contract is in its inception conditional, the transfer of the property to the purchaser takes place only on the performance of the 18 L. R. A.

Pelton v. Westchester F. Ins. Co. 77 N. Y. 605; *Davidson v. Hawkeye Ins. Co.* 71 Iowa, 532; *Semmelhaack v. Canada F. & M. Ins. Co.* 4 Mont. L. N. 205; *Germond v. Home Ins. Co.* 2 Hun. 540; *Johannes v. Standard Fire Office*, 70 Wis. 196; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; *Ramsey v. Phoenix Ins. Co.* 2 Fed. Rep. 429; *Laffan v. Naglee*, 9 Cal. 663; *De Rutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 63; *Doud v. Clarke*, 54 Cal. 48; *Peasley v. McFadden*, 68 Cal. 611; *Southern Pac. R. Co. v. Terry*, 70 Cal. 484; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Dennett v. Penobscot Fair G. Co.* 57 Me. 425, 2 Am. Rep. 58; *Smith v. Gage*, 41 Barb. 60, 2 Am. L. Reg. N. S. 488; *McKeehn v. Sterling*, 48 Barb. 331; *Moore v. Burrows*, 34 Barb. 173; *Adams v. Green*, Id. 176; *Richter v. Selin*, 8 Serg. & R. 439.

A contract to convey, accompanied by delivery of possession, operates as an equitable transfer of the title.

Baldwin v. Pool, 74 Ill. 97; *Fitzhugh v. Maxwell*, 34 Mich. 188; *Strickland v. Kirk*, 51 Miss. 799; *Den v. Dellinger*, 75 N. C. 300.

A title such as that of Stewart will support a warranty by the insured that he is the sole, entire, absolute and unconditional owner of the property.

1 Wood, Ins. § 88 et seq.; *Hough v. City F. Ins. Co.* 29 Conn. 10; *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Pa. 110; *Chandler v. Commerce F. Ins. Co.* Id. 228; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Swift v. Vermont Nat. F. Ins. Co.* 18 Vt. 313; *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 16; *Franklin F. Ins. Co. v. Crockett*, 7 Lea, 721.

Messrs. Barclay, Wilson & Carpenter, for respondents:

If Stewart was in possession as the tenant of the plaintiffs, on the first day of January, 1888, and remained in possession as tenant of the plaintiffs, until the destruction of the building, it is utterly incomprehensible that "he was more than a tenant."

The rule in equity that requires a specific performance in favor of a party who has made improvements, expended money, paid a part or the whole of the agreed price of property purchased in good faith from another, proceeds upon the idea that a failure to make such conveyance would be a fraud upon the purchaser. The application sought to be made of the rule in a court of law, in this case, by the appel-

condition, and until that event the property remains at the risk of the vendor. *Counter v. Macpherson*, 5 Moore, P. C. 83.

Personal property is, equally with real estate, the subject of conditional sale, and possession is to be construed as only prima facie evidence of its ownership. *Mount v. Harris*, 18 Medes & M. 185.

At law a failure of consideration in cases of contract is a sufficient ground for considering the contract as rescinded, and for maintaining the action for money had and received on the contract. *Lyon v. Annable*, 4 Conn. 350; *Pettibone v. Roberts*, 2 Root. 258; *Cloherly v. Creek*, 3 Harr. & J. 323; *Eames v. Savage*, 14 Mass. 423; *Davis v. Marston*, 5 Mass. 199; *Spring v. Coffin*, 10 Mass. 34; *Gillet v. Maynard*, 5 Johns. 86; *Raymond v. Beagnard*, 12 Johns. 274; *Wheeler v. Board*, Id. 363; *Putnam v. Westcott*, 19 Johns. 73; *Danforth v. Dewey*, 3 N. H. 79; *Boyd v. Aderson*, 1 Overt (Tenn.) 438.]

lant, would enable the insurance company, after the utmost good faith, on the part of the plaintiffs, in their application for insurance, payment of the premium, notice and proof of the loss, to refuse payment, and turn what was intended as a shield for the protection of honesty into a sword for its destruction.

If we admit, for the sake of argument, that the provision in the lease amounted to a sale of the premises, still the preponderance of authorities, as well as reason, shows that the Company cannot avoid payment on that account.

Washington F. Ins. Co. v. Kelly, 32 Md. 421. See also *Allen v. Mutual F. Ins. Co. in Harford Co.* 2 Md. 111; *Jackson v. Massachusetts Mutual F. Ins. Co.* 23 Pick 418; *Hitchcock v. Northwestern Ins. Co.* 26 N. Y. 68; *Strong v. Manufacturers Ins. Co.* 10 Pick. 40; *Stetson v. Massachusetts Mut. F. Ins. Co.* 4 Mass. 380; *Jackson v. Silvernail*, 15 Johns. 277.

A sale or assignment of the property will only defeat the recovery of the assignor in the policy, when and so far as it strips him of insurable interest.

3 Kent, Com. 261.

Where the insured had entered into an agreement for the sale of his insured property, but had not made the conveyance or received the purchase money, his interest in the property and policy was not thereby parted with so as to bar his right of action on the policy.

Perry County Ins. Co. v. Stewart, 19 Pa. 48; *Clinton v. Hope Ins. Co.* 45 N. Y. 454; *Kina Ins. Co. v. Jackson*, 16 B. Mon. 242; *Masters v. Madison County Mut. F. Ins. Co.* 11 Barb. 624; *Orrell v. Hampden F. Ins. Co.* 13 Gray, 481; *Trumbell v. Portage County Mut. F. Ins. Co.* 12 Ohio, 306; *Phillips v. Merrimack Mut. F. Ins. Co.* 10 Cush. 350; *Davis v. Quincy Mut. F. Ins. Co.* 10 Allen, 113; *Hill v. Cumberland Valley Mut. P. Co.* 59 Pa. 474; *Boston & Salem Ice Co. v. Royal Ins. Co.* 12 Allen, 381.

Beatty, Ch. J., delivered the opinion of the court:

In March, 1890, we made a decision in this case, reversing the judgment of the superior court with directions to enter judgment on the findings in favor of the appellant. 23 Pac. Rep. 383. After a rehearing of the case, and upon fuller consideration of the questions involved, we are satisfied that our former decision was erroneous and that the judgment of the superior court should be affirmed.

The action is upon a fire insurance policy. Plaintiffs had judgment in the lower court and defendant appealed from the judgment alone, claiming that upon the facts found the judgment should have been in its favor.

The policy in suit was issued in August, 1887, and the property insured consisted of a frame building designed for a hotel or boarding house. The defendant was advised by the papers accompanying the application for insurance—which, by the terms of the policy, are made a part of the contract—that the building was occupied, or to be occupied, by a tenant (no particular tenant being named) for hotel purposes, and it is found by the court, as alleged in the complaint, “that before said insurance was effected defendant had full knowledge that said building was built by plaintiffs for the

purpose of renting the same for a boarding and lodging house, and was to be occupied by the tenant of the plaintiffs: the said building not being at that time fully completed and furnished.”

After the insurance was effected and the building completed the plaintiffs, on December 24, 1887, by a written lease demised the insured premises to one J. D. Stewart, for a term of five years, at a fixed rent, payable monthly. The lease also contained stipulations binding the plaintiffs to put in certain furniture, consisting of carpets, cooking range, gas fixtures, etc., and binding Stewart to put in other necessary furniture. It was agreed that the building and furniture should be properly insured for the benefit of the parties as their interest might appear, and that Stewart, the lessee, should pay one half of the expense of insuring the building and the entire expense of insuring the furniture.

It was further agreed as follows: “Said party of the second part (Stewart) may at any time during said term of five years purchase said hotel, lots and premises for the sum of \$25,000 cash, and likewise purchase said carpets, gas fixtures and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots and premises on or before five years from this date for the sum of \$25,000, together with said carpets, gas fixtures and range at their cost price.”

The defendant had no notice of these stipulations for purchase and sale of the property. Under this lease and agreement Stewart entered into possession of the insured premises, and so continued until the destruction of the hotel by fire in April, 1888.

The plaintiffs thereafter, upon due notice and proofs of loss, demanded payment of the policy, which was refused by the defendant. Hence this action, which is defended on the ground of an alleged violation by plaintiffs of the following conditions of the policy:

“If the property be sold or transferred (in whole or in part) or upon the commencement of foreclosure proceedings against or a sale under a deed of trust or the existence of a judgment lien or the issue or levy of an execution against any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession (except in case of succession by reason of the death of the assured) whether by legal process or judicial decree, or voluntary transfer, assignment or conveyance; or if the title or possession shall be changed from any cause whatsoever; or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon,—this policy shall in each and every instance be void.”

The passages which we have italicised are those to which attention is particularly directed, the claim of appellant being that the lease and agreement of sale, and Stewart's possession thereunder, wrought a change both in the title and possession of the property insured, involving a forfeiture by plaintiffs of all rights under the policy.

In their argument at the rehearing counsel

for appellant took the position, for the first time, that possession by Stewart, under the lease and as a tenant merely, without regard to the contract of sale, was a violation of the provision of the policy against a change of possession. But clearly this position cannot be maintained in view of the statement made in the application upon which the policy was issued, to the effect that the building was to be occupied by a tenant for hotel purposes, and the fact found by the court that defendant had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. Occupancy of the identical character contemplated by the policy was not a change of possession. The issuance of the policy was an express consent to possession by a tenant, and since no particular tenant was named it was a consent to occupancy by any tenant selected by the assured, subject of course to revocation by canceling the policy and returning the premium if an objectionable tenant was selected.

The real and only question in the case is whether the contract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant. Upon this question we held in our former decision, in accordance with the contention of appellant, that Stewart by taking possession of the insured premises under the lease and agreement of December 24, 1887, not only acquired the right, but became absolutely bound to complete the purchase; that henceforth the buildings were at his risk, that if they were destroyed the loss would be his alone, because he was obliged at the expiration of his term as tenant, upon tender of a deed for the land without the buildings, to pay the full contract price of \$25,000. From this it necessarily followed that Stewart, from the time of taking possession, acquired an insurable interest equivalent to the value of the buildings, and that if plaintiffs could collect the insurance and keep it, they would be paid twice over for the buildings, so that they would have a direct interest in their destruction. Of course upon these premises it was impossible to avoid the conclusion that the effect of the transaction with Stewart was to work a change in the title not merely nominal and technical, but substantial and material to the risk, and necessarily violative of the conditions of the policy.

But on a fuller consideration of the case we are satisfied that the authorities cited in our opinion and in the briefs of counsel did not warrant us in holding that under the circumstances of this case Stewart, by taking possession under the lease and contract of December 24, 1887, became absolutely bound to complete the purchase of the premises at the expiration of his term, notwithstanding the previous destruction of the buildings.

There can be no question that under such a contract the equitable title to the land, as between the vendor and vendee, is in the

latter. This is a familiar doctrine of equity, based upon the principle that, for the prevention of fraud and the enforcement of the just rights of the parties, equity will deem that to be done which ought to be done. The maxim is applied most frequently in actions by the vendee for specific performance of the contract, or in aid of his defense when the vendor is seeking to recover possession of the land upon his legal title. *Laffan v. Naglee*, 9 Cal. 663; *DeRutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clark*, 54 Cal. 48; *King v. Ruckman*, 21 N. J. Eq. 599.

Decisions almost innumerable to the same effect might be cited from the reports of this and other States, but they do not decide the question involved in this case.

There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold.

When we come to make a critical examination of the cases cited to this point, and especially the cases in which the precise question we are considering are directly involved, we find that they lend a very slight support to the appellant's contention.

In the case of *McKechnie v. Sterling*, 48 Barb. 380, the doctrine is, it is true, carried to an extreme degree, but the authorities cited in support of that decision are not in point, and the reasoning by which they are made to support the decision is very unsatisfactory.

In *Richter v. Selin*, 8 Serg. & R. 439, the Supreme Court of Pennsylvania uses this language: "Where a contract is made for the sale of land, equity considers the vendee as the owner of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in contemplation of equity as actually seised of the estate that he must bear any loss that may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity." But this was said *arguendo* in deciding a case where the point was not directly involved, and the proposition, true enough in general, and in its application to the circumstances of that case, was stated in its most unqualified form and without regard to the special circumstances which in many cases render it inapplicable.

Similar statements of the same doctrine

are to be found in some of the insurance cases hereinafter referred to, with reference to most of which it was correctly applied, as we shall see.

But we shall see also that the doctrine has its reasonable limitations, and that this is one of the cases to which it cannot be applied without doing the wrong and injustice which it was designed to prevent.

In the case of *Wells v. Calnan*, 107 Mass. 514, the facts were that the plaintiff agreed to sell the defendant a farm and the defendant agreed to buy. On the day previous to that fixed for the payment and conveyance, the buildings on the farm were destroyed by fire. The plaintiff tendered a conveyance in pursuance of the contract, and demanded payment of the purchase price, which being refused, he sued for damages. It was held that he could not recover, because by reason of the destruction of the buildings he was unable to comply with the contract on his part. It is true the vendee had not taken possession, and the court found it necessary to distinguish the cases in which lessors in possession had been held liable on their covenant to pay rent or make repairs notwithstanding the destruction of tenements by fire during the term. In those cases it was said the liability of the defendant resulted from the fact that the lessors had fully complied with their contracts, while in the case under consideration the plaintiff was unable to do so.

There can be no doubt of the soundness of this distinction, and no difficulty, we think, in showing that it applies to the present case.

In the earlier Massachusetts case, *Thompson v. Gould*, 20 Pick. 184, it was applied where the defendant was in possession and had paid the purchase price for the purpose of sustaining his right to recover back the money paid.

In that case the agreement of purchase and sale was by parol, but the plaintiff paid at different dates the whole purchase price and got receipts in writing specifying the purpose of the payments, and he had entered into possession of the house. Clearly under the circumstances he had put himself in a position to enforce specific performance of the contract to convey, and was the owner of the equitable title. But before any conveyance was tendered, the house was destroyed by fire, and the plaintiff sued in assumpsit for the money paid. In a well-considered opinion the court held that he was entitled to recover back the money on account of failure of consideration.

It was conceded that the contract of the vendor, though by parol, could under the circumstances have been specifically enforced, but it was denied that it could have been enforced against the vendee after destruction of the house.

It may be said that in this decision the mere legal rights of the parties were regarded, and that the court could not act upon the equitable doctrine for want of jurisdiction; but it will be seen that the equitable doctrine was discussed in the opinion and its reasonable limitations pointed out.

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What those limitations are it is not necessary that we should consider exhaustively. For the purpose of this decision it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss.

Now, in this case, it is to be remembered that the agreement between plaintiffs and Stewart consisted of a lease for a term of five years, reserving a rent payable monthly in money, a stipulation giving Stewart the privilege of purchasing at \$25,000 at any time during the term, and the contract binding him to purchase at \$25,000 at the end of the term.

In considering the question before us we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it even if it remained whole and intact. To determine the character of his possession with reference to the extent of his liability upon his agreement to purchase, the contract is to be viewed as if it consisted merely of the lease and the agreement to purchase. Would Stewart, entering under such a contract, at the beginning of the term demised, be deemed, for the purpose of enforcing a most inequitable liability, to have entered and to be holding under his contract of purchase? Clearly he would not, if his possession could be referred to either the lease or the contract as distinct from the other; for there can be no doubt that during the term of the lease he would hold under that. His right to remain in possession would depend on his payment of rent and performance of other covenants of the lease, and would be determined by failure so to pay and perform.

And we think that, for the purpose of determining his liability under his agreement to purchase, in case of destruction of a material part of the property sold prior to the time for payment and conveyance, this distinction between the lease and agreement ought to be made. It is reasonable and equitable, and not opposed to any authority cited unless the case in 48 Barbour, above referred to, should be deemed an authority against it. If so, we can only say that we think that case goes to an unreasonable length, and that it ought not to be followed. On the contrary, we think the best considered cases warrant us in holding that the liability of Stewart upon his agreement to purchase ended with the destruction of the hotel; that it was never at his risk, but was always at the sole risk of the plaintiffs.

But appellant contends that even on this view there was a change of title and possession within the meaning of the policy, and he cites a number of cases to sustain the proposition that the equitable ownership of a vendee under a contract of purchase constitutes a sole, absolute and unconditional ownership, and consequently that the vendor

cannot also be the sole, absolute and unconditional owner. A review of these cases, however, will show that they differ essentially from the case in hand.

In the case of *Hough v. City F. Ins. Co.*, 29 Conn. 10, the legal title to the property insured was in a trustee, who held it as security for about \$1,600, subject to which incumbrance the plaintiff and two others owned the equitable title in equal shares. The plaintiff bought out his co-owners, agreeing to pay each the sum of \$1,000 for his interest, and he had paid on his purchase \$500 to one and \$700 to the other. He had also taken possession of the land and erected a dwelling thereon, at a cost of \$2,700 and was to receive a conveyance from the trustee upon the payment of the sum secured to him on the property. Under these circumstances the court held that it was not a misrepresentation on the part of plaintiff in applying for insurance to state that the property was his. And it was also held that his interest in the property was within the meaning of the policy an absolute interest, because he could by no contingency be deprived of it except by his own consent. No doubt this case was correctly decided.

The plaintiff by reason of his original interest in the property, his payment to his co-owners upon the purchase of their interests, and the money he had expended in improvements on the property, independent of his agreement to purchase, had bound himself to do so, and he was the only person who could suffer loss by destruction of the property. It was his, therefore, absolutely in every sense of the word material to the risk. And the decision was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeitures. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate object, i. e., the protection of the insurer against risks that are materially different from those which he has undertaken. The cases of *Millville Mut. F. Ins. Co. v. Wilgus*, and *Chandler v. Commerce F. Ins. Co.* 88 Pa. 107, 223; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Swift v. Vermont Nat. Ins. Co.* 18 Vt. 813, and *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 16, are all substantially like the Connecticut case, and the decisions rest upon the same ground. In every instance the vendee had made large or complete payments upon his purchase, or valuable improvements, or both. In other words, he had given bonds to complete it, so that the loss must necessarily fall upon him in case of destruction of buildings.

The case of *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, upon the authority of which, principally, our former decision herein was based, was another of the same sort. There the vendee had entered into possession of a small farm under a contract to purchase it for \$400, upon which \$50 was to be paid in cash. Prior to the sale the vendor had, as in this case, procured insurance on a building on the farm. After the sale the building was destroyed by fire, and the vendor sued

on the policy. The defense was breach of a condition of the policy against any sale or conveyance of the property by the insured. The defense was sustained on the ground that there was a sale of the property. This ruling was clearly opposed to the decision of the Supreme Court of Maryland in *Washington Ins. Co. v. Kelly*, 32 Md. 421, and to other decisions cited in the dissenting opinion.

It was rested also upon the false assumption that if the plaintiff could collect the insurance he could also collect the full purchase price of the building from his vendee, which would be holding in effect that the defendant remained bound by the policy after it became the interest of the assured to destroy the property.

But upon the doctrine of equity that the vendee in possession is the equitable owner of the property and the vendor merely his trustee of the legal title, the money collected by the plaintiff on the policy would have been held in trust for the vendee, and applied on the purchase price (*Reed v. Lukens*, 44 Pa. 202); so that in fact the plaintiff, even if he had been held entitled to recover on the policy, could have no interest in the destruction of the property. And so in this case, even if Stewart could be held bound by his contract of purchase after the fire, the plaintiff could gain nothing by collecting the amount of the policy. This, however, would be no answer to the objection of defendant that the title was changed in a sense material to the risk; for, to hold that the plaintiff could collect the insurance for the benefit of his vendee would convert the transaction into a virtual assignment of the policy, which can never be done without the consent of the insurer.

We do not, therefore, rest our decision in any degree upon the ground that the plaintiffs could not possibly have derived an advantage from the destruction of the hotel, and have only alluded to the matter for the purpose of calling attention to the false quantity in the reasoning of the Iowa Supreme Court in the case cited in support of our former decision.

The cases of *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460, 10 Cent. Rep. 575, and *Elliot v. Ashland Mut. F. Ins. Co.* 117 Pa. 548, 10 Cent. Rep. 581, cited on the rehearing, are essentially like the other cases cited to the same point, which we have already considered.

We conclude that there was in this case no change of title or possession material to the risk, and that the judgment of the superior court on the facts found was correct.

In reaching this conclusion we have not overlooked the argument based upon the fact that Stewart agreed to pay one half of the premium on the insurance of the hotel. That agreement is evidently one of the terms of the lease as contradistinguished from the agreement to purchase.

The judgment is affirmed.

We concur:

Paterson, J., Harrison, J., DeHaven, J., Garoutte, J.

McFarland, J.: I concur in the order of affirmance.

Petition for second rehearing denied October 19, 1891.

INDIANA SUPREME COURT.

MOUNT VERNON FIRST NATIONAL
BANK *et al.*, *Appls.*,

v.

Richard SARLLS *et al.*

(....Ind.....)

1. A property owner may maintain a suit to enjoin the rebuilding, in violation of a valid city ordinance, of a wooden building which has been partially destroyed by fire, although it would not be a nuisance *per se*, if it will work special and irreparable injury to him and to his property, as by diminishing the value of the property and increasing the rates of insurance thereon.

2. Owners of separate and distinct tenements may unite in an action to restrain the rebuilding, in violation of a city ordinance, of a structure partially destroyed by fire, the injury from which will affect all of them alike.

3. The intention to deprive a municipal corporation of its common-law powers will not be inferred simply because certain of such powers are enumerated and conferred upon it by its charter while no mention is made of the rest of them.

4. A municipality cannot, without express authority, absolutely and without regard to circumstances, prohibit the making, upon any wooden building within designated limits, of repairs to the amount of \$300 or over.

(September 22, 1891.)

APPEAL by complainants from a judgment of the Circuit Court for Posey County in favor of defendants in an action brought to enjoin the repairing of a certain wooden building. *Affirmed.*

The facts are stated in the opinion.

Messrs. Elijah M. Spencer and William P. Edson, for appellants:

The ordinance in question is fully authorized by law. The Statute confers upon the City of Mt. Vernon, if not expressly, at least by implication, as a part of the police power of the State, full authority to pass such ordinance.

1 Dillon, Mun. Corp. §§ 141, 143.

Under the police power of the State and general welfare clause of the Statute, a city may, by ordinance, prohibit the erection of frame buildings within its fire-limits, in the absence of express legislative authority; and such city

NOTE.—Municipal control over the erection of
wooden buildings.

It is entirely competent for a municipal corporation to regulate the extent of the fire limits and prescribe the character of the material with which buildings within certain designated limits shall be constructed. The city council has the sole, absolute, and final control of all questions of this character. *State v. Clarke*, 54 Mo. 17; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508; 1 Dill. Mun. Corp. § 94; *St. Louis v. Boffinger*, 19 Mo. 15; *Baker v. Boston*, 12 Pick. 184; 1 Dillon, Mun. Corp. 3d ed. § 475 p. 401, note 1; *Veazie v. Mayo*, 45 Me. 500; *Fay, Petitioner*, 15 Pick. 243; *Daniely v. Cabaniss*, 52 Ga. 211; *Parks v. Boston*, 8 Pick. 218; *Sheridan v. Colvin*, 78 Ill. 237; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 186; *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; 2 Dillon, Mun. Corp. § 832, and cases cited; *Indianapolis v. Indianapolis Gas L. & C. Co.* 66 Ind. 306.

The by-law of a municipality has the same effect within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has upon the subjects at large. *Lord Abinger in Hopkins v. Swansea*, 4 Mees. & W. 621, 640; *Milne v. Davidson*, 5 Mart. N. S. 409; *The Queen v. Osler*, 32 U. C. Q. B. 324.

That a city, especially when authorized by its charter, has the right to establish fire districts, and may prohibit the erection of wooden buildings, as a safeguard against the occurrence and spread of conflagration is not denied, and is well settled by authority. See 1 Dillon, Mun. Corp. 408, citing *Charleston v. Elford*, 1 McMull. L. 234; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Douglass v. Com.* 2 Hawle, 262; *Wadleigh v. Gilman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cow. 349, 352; *Charleston v. Reed*, 27 W. Va. 681; *King v. Davenport*, 98 Ill. 305; *Baumgartner v. Hasty*, 100 Ind. 575; *Klingler v. Bickel*, 10 Cent. Rep. 381, 117 Pa. 328.

While it is an indisputable proposition that the Legislature is alone empowered to enact statutory laws, it is equally well settled that it may, in its discretion, delegate to municipalities the power to

make by-laws and ordinances which are invested with all of the force and effect of general laws duly sanctioned by the Legislature. *Heland v. Lowell*, 3 Allen, 407; *St. Louis v. Boffinger*, 19 Mo. 13, 15; *Brick Presby. Church v. New York*, 5 Cow. 538; *St. Louis v. Manufacturers Sav. Bank*, 49 Mo. 574; *McDermott v. Board of Police*, 5 Abb. Pr. 422; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *Mason v. Shawneetown*, 77 Ill. 533; *State v. Tryon*, 39 Conn. 183; *Starr v. Burlington*, 45 Iowa, 87; *Indianapolis v. Indianapolis Gas L. & C. Co.* 66 Ind. 306.

The only test of general legislative action should be, Was the law passed in pursuance of and in accord with the Constitution, and in the exercise of the constitutional powers of the legislative body? In the case of a municipal corporation, the question is, whether it was in accord with the Constitution, state and federal, and then within the powers granted in the charter of the corporation. If so, the propriety and mode of its exercise is one solely for the legislative body exercising it. *Knoxville v. Bird*, 12 Lea. 121, 47 Am. Rep. 326.

Cities and villages are vested with power to prescribe fire limits, and direct that all wooden buildings within those limits, when damaged by fire, decay or otherwise, to the extent of fifty per cent of their value, shall be torn down and removed. *Hurd, Stat.* 1881, p. 219, § 62. See also *Harvey v. Dewoody*, 18 Ark. 252; *Ferguson v. Selma*, 43 Ala. 336; *Toledo, W. & W. R. Co. v. Jacksonville*, 87 Ill. 37; *Cooley, Const. Lim.* 5th ed. 471; *Wadleigh v. Gilman*, 12 Me. 403; *King v. Davenport*, 98 Ill. 305; *Louisville v. Webster*, 108 Ill. 414.

A regulation of the use of property, or a prohibition of its repair when partially destroyed, is not a condemnation to the public use. *Brady v. Northwestern Ins. Co.* 11 Mich. 425.

These cases rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. 2 Bacon. Abr. 147; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *North Western Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669, 24 L. ed. 1036-1039; 2 Kent, Com. 339.

may, by ordinance, prohibit the repair and rebuilding of frame houses within its fire limits, in the absence of express legislative authority.

Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; *Baumgartner v. Hasty*, 100 Ind. 580, 581; *Dillon, Mun. Corp.* § 405, cited approvingly in *Baumgartner v. Hasty*, 100 Ind. 580; *Wood, Nuisances*, § 741; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Wadleigh v. Gilman*, 12 Me. 408, 28 Am. Dec. 188; *Salem v. Maynes*, 123 Mass. 372; *Tray v. Winters*, 4 Thomp. & C. 256; *Hine v. New Haven*, 40 Conn. 478; *Alexander v. Greenville*, 54 Miss. 659; *Hasty v. Huntington*, 8 West. Rep. 322, 105 Ind. 542.

A city may adopt an ordinance prohibiting the repair and rebuilding of frame houses within its fire limits, in the absence of express legislative enactments authorizing the same.

Brady v. Northwestern Ins. Co. 11 Mich. 425; *Clark v. South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, *supra*; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

The general law which authorizes the City of Mount Vernon to adopt an ordinance forbidding the repair and rebuilding of wooden buildings, either expressly or by necessary implication, is constitutional and valid. The power of the State over police regulations is supreme.

Slaughter House Cases, 88 U. S. 16 Wall. 36, 21 L. ed. 394; *Baumgartner v. Hasty*, 100 Ind. 584; *Com. v. Alger*, 7 Cush. 84; *Taunton v. Taylor*, 116 Mass. 254; *Watertown v. Mayo*, 109 Mass. 315; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923.

The powers conferred by the laws of the State upon municipal corporations to protect property from fire "are in their nature legislative and governmental; the extent and manner of their exercise within the sphere prescribed by statute are necessarily to be determined by the judgment and discretion of the proper municipal authorities," and "the power of the city over the subject is that of a delegated quasi sovereignty."

Wheeler v. Cincinnati, 19 Ohio St. 21. See also *A Coal Float v. Jeffersonville*, 10 West. Rep. 833, 112 Ind. 18; *Dillon, Mun. Corp.* §§ 315, 319; *State v. White*, 82 Ind. 278, 42 Am. Rep. 496; *Fertich v. Michener*, 9 West. Rep. 894, 111 Ind. 472.

The ordinance in question is not unconstitutional, is not against common right, and is not unreasonable.

Dillon, Mun. Corp. §§ 141-420; *Respublica v. Duquet*, 2 Yeates, 493; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Clark v. South Bend*, 85 Ind. 276.

The following authorities further sustain the validity of the ordinance in question:

*Cooley, Const. Lim.** 595; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Fields v. Stokely*, 99 Pa. 306, 44 Am. Rep. 109; *Wood, Nuisances*, § 113; *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173.

Injunction is the proper remedy to prevent the wrongful acts of a person in repairing and rebuilding a frame house on his property, within the fire limits of a city, in violation of its ordinance, after he has threatened and com-

menced to so repair and rebuild the same, when the injunction is invoked by a person whose private property does and will suffer great and irreparable damage from such wrongful acts.

Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7; *Story, Eq. Jur.* § 924; *Milbau v. Sharp*, 27 N. Y. 625; *Doolittle v. Broome County Suprs.* 18 N. Y. 160; *Horstman v. Young*, 13 Phila. 19; *Brice's App.* 89 Pa. 85; *Rand v. Wilber*, 19 Ill. App. 395; *Wood, Nuisances*, §§ 730, 769; *High, Inj.* § 498.

Messrs. W. S. Jackson and G. V. Menzies, for appellees:

Appellants had no right to join in a bill for injunction.

Hilliard, Inj. 3d ed. 333-337.

An action to restrain the commission of a threatened public nuisance cannot be instituted by individuals, but must be brought by the proper officer, the people or the municipality.

Pom. Eq. Jur. § 1349; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239; *Jones v. Cardwell*, 98 Ind. 331; *Lippard v. Edwards*, 39 Ind. 165; *Holman v. Hibben*, 100 Ind. 338.

Courts of equity will not interpose their powers to enforce such by-laws either at the suit of the corporation itself or one of its members.

Waupun v. Moore, 84 Wis. 450; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *St. Johns v. McFarlan*, 33 Mich. 72; *Wood, Nuisances*, § 789.

The power conferred by a general welfare clause is restricted by reference to other provisions of the charter or constituent act.

State v. Merrill, 37 Me. 329; *Montgomery v. Montgomery & W. Pl. Road Co.* 81 Ala. 76; *Mount Pleasant v. Breeze*, 11 Iowa, 399.

The Legislature restricted, confined and covered all it intended to do in granting power to protest against fire in a special clause, excluding all other thoughts or ideas. *Expressio unius est exclusio alterius*.

"Repairing" is in no sense the same as "erecting" and cannot be so construed under the most liberal rules of interpretation.

Brady v. Northwestern Ins. Co. 11 Mich. 425.

Where the acts to be done more or less affect or impair private property—the powers granted to a municipal corporation must be strictly construed.

Kyle v. Malin, 8 Ind. 37; *LaFayette v. Cor.* 5 Ind. 39; *McEwen v. Gilker*, 38 Ind. 235; *Robb v. Indianapolis*, 88 Ind. 51; *Waldo v. Wallace*, 12 Ind. 584; *Leavenworth v. Norton*, 1 Kan. 432; *Hooper v. Emery*, 14 Me. 375; *Wood, Nuisances*, § 788.

It is repugnant to justice to extend by implication, a power which may become penal in its effects, and through and under the specious guise of providing for public security destroy vested rights.

A corporation with the power of making by-laws cannot make any such law to incur a forfeiture.

Kirk v. Norville, 1 T. R. 124.

No municipality in legislating by virtue of its charter can enact an ordinance unreasonable in its scope and operation.

A Coal Float v. Jeffersonville, 10 West. Rep. 833, 112 Ind. 15.

How unreasonably the second section of the

ordinance can operate is graphically stated by Justice Campbell in *Brady v. Northwestern Ins. Co. supra*.

McBride, J., delivered the opinion of the court:

This case involves the validity of the second section of an ordinance of the City of Mt. Vernon, entitled "An Ordinance Concerning the Prevention of Fires." The first section, the validity of which is not called in question, establishes fire limits and prescribes the material which may be used in the erection of buildings within these limits.

The second section is as follows: "Section 2. It shall be unlawful for any person to alter, repair, or rebuild any frame or wooden building situated within the limit defined and prescribed by this ordinance, whenever the amount required to alter, repair, or rebuild shall equal or exceed the sum of three hundred dollars. Any person violating the provisions of this section may be fined in any sum not less than two dollars, nor more than one hundred dollars, with costs, and each day that workmen are employed on such building shall constitute a distinct offense."

The complaint charges, in substance, that the appellees were the owners of certain real estate in Mt. Vernon, and within the fire limits prescribed by the ordinance in question, upon which they were threatening to and had commenced to rebuild and repair certain frame buildings, at a cost exceeding \$300, which had previously been partially destroyed by fire. The appellants (plaintiffs below) are shown to be each the owners of certain other tracts of land, either adjacent to or in the immediate vicinity of the appellee's building, on which valuable buildings have been erected; and they charge that by reason of the threatened repairing and rebuilding by the appellees, the danger of the destruction by fire of their respective buildings is "greatly increased and made more imminent, thereby diminishing the value of said plaintiff's real estate and increasing the rate of fire insurance thereon, to the irreparable injury and damage of the said buildings on each and all of the said pieces of real estate, so, as aforesaid, owned by the plaintiffs, and is an obstruction to the free use by the plaintiffs of their said property and interferes with the comfortable enjoyment thereof," etc.

Prayer for an injunction. The circuit court sustained a demurrer to the complaint and rendered judgment for costs in favor of the appellees. Three questions are presented and discussed:

1. Will injunction lie in such a case?
2. If so, is there a misjoinder of parties plaintiff?
3. Is the section of ordinance in question valid?

As a rule, a court of equity will not, at the suit of a city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings for the purpose of greater security against damage by fire. 15 Am. & Eng. Encyclop. Law, 1172; *St. Johns v. McFarlan*, 83 Mich. 72, 20 Am. Rep. 671; *Waupun v. Moore*, 34 18 L. R. A.

Wis. 454, 17 Am. Rep. 446; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Manchester v. Smythe*, 64 N. H. 380, 5 New Eng. Rep. 62.

Nor will the courts thus interfere at the suit of an individual when such interference is sought solely for the enforcement of the ordinance, and not because of special damage threatening the party asking such interference.

Some of the authorities above cited affirm that to warrant the application of the restraining power to prevent the erection of buildings in violation of a city ordinance the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance.

We can see no good reason for the distinction. When it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows, in addition, that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction. It is only when the injury is general and public in its effects, and no private right is violated in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights. *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7; *Wood, Nuisances*, 645 et seq.; *McCloskey v. Kreling*, 76 Cal. 511, 23 Am. & Eng. Corp. Cas. 151; *Horstman v. Young*, 13 Phila. 19; *Rand v. Wilber*, 19 Ill. App. 395; *Mouroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345. In the case at bar it is charged by the averments of the complaint that the threatened act will be in violation of a municipal ordinance, and that it will work special and irreparable injury to the property of the petitioners. They have the right to maintain the action.

There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorizes them to join in the action. *Tate v. Ohio & M. R. Co.* 10 Ind. 174, and authorities there cited; *Sullivan v. Phillips*, 110 Ind. 320, 9 West. Rep. 49.

The question as to the validity of the ordinance presents much greater difficulty. There can be no doubt that in this State cities possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character is recognized as a legitimate exercise of the police power, necessary to the safety of the city. *Baumgartner v. Hasty*, 100 Ind. 575; *Hasty v. Huntington*, 105 Ind. 542, 3 West. Rep. 322; *Clark v. South Bend*,

85 Ind. 276, and authorities cited in each. Also, *Monroe v. Hoffman*, *supra*; *King v. Davenport*, 98 Ill. 305; *Wadleigh v. Gilman*, 12 Me. 408, 28 Am. Rep. 188; *Salem v. Maynes*, 128 Mass. 372; *Troy v. Winters*, 4 Thomp. & C. 256; *McKiddin v. Fort Smith*, 35 Ark. 352; *Klinger v. Bickel*, 117 Pa. 326, 10 Cent. Rep. 381.

In addition to the power thus possessed, clause 32 of § 3106, Rev. Stat. 1881, enumerating the powers conferred upon cities, confers express authority to establish fire limits and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory authority is still further extended by clause 5 of the same section, and by section 3155, known as the "general welfare" clause. Counsel for appellee insist, however, that the enactment of the statutes in question served as a limitation upon the powers of the city; that the powers therein enumerated and more belonged to the city at common law, and that by the statutory enumeration of certain specific powers, all others not thus enumerated are excluded. *Expressio unius est exclusio alterius* has no application. The Statute, in so far as it enumerates common-law powers previously possessed by the municipality is merely declaratory of the common law. But, while it is no doubt competent for the Legislature, in creating such corporations, to deprive them of all common-law police power, and enact that they shall possess and exercise such only as are conferred by statute, such intention of the Legislature will not be inferred simply because some of the common-law powers are enumerated while no mention is made of others. In the exercise of these powers, they may not only prescribe where wooden buildings may and where they may not be erected, but they may undoubtedly exercise a reasonable control over the making of repairs on all buildings, whether of wood or not, and may prevent the use of inflammable or otherwise dangerous material in making such repairs. It can hardly be doubted, that if the owner of a building proposed to make repairs or additions to it of such material, or in such manner as to seriously menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or additions. *Montgomery v. Louisville & N. R. Co.* 84 Ala. 127; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

They also have full power to abate nuisances, and may, if necessary, remove or compel the removal of buildings which have for any cause become nuisances, by getting in such condition that they greatly endanger the public health or safety or the safety of adjacent property, provided the danger inheres in the building and not simply in the use to which the building is put. Here, also, although the statute gives ample authority, they have, without statutory authority, ample power at common law to cause the abatement of the nuisance; and if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it. *Baumgartner v. Hasty*, *supra*, and authorities cited.

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They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance, not, necessarily, because the building thus erected is a nuisance, but because its erection was in violation and defiance of the law, and its owner cannot complain when the law is vindicated by its removal. If it were possible to so prepare wood that it would be absolutely non-inflammable, and that a building erected of it would be fire-proof and safer than one erected in the ordinary way, of stone or brick, a building thus erected of wood, in violation of a valid ordinance enacted under clause 32 of section 3106, *supra*, forbidding such erection, would be as much subject to removal or destruction by the authorities as if it were constructed of wood not thus prepared.

It is manifest, therefore, that the right to remove or destroy the building thus erected in violation of an ordinance does not grow out of the fact that it is a nuisance, as a building made out of such material, if otherwise skillfully and properly constructed, would be as safe or safer than one built in the ordinary way, of stone and brick, and could not be a nuisance. As is said in *Baumgartner v. Hasty*, *supra*: "A municipal corporation has no power to treat a thing as a nuisance which cannot be one." See also *Wood, Nuisances*, 828; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The power in such case to compel the removal of the building grows solely out of the fact that its erection was in violation of the ordinance.

The discovery of a process by which wood could be made non-inflammable, and in all respects as safe to be used in the construction of buildings as stone or brick or iron, would end the common-law power of the city to prohibit the erection of wooden buildings, or its power under the general welfare clause, while under the statute that power would still exist simply because the material was wood, and not at all because it was dangerous. So with the power to remove buildings already erected. There is no express legislation on the subject, and such powers as the city has are its common-law powers, reinforced by the general welfare clause of the Statute.

As above shown, a building erected in violation of a valid ordinance may be removed without reference to its character; but with this exception cities can only condemn as nuisances and compel the removal of buildings which are in themselves for some reason dangerous or hurtful. The author of a valuable work on the law of nuisances states the law as follows: "The power to abate nuisances does not warrant the destruction of valuable property which was lawfully erected; or anything which was erected by lawful authority. It would indeed be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all the

consequences; and even if such power is expressly given by the Legislature, it is utterly inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance and is in defiance of it." Wood, Nuisances, 823. See also the opinion of Justice Miller in *Yates v. Milwaukee*, *supra*.

This may serve to indicate the scope of the common-law powers of the city in this direction, and the additional powers given by the Statute. At common-law, they are only authorized to interfere with the erection or repair of buildings far enough to prevent the doing of that which from its nature would have a tendency to create or enhance danger.

There is in this State no statute purporting to give to cities any power to prevent the repair of wooden buildings. If they have such power, it is derived either from the general welfare clause, or it is an incident of their common-law police power. The section of ordinance in question, if valid, absolutely prohibits the altering or repairing of all frame or wooden buildings within the fire limits, in all cases where the cost of altering or repairing will equal or exceed \$300. It makes no difference what material is to be used in making the repairs, or what the effect may be on the building. Repairing with fire-proof material is equally prohibited, with repairs from dangerous and inflammable material. A repair which would tend to diminish danger falls under the ban equally with those the tendency of which would inevitably increase it. It makes no difference whether the building was erected before or after the establishment of fire limits, or what its value is. Its value may be trifling. It may be a mere wreck or remnant which \$300 would practically rebuild, or it may be valuable, worth many thousands of dollars, and the cost of the repairs although \$300 or more, relatively insignificant. It may also be that no other building is near it to be affected or endangered.

As we have heretofore said, we do not doubt that cities may exercise a reasonable control over the making of repairs to buildings, and may prevent alterations and repairs which would create nuisances. This they can do even in the absence of statutory authority, in the exercise of the police power. And where fire limits are established, they may doubtless prevent the repair of a wooden building within such limits, when to repair would practically be to rebuild, whether such repairs would create a nuisance or not. They cannot, however, at least without express statutory authority, enforce a general sweeping prohibition of all repairs.

Whether a statute attempting to confer such power would be constitutional we need not, of course, decide in this case; but a consideration of some of the possible effects of such an ordinance may well suggest a query of that character.

To repair a building means simply to restore it to a sound condition. The natural and probable effect of repairing, if carefully done, would be to diminish danger, instead of to increase it. Certainly, a building so

much injured or otherwise out of repair as to require \$300 to repair it is more likely to endanger the public and surrounding property than if put in proper repair. If it is lawful to maintain it without repairs, how can the police power afford any jurisdiction for a refusal to allow its owner to remedy the effects of accident or decay and restore it to a sound condition? To hold that this was a proper exercise of the police power would be to prevent entirely the use of that power which is designed to protect society and prevent the doing of things inimical to its well being. Such an ordinance might in many cases compel the owner of valuable property to stand by and allow it to become valueless and a nuisance without the power to prevent it. The accidental destruction or removal of a roof which it would cost \$300 to replace might thus reduce valuable property to the condition of a mere heap of material. It is not simply a restraint on a noxious or improper use of property by its owner, but prohibits him doing that which alone will in many cases save his property from becoming a noxious and dangerous thing. Instead of restraining him from so using it as to make it pernicious to his neighbors, it would compel him by inaction to allow it to become and remain so. It might unquestionably in many cases amount to a taking of the property of the citizen without due process of law, and without the sanction of that overriding necessity by virtue of which at times the rights of the individual may be sacrificed for the public good.

Re Jacobs, 98 N. Y. 98, 54 Am. Rep. 636, Justice Earl, speaking for the court, says: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys its value or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth if the Legislature could, without compensation, destroy property, or its value, deprive the owner of its use, deny him the right to live in his own house or to work at any lawful trade therein," etc.

In *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166-177, 20 L. ed. 557-560, Miller, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution. . . . But the claim is made that the Legislature could pass this Act in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the

maxim: *Salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim *sic utere tuo ut alienum non laedas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto," etc.

In Potter's Dwaris on Statutes, 458, it is said that, "the limit to the exercise of the police power can only be this, the legislation must have reference to the comfort, the safety or the welfare of society."

In *Watertown v. Mayo*, 109 Mass. 315-319, Colt, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance." In *Slaughter House Cases*, 88 U. S. 16 Wall. 36-87, 21 L. ed. 394-412, Field, J., says: "Under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement," etc.

In *Coe v. Schultz*, 47 Barb. 64, a learned judge speaking of the constitutional limitations upon the police power says: "I am not willing to concede that the Legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to one present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definitions or common-law decisions. . . . Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive."

The author of Tiedeman's Limitations of Police Power says: "Sec. 122: . . . An arbitrary interference by the government, or by its authority with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution. . . . One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's land to the hurt or annoyance of another is a nuisance and may be prohibited. . . . Section 122 a:

But, the police power of the Legislature in reference to the prohibition of nuisances is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. The Legislature cannot prohibit a use of lands which works no hurt or annoyance to the 18 L. R. A.

neighbors or to adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the Legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the Legislature has declared it to be so."

This author also tersely and correctly states the full scope of police regulations, when confined within their proper limits, substantially as follows: "To compel everyone to so use his own, and so conduct himself as not to injure others, or infringe upon their rights."

Tried by these tests, the second section of the ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property or upon the rights of others, and applies with equal force to buildings detached and remote from all others, as to those in immediate proximity to others, and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it.

It will not be contended by anyone that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified, they must become nuisances. Yet this ordinance by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property.

We have not been able to find an authority anywhere which would sustain appellants' position in this case. The case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, cited by them, holds that under the charter of the City of Detroit, which expressly authorized the enactment of an ordinance forbidding repairs to wooden buildings, an ordinance which forbade such repairs without the consent of the common council was valid. That case in two essential particulars differed from the case at bar: (1) the charter gave express authority to enact the ordinance; and (2) the ordinance then in question was not prohibitory, but allowed repairs when consent was first obtained of the common council. The opinion was by a divided court; Campbell, J., filing a strong dissenting opinion holding the ordinance invalid as applied to a building erected before its enactment, notwithstanding the charter.

The case of *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89, was also a case where the charter of the City of Jacksonville conferred express authority, and the ordinance in question only forbade the building or repairing of buildings within the fire limits

with other than fire-proof material. A party removed an old shingle roof from her building and replaced it with a new shingle roof. Failing to remove it upon notice, the city marshal removed it. It was held that under the express authority conferred by the charter the ordinance was valid. The ordinance in that case, instead of prohibiting repairs, simply prescribed the material that might be used in making repairs. These two cases are the only ones cited by the appellants upon the question of the right to prohibit repairs, although many others are cited upon the general power of the city in the establishment of fire limits, and their power to prohibit the erection of buildings. Other authorities bearing upon the right to prohibit, or to regulate, repairs are as follows:

Horr & Bemis, on Municipal Police Ordinances, page 214, says: "The making of ordinary repairs to existing buildings cannot be prohibited. Reshingling a building for instance, is an ordinary repair." See also, to the same effect, *Reg. v. Howard*, 4 Ont. 377; *Brown v. Hunn*, 27 Conn. 332; *Stewart v. Com.* 10 Watts, 307.

The case of *Ex parte Fiske*, 72 Cal. 125, was a case where an ordinance prohibited the alteration or repair of wooden buildings within the fire limits without permission in writing from the fire wardens. The court discusses at some length the provision that certain officers may grant permission to make repairs, and says: "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to guard against, and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore, the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression." The court

concludes that the conferring of the discretionary power on the fire wardens was valid and sustained the ordinance.

The case of *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127, was a case where an ordinance prohibited repairing the roofs of buildings within the fire limits with wood or other inflammable material. Like *King v. Davenport*, *supra*, it did not prohibit making repairs, but forbid the use of certain material in making them.

In *State v. Schuchardt*, 42 La. Ann. 49, it is held that a legislative mandate, authorizing a municipal corporation to prevent the reconstruction in wood of old buildings within certain limits, does not include the mandate to prevent the repairing with shingles the roof of buildings originally covered with shingles. It will be observed on examining these cases with others that more or less directly bear upon the question involved, that there is wide diversity in the interpretation given to the law in the different courts. Some go so far as to deny the power to interfere at all with the making of ordinary repairs. The weight of authority, however, is clearly with these cases which recognize the power of municipal corporations to regulate the making of repairs to buildings, and treat it as a legitimate exercise of the police power, but none of them go to the extent of sustaining the power of absolutely prohibiting repairs, as is sought to be done in this case. The complaint contains no averments showing the value of the building proposed to be repaired. It is possible that the part remaining will be of small value, and that this is a case where to repair will mean a substantial rebuilding of a structure. If so, however, it would have been easy to show such fact by special averment. As it is, we are unable to say from any averment of the complaint that the proposed repairs, costing \$300 or more, may not be very small compared with the value of that portion of the building which remains, and that to restore or rebuild it may not be to preserve valuable property and to prevent instead of create a nuisance.

In our opinion, the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

WISCONSIN SUPREME COURT.

Frederick BROWNELL, *Appt.*,
v.

Harris R. DURKEE *et al.*, *Respts.*

(....Wis.....)

An officer cannot forcibly take personal property from its owner, who has

acquired peaceable possession of it after the officer has levied on it as the property of the third person.

(March 17, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Rock County in favor of defendants in an action brought to re-

NOTE.—Right to defend property.

A sheriff, in the execution of a writ of attachment, is not authorized to take personal property into his custody where it is in the possession of a third person; in such case he can only attach the property by leaving a certified copy of the writ, and a notice specifying the property attached, with 13 L. R. A.

the person having the possession of the same. *Lewis v. Birdsey*, 19 Or. 164.

The right of self-defense extends to the protection of property, and to its recovery after it is taken, where it can be re-taken without undue violence. *State v. Elliot*, 11 N. H. 540. See 1 Wharton, Cr. L. 8th ed. § 102; *Desty*, Cr. L. § 81a.

cover damages for an assault upon plaintiff and alleged wrongful ejection of him from a certain railroad car. *Reversed.*

The facts are stated in the opinion.

Messrs. Fethers, Jeffris & Fifield, with **Mr. J. F. Lyon**, for appellant:

The owner may lawfully retake the possession of goods unlawfully taken or detained from him wherever he finds them, provided he does not thereby endanger the public peace, etc. Cooley, Torts, pp. 50-56, and cases cited.

It is held in Massachusetts that one may even resort to force to retake his property.

Com. v. Donahue, 2 L. R. A. 623, 148 Mass. 529.

A man is justified in using force to protect his property against a person who attempts to take possession of it wrongfully.

Filkins v. People, 69 N. Y. 101.

The owner of property is justified in resisting the attempt of an officer to take property under process running against another. And if the officer use force upon the owner, the officer is guilty of an assault and battery and is liable to the owner in damages.

Elder v. Morrison, 10 Wend. 128; *Pike v. Colvin*, 67 Ill. 227; *Wentworth v. People*, 5 Ill. 550; *State v. Johnson*, 12 Ala. 840; *People v. Clements*, 13 West. Rep. 760, 68 Mich. 655; *Com. v. Kennard*, 8 Pick. 138; *Buck v. Colbath*, 70 U. S. 8 Wall. 384, 18 L. ed. 257; *Filkins v. People* and *Elder v. Morrison*, *supra*.

Even under the Vermont rule, in view of the undisputed testimony in this case, plaintiff was entitled to a verdict for at least his actual damages.

Merritt v. Miller, 18 Vt. 416. See *Sims v. Reed*, 12 B. Mon. 51.

Messrs. John B. Simmons and Charles S. French, for respondents:

A mere temporary interference with the property, not going to the extent of removing it from the place of storage selected by the officer, nor withdrawing it from his control, does not amount to a change of possession nor in any way affect the lien of the attachment.

Harriman v. Gray, 108 Mass. 229; *State v. Buchanan*, 17 Vt. 578; *Faris v. State*, 3 Ohio St. 159.

The question of the rights of an officer in the execution of an attachment, when directed to levy upon property the title to which is at the time or afterward becomes the subject of controversy, first came up for adjudication in this country, in *State v. Downer*, 8 Vt. 424.

In that case the court decides the better and safer and only practicable rule to be that, whenever the question of property is so far doubtful that the creditors or officers may be supposed to act in good faith in making the attachment the owner cannot even justify resistance, but must yield possession and resort to his remedy by action.

See also *State v. Buchanan*, *supra*; *State v. Fifield*, 18 N. H. 84; *State v. Richardson*, 88 N. H. 208; *Faris v. State*, 3 Ohio St. 159; 2 Am. & Eng. Encyclop. Law, 792, note 2, and cases cited; *Harriman v. Gray*, 108 Mass. 229.

It is the duty of the officer to make the levy, and in doing so to overcome all resistance, and it is just as much his duty to retain it against opposition, until the law has settled the disposition to be made of it.

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1 Wade, Attachm. §§ 181, 248; *State v. Fifield* and *State v. Downer*, *supra*; *Marshall v. Hosmer*, 4 Mass. 68; *Marsh v. Gold*, 2 Pick. 285; *Chamberlain v. Beller*, 18 N. Y. 115; *Long v. Neville*, 86 Cal. 455; *Com. v. Van Dyke*, 57 Pa. 34.

This is also the rule in Wisconsin.

Grace v. Mitchell, 31 Wis. 533. See also *Halpin v. Hall*, 42 Wis. 176; *Webber v. Blunt*, 19 Wend. 188; *Connelly v. Walker*, 45 Pa. 449; *Winter v. Kinney*, 1 N. Y. 865.

It is even held that the officer is not excused by his knowledge that the attachment was obtained from an improper motive.

Wakefield v. Fairman, 41 Vt. 339; *Bond v. Ward*, 7 Mass. 123.

If it be his duty as an officer to levy, then his act is not a mere naked trespass, but it is an act *colore* or *virtute officii*, and upon this principle the sureties upon his official bond are liable, and likewise he and they are liable for the acts of his deputies.

1 Wade, Attachm. § 241, and cases cited; 2 Freeman, Executions, § 254, and cases cited; *Rogers v. Wright*, 21 Wis. 684; *Turner v. Stinson*, 137 Mass. 191; *Lammon v. Fousier*, 111 U. S. 17, 28 L. ed. 337; *People v. Schuyler*, 4 N. Y. 178; *People v. Mercereau*, 74 Mich. 687.

Cole, Ch. J., delivered the opinion of the court:

This is an action brought to recover damages for the wrong of the defendants in assaulting the plaintiff on or about the 15th of December, 1885, and forcibly ejecting him from a railroad car while he was unloading coal that belonged to him. The defendants justify their acts by answering that at the time the defendant Harris R. Durkee was a constable, and had a writ of attachment in favor of the other two defendants against one Price and one Paul, and that he levied on the coal in the car mentioned as the property of Price and Paul, in good faith, and without malice, and exercised only so much force as was necessary for the purpose of ejecting the plaintiff from the car where the coal was. It appears that the plaintiff, shortly before the 15th of December, ordered a car of coal, which he expected to sell to Price. The car arrived at Geneva, consigned to him. Price paid the freight on the coal, but did not pay for the coal, and it was not delivered to him by the plaintiff. The attachment was levied on the coal in the car, while the car was standing on the side track of the company at Geneva, on the 15th of December, as the property of the defendants in the attachment. The railroad agent was informed of the attachment, and was asked by the constable to seal the car up, and let it stand where it was, for him, temporarily. The next day the plaintiff notified the defendants that Price did not own the coal, but that it belonged to him. On the morning of the 17th of December the plaintiff went to the freight depot, saw the agent about the coal, and the agent formally opened and delivered the car of coal to him. The plaintiff thus took quiet and peaceable possession of the car, and was engaged in removing the coal therefrom, when the constable arrived on the ground, forbade him

from interfering with the coal, and demanded possession of the car. This being refused, he forcibly ejected the plaintiff from the same, which is the wrong complained of.

These material facts are clearly established by the evidence, and are really not disputed. The possession of the coal, after the seizure on the attachment, must be deemed to have been constructively in the constable, as he had left the car, with its contents, where he found it, though in charge of the railroad company. But he had taken as complete possession of the coal as was practicable, unless he removed it from the car. The constable had such possession and special interest in the coal by virtue of his levy that he could have maintained an action against anyone who interfered with it, had the coal been the property of the defendants in the attachment. It seems to us there can be no doubt as to the correctness of this proposition. But the coal belonged to the plaintiff. It had been ordered by him, and was consigned to him, and was afterwards adjudged to be his property in an action brought to recover the value thereof. But after the seizure, as we have said, he acquired peaceable possession of the coal, and held such possession when the constable deprived him of it in a forcible manner.

The important question in the case is as to the justification of the officer. The other defendants were present at the time, aiding and abetting him in the execution of the writ. The learned counsel for the defendants argues and insists that, as the officer was required by his writ to levy upon the coal the title to which was in dispute or in doubt, and he being indemnified therefor, he was in duty bound to make the levy and hold the property until the question of title was settled, or the property otherwise released; and that an officer, while so acting, may not be lawfully interfered with or resisted by the rightful owner, whether such owner be the defendant in the attachment or not; but that the officer had the right to overcome such resistance, and keep or regain possession by the use of such force as might be necessary for the purpose. The learned circuit court doubtless adopted this view of the law, as it directed a verdict for the defendants.

The counsel for the plaintiff insists that the court erred in thus directing the verdict for the defendants, because, he says, it was a question of fact for the jury to determine whether the defendants were acting in good faith in seizing the coal as the property of Price and Paul, and in taking it from the possession of the plaintiff; also whether the defendants used greater force than was necessary in ejecting the plaintiff from the car; and further, that, under the undisputed testimony, the plaintiff was entitled to recover his actual damages for the wrongful act of the defendants in ejecting him from the car. We shall spend no time in considering the first two questions. As it is said by the opposing counsel, no claim was made on the trial that the evidence raised any doubts on these points, and there was no suggestion or request made that they should be sub-

mitted to the jury. The judgment must be reversed for the reason which we will now proceed to state. As we have said, the important question is, Was the officer justified or protected in forcibly taking possession of the coal as against the plaintiff, who was the real owner? The counsel for the plaintiff contends he was not so justified or protected. He says, notwithstanding the absolute right of the officer to proceed and execute the writ, still, if he takes the property of the plaintiff on a process against Price and Paul, he is none the less a trespasser upon the rights of the plaintiff, and, if a trespasser, he acquired no property in the thing attached as against the real owner. The plaintiff, he says, may have his action, and recover the value of the property taken, as was done in this case; or if, after the seizure on the attachment, the plaintiff can peaceably obtain the possession of the attached property, he may take it, and thus subject himself to an action at the suit of the officer; but that the officer has no right in law to dispossess the owner by using force for that purpose, and is not protected in doing so. These different positions of counsel as to the duty and liability of an officer attaching property, though diametrically opposed, are sustained by high authority. There is a serious conflict of judicial opinion on the subject, and we have to make a choice to some extent between the rules laid down in opposing decisions. The courts of Vermont, New Hampshire and Ohio support the contention of the defendants, while those in Massachusetts, New York, and Illinois sustain the plaintiff's position. See *State v. Downer*, 8 Vt. 424; *State v. Buchanan*, 17 Vt. 573; *State v. Fyfield*, 18 N. H. 84; *State v. Richardson*, 88 N. H. 208; *Faris v. State*, 3 Ohio. St. 159. *Contra: Com v. Kennard*, 8 Pick. 133; *Elder v. Morrison*, 10 Wend. 123; *Wentworth v. People*, 5 Ill. 550.

But the rule which commends itself to our judgment as the most salutary and reasonable is to hold that if, after seizure on attachment against a third party, the rightful owner can quietly and peaceably obtain possession of the property, he may retain such possession, and the officer will not be justified in using forcible means to regain possession. If the officer wishes to test the right of the owner, he should bring an action for that purpose. The courts which adopt the Vermont rule think there are strong grounds of public policy, where the question of property is doubtful, that the owner should resort to his remedy at law to settle the question in the courts. There is, doubtless, force in this consideration. Parties should not be permitted to resort to force to vindicate their rights where peaceable remedies exist. But the question can be as well determined in an action brought by the officer as when it is brought by the owner. The courts all admit that due regard should be had to the rights which the owner has to his property, and that these rights should be protected and secured as far as possible. Now, why should the owner then, when he has possession of that which is his own, be required to give it up to an officer who comes

with a process, not against him, but against a third party, with whom he has no connection, and demands possession? See *Gilman v. Williams*, 7 Wis. 329 (side page). We can perceive no sufficient reason, founded either in law or on public policy, for holding that the owner of personal property may not insist upon his rights, and refuse to surrender the same to an officer, because the latter has attached it on a writ against a third party. The creditor or officer is not without legal redress to test the question of title to the property. It is admitted that the officer is a trespasser if he seizes property not belonging to the defendant in the attachment. Why should his unlawful act be regarded with more favor than the rights of the real owner? True, it is said, the owner of property seized or attached on a process against another has legal remedies by an action, and therefore he ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and the creditor

may fail to collect his debt. But, as we have said, the officer, after a levy, may bring an action against anyone who interferes with his possession, and thus settle all rights of property. See *Merrit v. Miller*, 13 Vt. 416. There is no hardship in this rule. It is surely unnecessary to allow the officer to resort to force and violence to regain possession of attached property, where the law affords him an adequate legal remedy to enforce his rights. To allow him to use force under such circumstances is certainly not essential for the protection of the officer, nor to vindicate the authority of the law. But the question is so fully considered and discussed in the cases to which we have referred that no further remarks upon the subject are called for.

We think the circuit court erred in directing a verdict for the defendants, and that the judgment of the Circuit Court must be reversed, and a new trial ordered.

Rehearing denied.

ARKANSAS SUPREME COURT.

Biscoe HINDMAN *et al.*, *Appts.*,
v.

Laura E. B. O'CONNER.

(....Ark.....)

1. A judicial sale of minors' property to their step-grandmother will, at their request, be set aside when, after the death

of their mother and at her request the step-grandmother took charge of them and was virtually constituted their guardian by the probate court and had before the sale at their request taken charge of the property and taken up her residence thereon, although the management of the sale was by law imposed on a stranger, the curator of the estate, and the purchaser acted fairly and in good faith.

2. The five years' Statute of Limitations

NOTE.—Confidential relations between parties.

The rule of the civil law is practiced in our courts of equity, and applied to trustees, agents, and generally to all persons who have been employed in a confidential character in relation to property. *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 523; *Parkist v. Alexander*, 1 Johns. Ch. 397, 1 L. ed. 186.

The rule holds good as to all advantages gained by means of necessary confidence, growing immediately out of the legal relations of the parties as attorney and client, guardian and ward, etc. *Marvin v. Bennett*, 26 Wend. 188.

A fundamental doctrine of equity is that a trustee can gain no advantage to himself, to the detriment of those for whom he holds a trust. The object of the rule is to secure fidelity on the part of the trustee, and to preserve the interest of those whose rights are confided to his care. *Wright v. Ross*, 36 Cal. 432; *Parkist v. Alexander*, *supra*; *Holridge v. Gillespie*, 2 Johns. Ch. 33, 1 L. ed. 236; *Van Horne v. Fonda*, 5 Johns. Ch. 400, 1 L. ed. 1126; *Slade v. Van Vechten*, 11 Paige, 22, 5 L. ed. 42.

Personal interests cannot conflict with fiduciary duty.

No one having duties to discharge of a fiduciary nature shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. *Gardner v. Ogden*, 22 N. Y. 342; *Michoud v. Giron*, 45 U. S. 4 How. 503, 11 L. ed. 1076; *Campbell v. Johnston*, 1 Sandf. Ch. 152, 7 L. ed. 276. See note to *Manhattan Cloak & S. Co. v. Dodge* (Ind.) 6 L. R. A. 369.

13 L. R. A.

This principle applies to the relation of trustee or agent. *Olcott v. Tioga R. Co.* 27 N. Y. 555; *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 355; *Moore v. Moore*, 4 Sandf. Ch. 48, 7 L. ed. 1018. See *Ward v. Smith*, 3 Sandf. Ch. 562, 7 L. ed. 963; *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218.

A purchase by the testamentary guardian of one of the devisees will not be rendered valid by the fact that the ward had another guardian, appointed by the surrogate for the express purpose of representing his interests in that particular transaction (*Brasher v. Van Cortlandt*, 2 Johns. Ch. 242, 1 L. ed. 362); this rule applied in *Boetwick v. Atkins*, 3 N. Y. 60.

Party cannot purchase property for his own benefit where he has a duty to perform in relation to it.

It is a rule in equity that no party is permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, and for his individual use. *Voorhees v. Presbyterian Church*, 8 Barb. 142, 5 How. Pr. 6; *State v. McKay*, 43 Mo. 603; *Williams v. Townsend*, 31 N. Y. 415; *Currie v. Cowles*, 6 Bosw. 462; *Colburn v. Morton*, 3 Keyes, 305, 36 How. Pr. 160, 5 Abb. Pr. N. S. 315, 1 Trans. App. 149, 1 Abb. (N. Y. App. 384; *Chase v. Hogan*, 6 Bosw. 450; *Cram v. Mitchell*, 1 Sandf. Ch. 256, 7 L. ed. 320, 3 N. Y. Legal Obs. 106; *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 L. ed. 1008; *Abbot v. American Hard Rubber Co.* 33 Barb. 593, 21 How. Pr. 201; *South Baptist Soc. v. Clapp*, 13 Barb. 47; *Boardman v. Flores*, 37 Mo. 561; *Dobson v. Racey*, 3 Sandf. Ch. 62, 7 L. ed. 770; *Blake v*

applies to an action to set aside the confirmation of a judicial sale of minors' lands at which their guardian had become the purchaser, notwithstanding the ground upon which the claim to relief is based is fraud.

3. The record must show that the minor resided within the county in which the court was held which attempted to remove his disability under the authority conferred by Act of February 18, 1869, to render the order of removal valid.

(July 3, 1891.)

A PPEAL by complainants from a decree of the Circuit Court for Phillips County in favor of defendant in a suit brought to set aside a judicial sale of land. *Reversed in part. Affirmed in part.*

The facts are stated in the opinion.

Messrs. U. M. Rose, G. B. Rose and John C. Palmer, for appellants:

The rights of the beneficiaries in trust estates have always been carefully guarded by the laws of this State, particularly in regard to transactions involving titles to land.

Imboden v. Hunter, 23 Ark. 632.

A trustee "in the strict sense of the word" is "a person who holds property upon trust."

Rapalje & Lawrence, Law Dict.

The probate court decreed that O'Conner and his wife should assist in the management of complainants' property. This made them trustees in the strict sense of the term.

The guardian cannot purchase the property of his ward, either in his own name or by the intervention of a third person.

De Felice, *La Legislation Universelle*, Tome 13, pp. 480, 486.

2 Domat, *Civil Law*, §§ 2, 3.

"Trustee" is also used in a wide and perhaps inaccurate sense, to denote that a person has the duty of carrying out a transaction, in which he and another person are interested, in such manner as will be most for the benefit of the latter, and not in such way that he himself might be tempted, for the sake of his personal advantage, to neglect the interests of the other.

2 Rapalje & Lawrence, Law Dict. 1802.

This is the sense in which the word is used in the rule forbidding trustees to buy.

See *Jones v. Arkansas Mech. & A. Assn.* 38 Ark. 26; *West v. Waddill*, 33 Ark. 587; *Lewin, Tr.* p. 484; *Underhill, Tr.* p. 484; *McGaughey v. Brown*, 46 Ark. 82; *Wright v. Walker*, 80 Ark. 44; *Livingston v. Cochran*, 38 Ark. 301; *Black v. Keenan*, 5 Dana, 570; *Brockett v. Richardson*, 61 Miss. 766.

The fact that the sale was conducted by the curator can make no difference.

Powell v. Powell, 80 Ala. 11.

Whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate.

Davoue v. Fanning, 2 Johns. Ch. 259, 1 L. ed. 371.

The court below fell into the error of supposing that the plaintiffs must show some actual fraud in order to sustain their complaint.

West v. Waddill, *supra*; *Ex parte James*, 8 Ves. Jr. 347; *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. Cas. 461; *Gardner v. Ogden*, 22

Buffalo Creek R. Co. 56 N.Y. 491; *Downs v. Rickards*, 4 Del. Ch. 433; 2 Pom. Eq. Jur. 433; *Moore v. Moore*, 4 Sandf. Ch. 37, 7 L. ed. 1014; *Burhans v. Van Zandt*, 7 N.Y. 523; *Ringo v. Binns*, 35 U.S. 10 Pet. 269, 9 L. ed. 420; *Flisk v. Barber*, 6 Watts & S. 18; *Jewett v. Miller*, 10 N.Y. 402; *Rogers v. Rogers*, Hopk. Ch. 515, 3 L. ed. 507; *Hamilton v. Wright*, 9 Clark & F. 111; *De Caters v. De Chaumont*, 3 Paige, 178, 3 L. ed. 105; *Tanner v. Elworthy*, 4 Beav. 487; *Carter v. Palmer*, 1 Dru. & W. 722; *York Bldg. v. Mackenzie*, 8 Bro. P. C. 42; *Anderson v. Lemon*, 8 N.Y. 238; *Van Epps v. Van Epps*, 9 Paige, 237, 4 L. ed. 682; *Terwilliger v. Brown*, 44 N.Y. 241, 50 Barb. 13; *Olcott v. Tioga R. Co.* 27 N.Y. 565; *Hawley v. Cramer*, 4 Cow. 717; *Slade v. Van Vechten*, 11 Paige, 21, 5 L. ed. 42; *Torrey v. Bank of Orleans*, 9 Paige, 649, 4 L. ed. 858; *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 368.

This rule was not limited in its application to a particular class of persons, such as trustees, guardians, or solicitors, but went much deeper, and the rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest, where he had a duty to perform which was inconsistent with the character of purchaser. *Dickinson v. Codwise*, 1 Sandf. Ch. 226, 7 L. ed. 209; *Marshall v. Carson*, 38 N.J. Eq. 254; *Fulton v. Whitney*, 66 N.Y. 556.

Any person placed in a situation of trust or confidence in reference to the subject of the sale, or who has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. *Williams v. Townsend*, 31 N.Y. 415.

If an agent employed to sell becomes himself the purchaser, or the agent of another; or if he be an agent to buy, and he becomes himself the seller, or the agent of another in making the sale, the principle is the same.

pal may avoid the sale or purchase in equity. *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 20 Barb. 471; *Reed v. Warner*, 5 Paige, 650, 3 L. ed. 839; *Van Epps v. Van Epps*, *supra*; *Barker v. Marine Ins. Co.* 2 Mason, 390; *Bennett v. Pratt*, 4 Denio, 275.

The law will not permit a trustee to act in the double capacity. *Wilcox v. Smith*, 26 Barb. 352; *Bayer v. Phillips*, 17 Abb. N. C. 430; *Gardner v. Ogden*, 22 N.Y. 337; *Forbes v. Halsey*, 26 N.Y. 53; *Joyner v. Farmer*, 78 N.C. 200; *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 14 N.Y. 91; *Torrey v. Orleans Bank*, 9 Paige, 663, 4 L. ed. 859.

Trustee cannot purchase the objects of the trust.

The trustee of property cannot become its purchaser. He has a duty to perform in regard to it which is entirely inconsistent with his assuming that character. *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 L. ed. 1096; *Dobson v. Racey*, 3 Sandf. Ch. 60, 7 L. ed. 770; *Moore v. Moore*, 4 Sandf. Ch. 37, 7 L. ed. 1014; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 7 L. ed. 318.

Trustees are never permitted, without the aid of the court, to buy the property which they hold as such. *Carson v. Marshall*, 37 N.J. Eq. 215; *Staats v. Bergen*, 17 N.J. Eq. 297, 554; *Fulton v. Whitney*, 66 N.Y. 548; *Bennett v. Austin*, 61 N.Y. 808, 332.

A trustee cannot purchase an outstanding title and hold it for his own use, against his *cestui que trust*, even though he purchases at a judicial sale under a title superior to that conveyed to him as trustee. *Roberts v. Moseley*, 64 Mo. 511; *Jewett v. Miller*, 10 N.Y. 406; *Kellogg v. Wood*, 4 Paige, 579, 3 L. ed. 569.

A trustee acting in his fiduciary character, and without the intervention of the beneficiary, cannot sell the trust property to himself nor buy his own property from himself for the purposes of the trust. *Fox v. Mackreth*, 2 Bro. Ch. 400, 1 White & T. Lead. Cas. Eq. 4th Am. ed. 188, 212, 237; *Lewis v.*

N. Y. 327; *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 14 N. Y. 91; *Mecham*, Ag. § 463; 1 Story, Eq. Jur. § 322; 2 Sugd. Vend. p. 687; *Michoud v. Girod*, 45 U. S. 4 How. 554, 11 L. ed. 1099; *Milton v. Taylor*, 38 Ark. 428; *Gillespie v. Holland*, 40 Ark. 32.

If there were no more in the order of the probate court than the appointment of the appellee as the adviser of the curator in the management of the property, that alone would suffice to prevent her from buying the trust property.

Underhill, Trusts, p. 293; *Torrey v. Bank of Orleans*, 9 Paige, 661, 4 L. ed. 858; *Hawley v. Cramer*, 4 Cow. 738; *Allen v. DeGroodt*, 98 Mo. 159, 14 Am. St. Rep. 626; *Moore v. Woodall*, 40 Ark. 49; *Story*, Eq. Jur. § 317; *McCants v. Bee*, 18 Am. Dec. 616, note.

The proceeding to remove the minor's disabilities, being unknown to the common law, and unlike any known to the common law, the residence of the minors is jurisdictional, and must be shown by the record in the proceeding, or else the order is void.

Pulaski Co. v. Stuart, 28 Gratt. 879; *Thatcher v. Powell*, 19 U. S. 2 Wheat. 119, 5 L. ed. 221; *Harrey v. Tyler*, 69 U. S. 2 Wall. 842, 17 L. ed. 873; *Galpin v. Page*, 85 U. S. 18 Wall. 871, 21 L. ed. 964; *Wells*, Jurisdiction of Courts, § 162; *Gibney v. Crawford*, 51 Ark. 85; *Denning v. Corwin*, 11 Wend. 648; *Striker v. Kelly*, 7 Hill, 24; *Lawson*, Presumptive Ev. p. 27; *Reeces v. Clarke*, 5 Ark. 27; *Ex parte Anthony*, Id. 358; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, Id. 182; *Latham v.*

Jones, Id. 371; *Everett v. Clements*, 9 Ark. 480; *Butler v. Wilson*, 10 Ark. 316; *Freem. Judgm.* § 123.

Messrs. Stephenson & Trieber, John J. Harnor and E. C. Harnor, for appellees:

Appellants by their conduct, before and after the confirmation of the sale, having full knowledge of all the facts, are estopped to deny the title of appellee.

No word of dissent or dissatisfaction was expressed by appellants, or either of them, until the filing of the bill in this case, more than six years after the confirmation of the sale, full three years of which existed after the disabilities of each of them were removed. This bars their right of recovery.

Jones v. Graham, 36 Ark. 390; *McGaughey v. Brown*, 46 Ark. 25; *Woodard v. Jagers*, 43 Ark. 248; *Scott v. Freeland*, 7 Smedes & M. 409, 45 Am. Dec. 810; 2 Pom. Eq. §§ 815, 917, 965; *Story*, Eq. § 335; *Hoffert v. Miller*, 86 Ky. 572; *Goodnow v. Empire Lumber Co.* 31 Minn. 468; *Wells v. Seizas*, 24 Fed. Rep. 82; *O'Brien v. Gasin*, 20 Neb. 348; *Ward v. Larterty*, 19 Neb. 429; *Durflee v. Abbott*, 61 Mich. 471; *Thley v. Padgett*, 27 S. C. 300.

Guardian of minors may purchase lands of wards when the sale by a public officer is inevitable, and when he has no funds in his hands belonging to the wards.

Chorpenning's App. 32 Pa. 315, 72 Am. Dec. 789; *Prevost v. Gratz*, Pet. C. C. 378; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516.

The position occupied by appellee at the time of the application for and sale of the

Hillman, 3 H. L. Cas. 607; *Aberdeen R. Co. v. Blakie*, 1 Macq. H. L. Cas. 461; *Re Bloye's Trust*, 1 Maon. & G. 488; *Knight v. Marjoribanks*, 2 Maon. & G. 10; *Parkinson v. Hanbury*, 2 De G. J. & S. 450; *Ingle v. Richards*, 6 Jur. N. S. 11, 78; *Ridley v. Ridley*, 34 L. J. Ch. 462; *Franks v. Bollans*, 37 L. J. Ch. 148, 165; *Grover v. Hugell*, 3 Russ. 428; *Gregory v. Gregory*, Coop. Ch. 201; *Baker v. Carter*, 1 Younge & C. 250; *Woodhouse v. Meredith*, 1 Jac. & W. 204, 222; *Ex parte Lacey*, 6 Ves. Jr. 625; *Ex parte Bennett*, 10 Ves. Jr. 381, 394; *Randall v. Errington*, 10 Ves. Jr. 423; *Atty-Gen. v. Clarendon*, 17 Ves. Jr. 491, 500; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, Id. 91; *Scott v. Umbarcker*, 41 Cal. 410; *Union Slate Co. v. Tilton*, 69 Me. 244; *Connolly v. Hammond*, 51 Tex. 635; *Paine v. Irwin*, 16 Hun, 390; *Michoud v. Girod*, 45 U. S. 4 How. 558, 11 L. ed. 1078; *Stephen v. Beall*, 89 U. S. 22 Wall. 329, 22 L. ed. 786; *Wormley v. Wormley*, 21 U. S. 8 Wheat. 421, 5 L. ed. 651; *Caldwell v. Taggart*, 29 U. S. 4 Pet. 190, 7 L. ed. 828; *Freeman v. Harwood*, 49 Me. 195; *Dyer v. Shurtleff*, 112 Mass. 165; *Brown v. Cowell*, 116 Mass. 461; *Smith v. Frost*, 70 N.Y. 65; *Fulton v. Whitney*, 66 N.Y. 518; *Star F. Ins. Co. v. Palmer*, 9 Jones & S. 267; *Woodruff v. Boyden*, 3 Abb. N. C. 29; *Child v. Braace*, 4 Paige, 309, 3 L. ed. 449; *Campbell v. Johnston*, 1 Sandf. Ch. 148, 7 L. ed. 275; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 7 L. ed. 318; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 563; *Johnson v. Bennett*, 39 Barb. 237; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; 2 Pom. Eq. Jur. 462.

Property not the subject of the trust, but whose sale at less than its value will diminish the trust fund, cannot be purchased by the trustee for himself. *Fulton v. Whitney*, 66 N.Y. 555, 5 Hun, 19; *Cass v. Carroll*, 35 N.Y. 385; *Hickley v. Hickley*, L. R. 2 Ch. Div. 190.

Trustee cannot purchase the trust property. See notes to *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792; 18 L. R. A.

Anderson v. Butler (S. C.), 5 L. R. A. 106; *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218.

Effect of purchase by trustee.

A trustee cannot derive any private advantage from the sale of the trust property committed to his guardianship; and all the advantages which he does thus improperly acquire shall result to the benefit of the *cestui que trust*. *Chapin v. Weed*, *Clarke*, Ch. 466, 7 L. ed. 173.

A trustee who buys in the trust property under a prior incumbrance, and at a price below its real value, is always considered as doing so for the use and benefit of his *cestui que trust*. *Colburn v. Morton*, 36 How. Pr. 160, 5 Abb. Pr. N. S. 315, 3 Keyes. 305, 1 Trans. App. 149, 1 Abb. App. Dec. 385; *Campbell v. Johnston*, 1 Sandf. Ch. 148, 7 L. ed. 275.

Where the purchaser is the attorney for the execution plaintiff, and has controlled a part of the preliminaries to the sale, he will be deemed to hold the property as trustee of the owner. *O'Donnell v. Lindsay*, 7 Jones & S. 535; *Dickinson v. Codwise*, 1 Sandf. Ch. 214, 7 L. ed. 304; *Dobson v. Racy*, 3 Sandf. Ch. 60, 7 L. ed. 770; *Alkins v. Delnege*, 12 Ir. Eq. 1; *Harrison v. Guest*, 6 DeG. M. & G. 435.

A purchase by a guardian of his ward's land may be enforced against the purchaser's assignee in bankruptcy, and the sureties for the purchase money (*Reed v. Jones*, 30 Gratt. 138; 2 Tucker's Bl. Com. 459; *Moore v. Hilton*, 12 Leigh, 1; *Daniel v. Leitch*, 13 Gratt. 195; *Howery v. Helmes*, 20 Gratt. 1; *Cline v. Catron*, 22 Gratt. 378; *Phelps v. Seely*, Id. 573; *Zirkle v. McCue*, 26 Gratt. 517; *Brook v. Rice*, 27 Gratt. 512; *Talley v. Starke*, 6 Gratt. 339); or against an executor who purchases at his own sale. *McClure v. Miller*, 1 Bail. Eq. 107, 21 Am. Dec. 522.

Purchase inures to benefit of *cestui que trust*.

property imposed no duty upon her as to its conduct or management.

West v. Waddill, 38 Ark. 587, and *Imboden v. Hunter*, 23 Ark. 622, enunciating the duties of trustees, lay down the rule of law applicable to those whose relations to the property impose upon them positive duties to be performed in and about the sale, by and through which the price may be affected.

There is a distinction where the trustee deals with the *cestui que trust*, the latter having his own advisor.

Cotton v. Stanford, 82 Cal. 351.

While as a rule trustees are not permitted to purchase the property of *cestuis que trust*, yet such purchases are only voidable, and will not be set aside in all cases by courts of equity.

See *Jones v. Graham*, 36 Ark. 383; *McGaughey v. Brown*, 46 Ark. 25; *Woodard v. Jagers*, 48 Ark. 248; *Apel v. Kelsey*, 47 Ark. 419.

In the case at bar the minors were actually present in the probate court by their attorneys, by their next friend in the person of their nearest adult relative, and by their friend who had been, in the lifetime of their mother, the trustee to hold title to their real property, and their failure to appeal was, under the ruling of *Jones v. Graham*, an election to take the proceeds and discharge the trust.

Bramble v. Kingsbury, 39 Ark. 181; *Jowers v. Phelps*, 33 Ark. 463; *Goodman v. Winter*, 64 Ala. 410; *Schnell v. Chicago*, 38 Ill. 382; *Penn v. Heisey*, 19 Ill. 295; 1 Story, Eq. § 885.

Appellants were barred by the Statute of Limitations when the bill was filed.

The bill was filed October 13, 1887, six years

and two days after the date of confirmation of the sale, at which time Biscoe and Blanche Hindman had been of full age more than three years; and as to the statute bar, so far as they are concerned, there can be no question.

McGaughey v. Brown, *supra*; *Chandler v. Neighbors*, 44 Ark. 479.

As to T. C. Hindman, his disabilities of non-age were removed by the Phillips Circuit Court on November 15, 1881, so that at the time of the filing of the bill more than three years had elapsed, during which he was under no disability.

Judgments of superior courts, even of limited jurisdiction, cannot be collaterally attacked where the court had jurisdiction of the person and subject matter.

The circuit courts of the United States are courts of limited jurisdiction, one of the requisites to give it jurisdiction being that there shall be divers citizenship of the plaintiffs and defendants; yet it has been held that a failure of the record to show the necessary citizenship will not vitiate a judgment of such a court in a collateral proceeding, although on appeal such a judgment would be set aside and reversed.

McCormick v. Sullivan, 23 U. S. 10 Wheat. 193, 6 L. ed. 300; *O'Brien v. Gaslin*, 20 Neb. 347; *Applegate v. Lexington & Co. County Min. Co.* 117 U. S. 255, 29 L. ed. 892; *Harvey v. Tyler*, 69 U. S. 2 Wall. 329, 17 L. ed. 372; *Florentine v. Barton*, 69 U. S. 2 Wall. 310, 17 L. ed. 733; *Freem. Judgm.* §§ 116, 118, 119, 122-124, 126-128; *Boyd v. Roane*, 49 Ark. 398; *Adams v. Thomas*, 44 Ark. 267. The two last reaffirming *Borden v. State*, 11 Ark. 519.

See note to *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792.

Relief of cestui que trust.

A purchase by a trustee is voidable at the election of the *cestui que trust*, within a reasonable time. *Wormley v. Wormley*, 21 U. S. 8 Wheat. 421, 5 L. ed. 651.

When the delay is far within the Statute of Limitations, and the trustee has not suffered from any act done on the supposition that the *cestuis que trust* have abandoned their intention to question the sale, the laches will not bar such proceedings. *Morse v. Hill*, 136 Mass. 66. See note to *Cox v. Mackreth*, 2 Bro. Ch. 400, 1 White & T. Lead. Cas. Eq. 123; *De Bussche v. Alt*, L. R. 8 Ch. Div. 286; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Michoud v. Girod*, 45 U. S. 4 How. 608, 11 L. ed. 1076; *Learned v. Foster*, 117 Mass. 365; *Clark v. Blackington*, 110 Mass. 368; *Yeackel v. Litchfield*, 13 Allen, 417; *Litchfield v. Cudworth*, 15 Pick. 25; *Hayward v. Ellis*, 18 Pick. 272.

No one but the *cestui que trust* has a right to call in question or set aside a purchase made by the trustee for his benefit. *Wilson v. Troup*, 2 Cow. 238; *Graves v. Waterman*, 63 N. Y. 658; *Johnson v. Bennett*, 39 Barb. 250.

And he can at once have a purchase made by the trustee of the equity of redemption at a sale thereof set aside. *Hubbell v. Medbury*, 53 N. Y. 101.

The right of action was held to have expired after ten years from the time at which it had accrued. *Ibid.*

His right to set aside the purchase does not depend upon the question of good faith in the purchase, but on the peril of permitting any conflict between the personal interests of the individual and his duties as trustee, in his fiduciary character. *Duncomb v. New York, H. & N. R. R. Co.* 84 N. Y. 199.

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He is not bound to prove fraud in the purchase by the trustee. *Grubbs v. McGlawn*, 39 Ga. 675; *Price v. Winter*, 15 Fla. 106; *Miles v. Wheeler*, 43 Ill. 126.

On what terms set aside.

The purchase money and expenditures for repairs and permanent improvements must be refunded, and complete equity must be done between the parties, to authorize setting aside such purchase. *Yeackel v. Litchfield*, 13 Allen, 419; *Rotch v. Morgan*, 105 Mass. 430; *Duncomb v. New York, H. & N. R. R. Co.* 22 Hun. 135; *People v. Merchants Bank*, 35 Hun. 100; *Elchelberger v. Hawthorne*, 33 Md. 564; *Hill, Trustees*, 4th Am. ed. 539, and cases cited; *Cumberland Coal & I. Co. v. Sherman*, 50 Barb. 570; *Terwilliger v. Brown*, 59 Barb. 9; *Hawley v. Cramer*, 4 Cow. 735; *Abbot v. American Hard Rubber Co.* 33 Barb. 578; *Mason v. Martin*, 4 Md. 124; *Jones v. Jones*, 4 Gill, 87; *McLaughlin v. Barnum*, 31 Md. 425.

Setting aside sale.

If one acting as trustee for others becomes himself interested in the purchase, the *cestuis que trust* are entitled to have the sale set aside, unless the trustee had fairly devoted himself of the character of trustee. *Stephen v. Beall*, 39 U. S. 22 Wall. 340, 22 L. ed. 788; *Jewett v. Miller*, 10 N. Y. 402; *Slade v. Van Vechten*, 11 Paige, 21, 5 L. ed. 42.

Or if the fact is unknown to the buyer and seller. *Armstrong v. Campbell*, 3 Yerg. 238; *Graves v. Waterman*, 63 N. Y. 658.

Executors and administrators who become buyers at sales made by themselves acquire only an imperfect title, which will be set aside at the option of any of the parties interested in the property. *Yeackel v. Litchfield*, 13 Allen, 419; *People v. Open Board of S. B. Bldg. Co.* 82 N. Y. 103.

And it has been quite generally held that where an administrator becomes a purchaser of the estate

The removal of the disabilities of non-age set in motion the Statute of Limitations. The three years' extension of the Statute of Limitations was given as a protection to the disability of minors, etc. When that is removed the terms of the statute are satisfied.

Garland County v. Gaines, 47 Ark. 558.

Battle, J., delivered the opinion of the court:

In September, 1867, Thomas C. Hindman, and on the 19th of August, 1876, Mary B. Hindman, his wife, died intestate, leaving Susie Hindman, Biscoe Hindman, Thomas C. Hindman, Jr., and Blanche Hindman, their only children, surviving them. Biscoe, Thomas C., and Blanche were minors when their parents died,—Biscoe having been born on the 27th of November, 1861; Thomas C. on the 23d of November, 1863; and Blanche on the 2d of December, 1865. Laura E. O'Conner and the mother of Mrs. Hindman were sisters, and Mrs. O'Conner (Laura E. B.) was the step-grandmother of Mrs. Hindman's children, she having been the wife of their grandfather. When Mrs. Hindman was on her death-bed, she requested Mrs. O'Conner to take charge of her children, and she promised that she would to the best of her ability, and proceeded to do so immediately after the death of Mrs. Hindman, by taking them home with her, and exercising personal supervision over them. On the 5th of September, 1876, Susie, Biscoe, and Thomas C. Hindman filed a petition in the Phillips Probate Court, stating that they and Blanche Hindman were children and heirs-at-law of Mary B. Hindman, deceased; that Biscoe, Thomas C., and Blanche were minors; that they were the owners in their own right of an interest in real estate in the County of Phillips in this State, and equally entitled to a distributive share in the estate of their mother, the late Mary B. Hindman, and representing that their mother had requested that Mrs. O'Conner and her husband should take charge of and have the entire control and custody of her children, and assist in the management of their property interests; and asking that B. Y. Turner be appointed curator of the estate of the minors. On the same day the probate court granted the petition, and B. Y. Turner, having given bond with approved security, was appointed curator of the estate of Biscoe, Thomas C., and Blanche Hindman. The court further ordered that the minors remain in the care and custody of Mrs. O'Conner and her husband, in accordance with the last wish

and request of their mother; and appointed J. H. O'Conner, the husband of Mrs. Laura E. B. O'Conner, the attorney and next friend of the minors, "to look after and render such aid and assistance to the curator as may be necessary for their interest." After this the children continued to live with Mrs. O'Conner, and she endeavored to act the part of a mother to them. They were the owners of block 17, in that part of the City of Helena known as New Helena, having thereon a valuable residence, the late home of their father and mother, and other buildings. It became delinquent for taxes for the years 1873, 1874, and 1875, and she redeemed it by paying \$396.87, the cost of redemption. Susie, needing money to enable her to attend school and pay her debts, offered to sell and convey to her her (Susie's) interest in the block. She bought it, and became the owner of one undivided fourth of the block. On the 22d of November, 1880, Bart. Y. Turner, curator of the estate of the minor children, presented his petition to the Phillips Probate Court for an order to sell the minors' interest in the block; and the court, finding that it was to the interest of the minors that it should be sold to procure means for their support and education, ordered it to be sold on the 10th of January, 1881. The block was not sold on that day for the want of bidders; and the court again ordered it to be offered for sale, and fixed the 11th of April, 1881, as the day of sale. The entire block, including the one fourth purchased from Susie, with the consent of Mrs. O'Conner, was offered for sale on the last-named day; and Mrs. O'Conner, at the request of the children, bid for the same. She offered \$4,000 for the block, and, no one bidding more, she was declared the purchaser. The curator reported the sale to the probate court for confirmation. It having been reported that one A. H. Johnson would have given \$4,200, the children were dissatisfied, and filed exceptions to the report. Mrs. O'Conner thereupon offered \$4,500, and the \$4,000 in the report was changed to \$4,500, and the exceptions were withdrawn, and the sale was confirmed by the court, and the property was conveyed to Mrs. O'Conner. Three fourths of the purchase money, amounting to \$3,375, which was the proportion due the minor children, have been paid.

To set aside the purchase of the three-fourths interest of the block that belonged to Biscoe, Thomas C., and Blanche Hindman, this action was brought by them since they ceased to be minors. They contend that Mrs. O'Conner

of his intestate, such purchase is not merely voidable, but absolutely void. *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 132; *Walton v. Torrey*, Harr. Ch. (Mich.) 259; *Beaubien v. Poupard*, Id. 206; *Pearson v. Moreland*, 7 Smedes & M. 609, 45 Am. Dec. 319; *Erskine v. De la Baum*, 3 Tex. 408, 49 Am. Dec. 751; *Stallings v. Foreman*, 2 Hill, Ch. 405; *Ingerson v. Starkweather*, Walk. Ch. 348; *Ryden v. Jones*, 8 N. C. 497, 9 Am. Dec. 660; *Scott v. Gorton*, 14 La. 115, 33 Am. Dec. 573; *Church v. Marine Ins. Co.* 1 Mason, 341; *Clute v. Barron*, 2 Mich. 192; *Torrey v. Bank of Orleans*, 9 Paige, 649, 4 L. ed. 853; *Ex parte Bennett*, 10 Ves. Jr. 384; *Michoud v. Girod*, 45 U. S. 4 How. 508, 11 L. ed. 1076; *Worthy v. Johnson*, 8 Ga. 235, 52 Am. Dec. 399; *Musselman v. Eshleman*, 10 Pa. 394, 51 Am. Dec. 493, note; *Grubbs v. McGlawn*, 39 13 L. R. A.

Ga. 674; *Alexander v. Alexander*, 46 Ga. 201; *Buckles v. Lafferty*, 2 Rob. (Va.) 292, 40 Am. Dec. 752.

A purchase of trust property by a trustee at public sale is valid at law, and is voidable only, not void, in equity. It is voidable only at the election of the persons whose interests are affected by the purchase. *Olcott v. Tioga R. Co.* 27 N. Y. 567; *Jackson v. Van Dalsen*, 5 Johns. 47.

A purchase by an auctioneer, employed by an executor, in which the executor became interested before confirmation, is invalid, both because the auctioneer was agent of the executor and because of the interest acquired by the auctioneer. *Terwilliger v. Brown*, 44 N. Y. 241, 59 Barb. 13.

Sale may be set aside. See note to *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792.

was under a disability to purchase, arising from the relation she sustained to them at the time the block was sold. Can they avoid the sale?

As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale, within a reasonable time, however innocent the purchaser may be. 1 Story, Eq. Jur. §§ 307-323, and cases cited.

In Sugden on Vendors the rule and its reason are expressed as follows: "It may be laid down as a general proposition that trustees, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any person who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned; for, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" 2 Sugd. Vend. 7th Am. ed. *887; *Michoud v. Girod*, 45 U. S. 4, 11 L. ed. 1077.

In *Imboden v. Hunter*, 28 Ark. 622, this court said: "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price; and as purchaser, it is his interest to get it for the lowest; and these relations are so essentially repugnant—so liable to excite a conflict between self-interest and integrity—that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule that the sale was bona fide, and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party itself works his disability to purchase. . . . The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation

of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use."

Following the rule laid down in *Imboden v. Hunter*, *supra*, this court held in *Wright v. Walker*, 30 Ark. 44, that "the purchase by an attorney, at a tax-sale of land in regard to which he had been retained," was inconsistent with his relations to his client, and could be avoided by the client, notwithstanding there was no bad faith in the purchase. After a careful examination of numerous authorities, it held that it was a well-settled principle that no one can be permitted to purchase an interest when he has a duty to perform that is inconsistent with the character of a purchaser,—quoting the remark of Lord Thurlow in *Hall v. Hallett*, 1 Cox, Ch. 134, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

In *West v. Waddell*, 33 Ark. 587, reiterating the doctrine laid down in the cases cited, this court held that a purchase of land at an administrator's sale by the attorney of the administrator was voidable at the instance of the heirs of the intestate to whose estate the land belonged.

In *Livingston v. Cochran*, 33 Ark. 294, this court, in considering the validity of a purchase of lands by a probate judge at a sale made by an administrator under an order of the court of which he was the judge, after quoting, as we have, from *Imboden v. Hunter*, said: "All that is above said in relation to trustees purchasing at sales made by them applies, on principle, to the case of a probate judge purchasing at a sale made upon his own order, and which he is obliged to have conducted fairly, and for the benefit of creditors, legatees, or distributees of the estate."

In *Clemens v. Cates*, 49 Ark. 242, this court used the following language: "The law forbids a trustee, and all other persons occupying a fiduciary or quasi fiduciary position, from taking any personal advantage, touching the thing or subject as to which such fiduciary position exists. . . . If such a person acquires an interest in property as to which such a relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition. This rule applies to tenants in common by descent with the same force and reason as it does to persons standing in a direct fiduciary relation to others; for they stand, by operation of law, in a confidential relation to each other, as to the joint property, and the duty is imposed on them to protect and secure their common interests. They have a community of interest which produces a community of duty, and imposes on each one the duty to exercise good faith to the others. Neither one can take advantage of the others by purchasing an outstanding title or incumbrance, and asserting it against them. Such an act would be inconsistent with good faith, and against the reciprocal obligations to do nothing to the prejudice

of each other's equal claims which' their relationship created. Such a purchaser, notwithstanding the design of the one making it was to the contrary, would be for the common benefit of all the co-tenants, and the legal title acquired would be held in trust for the others, if they should choose, within a reasonable time, to claim the benefit thereof, by contributing, or offering to contribute, their proportion of the purchase money."

We have quoted at length from the opinions of this court to show the reason and extent of the rule laid down. Its applicability to guardians and wards, and persons standing in like relation is apparent. Judge Story, in speaking on this rule, says: "In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that, during the existence of the guardianship, the transactions of the guardian cannot be binding upon the ward, if they are of any disadvantage to him; and, indeed, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith, *uberrima fides*, on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian." 1 Story, Eq. Jur. 13th ed. § 817.

Quasi guardians and all other persons occupying the relation of confidential advisers have been held to come within the rule. *Revett v. Harbey*, 1 Sim. & Stu. 502, 1 Eng. Ch. 502; *Huguenin v. Baseley*, 14 Ves. Jr. 273; 1 Story, Eq. Jur. 13th ed. §§ 317, 319, and cases cited; 1 Perry, Tr. § 204; *Torrey v. Bank of Orleans*, 9 Paige, 668, 4 L. ed. 859; Underhill, Tr. p. 293.

In *Hobday v. Peters*, 28 Beav. 349, a mortgagor consulted a solicitor, "who turned her over to his clerk to assist her gratuitously." The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount due thereon. The court held that the clerk was a trustee for the benefit of the mortgagor. The same was held as to the clerk of a broker employed to make sale of land in *Gardner v. Ogden*, 22 N. Y. 327.

The relation sustained by Mrs. O'Conner to the Hindman children, at the time of the sale in question, was peculiarly confidential. A dying mother had committed them to her care. She took them to her house, and treated them as a part of her family. They were the children of her niece, and the grandchildren of a former husband. Her treatment of them was

kind, and, with the ties of kindred which existed between them naturally caused them to lean on her for protection and repose in her implicit confidence. She recognized this fact, and sometimes, if not always, responded to their wishes. At their request she moved upon the block in question, and with them occupied the late residence of their parents, and continued to do so some time before, and at the time of, and after the sale. At their request the probate court virtually made her and her husband the guardians of their persons, and they accepted the situation. At their request she paid out \$896.87 to redeem their home from a forfeiture for taxes. When the home was offered for sale they wanted her to buy it, and looked to her to save it from the sacrifice. She responded to their request, but failed to meet their expectation. She purchased, but, having heard that another would give more, they were dissatisfied. She increased her bid, and they withdrew all opposition to the confirmation of the sale by the probate court; but they had been disappointed and the final result was a lawsuit.

But it is contended for Mrs. O'Conner that "the position occupied by her, at the time of the application for an order to sell, and the sale of the property purchased by her, imposed no duty upon her as to its conduct or management;" that the conduct and management of the sale was, by the law, imposed upon Turner, as curator, and that she acted fairly and in good faith. For this among other reasons, her counsel insist that the sale should not be set aside.

In support of their contention, they cite and rely upon *Jones v. Graham*, 36 Ark. 383. In that case the facts were: An administrator reported to the probate court that there had come into his possession a deed of trust of certain lands, executed in 1860, by one Sullivan to George W. Beasley, to secure to the intestate a debt of about \$5,500. "That he had directed the trustee to sell under the power; that he had attended the sale, and finding the lands were about to go below value, had himself bid the sum of \$3,040, and the lands were upon that bid struck off, no one being willing to bid more. He represented that he had no desire to keep the lands, but was willing to hold them as the property of the estate, if the court should deem it best; and submitted the matter to the court to say whether he should keep them as his own, charging himself with the net price, after paying expenses or hold them as administrator for the benefit of the estate." The court ordered him to keep the lands as his own, and to receipt to the estate for the proceeds of the sale, less the amount of the indebtedness of his intestate to himself. In pursuance of this order, he, in his settlement, charged himself with the sum of \$2,715.50, as proceeds of the sale. The settlement was laid over until the second term of the court after it was filed, a period of nearly six months, when it was taken up and confirmed without objection. This court held that the whole proceeding of the court upon the report of the administrator was unauthorized and irregular; that the administrator became clothed, upon the purchase, with a constructive trust because of the use of the means of the estate in making

the purchase, and also because of his fiduciary relation to the estate; and was wearing it when he went into the probate court to ask, if deemed best, that he should be denuded, by accounting for the proceeds; and that the order of the probate court had no greater effect than mere advice as to the probable future action of the court upon his settlement, when the same should be made. But this court, nevertheless, refused to disturb the sale. Why? The reasons assigned are: Constructive trusts are at the option of those entitled to claim the benefits: that they may leave the property in the hands of the trustee, and accept the proceeds, in accordance with the legal title, and that election, deliberately and intelligently made, dispels the trust; and that in that case the action of the probate court, "in view of the obvious absence of all fraudulent intent, the length of time that the settlement lay unchallenged and its first confirmation," amounted to an election to take the proceeds and discharge the trust.

In *Jones v. Graham* the court said that it did not mean to say "that, ordinarily, the approval of a sale, or dealing with the proceeds by a probate court, would relieve a purchaser of a constructive trust;" that, ordinarily, it would not; that that case was a peculiar case, not likely to arise again; that it stood on its own peculiar grounds, with such distinctions from reported cases as will be sufficiently obvious; and that it was not like the case of an administrator or attorney who simply purchases for himself, with the design of acquiring the property, and who has the sale confirmed without question or explanation of the circumstances. Whether the court was correct in its conclusion or not it is not necessary for us to say, but it is evident that the court did not intend to repudiate the rule announced in former cases. That case was regarded as exceptional. But this case does not come within the exception as laid down in that case. Here the purchaser bought for herself, with the design of acquiring the property. Three of the Hindman children were minors. She was quasi guardian of their persons, and stood to them in the place of a parent. They were under her care and protection, and the property sold was and had been in her possession. They were not *sui juris*, and could not act for themselves. If the curator had failed to discharge his duty in the management of their property, and in making settlements in the probate court, it was the duty of her and her husband, if of anyone, to have interfered in their behalf and asserted their rights. No election to accept the proceeds and ratify the sale could have been made by them while the disabilities of minority rested upon them, and none can be imputed to them on account of any act or failure of theirs while such disabilities continued.

The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or advantageous. If the trustee or other person having

a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty, and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the *cestui que trust* or other person to come at his option, and, without showing actual injury or fraud, have the sale set aside. *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 865; *Torrey v. Bank of Orleans*, 9 Paige, 668, 4 L. ed. 859; *Ex parte James*, 8 Ves. Jr. 345; *Brockett v. Richardson*, 61 Mass. 766; *Van Epps v. Van Epps*, 9 Paige, 287, 4 L. ed. 682; *Campbell v. Walker*, 5 Ves. Jr. 678, 18 Ves. Jr. 601; *Callis v. Ridout*, 7 Gill & J. 1; *Ex parte Lacey*, 6 Ves. Jr. 625; *Ex parte Bennett*, 10 Ves. Jr. 381; *Campbell v. Pennsylvania L. Ins. Co.* 2 Whart. 62; *Michoud v. Girod*, 45 U. S. 4 How. 557, 11 L. ed. 1100, and cases before cited; *McGaughey v. Brown*, 46 Ark. 25.

Mrs. O'Conner comes within the rule. She was virtually constituted guardian of the persons of the minor children by the order of the probate court. Her husband was appointed their attorney and next friend to look after them, and to render such aid and assistance to the curator as might be necessary for their interest. She and her husband took possession of their property, and she redeemed it. How far the curator was controlled by them does not appear, but it does appear that he permitted them to take charge of their property, obviously on account of their relation to the children. They had ample opportunities, by reason of their relation to the children, to acquire full knowledge of the property. Whether they acquired information by reason of such relation, which, if known to the public, would have caused the property to have been sold for more than it did, is not, under the rule, necessary to inquire. She occupied a confidential relation to the children, approaching nearly to that of parent to child. Whether she abused it, no inquiry, under the rule, can be made. She and her husband assumed the duty of taking care of the children and looking after their property. While she sustained that position she was not permitted to purchase their property, because the right to do so might have interfered with a faithful discharge of her duty.

Mrs. O'Conner relies on the five years' Statute of Limitations to sustain her title. That Statute provides: "All actions against the purchaser, his heirs, or assigns for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Appellants insist that that Statute has no application to an action like this, the object of which is to set aside a sale of land for fraud. So *McGaughey v. Brown*, 46 Ark. 25, was an action to set aside a sale of land for fraud. The prayer of the bill in that case was that the sale be set aside; that a master be appointed to take an account of the rents and profits; that

the conveyances of the land, which were alleged to be fraudulent, be removed as a cloud upon the title of plaintiffs; and that they be put into the possession of the land. This court held that the object of the bill was to get possession of the land, and that the action was barred by the five years' statute.

In this case the prayer of the complaint is that the sale be set aside; that an account be taken between the plaintiffs and defendants, as to the rents and profits of the block in question, and the sums paid by defendant for the benefit of plaintiffs; and that "the correct and true balance be ascertained between them;" and that said property be sold for purposes of partition and to satisfy the balance found by the master, and for other relief. One of the obvious objects of the complaint was the recovery of the land. That was necessary to accomplish the purpose of the action. The Statute applies.

The sale in question was confirmed on the 11th day of October, 1881. Mrs. O'Conner held adverse possession after that date. This action was brought on the 18th of October, 1887, at which time Biscoe and Blanche Hindman had been of age more than three years, and were barred from maintaining it. Three years had not expired when Thomas C. arrived of age; but it is said his disabilities of nonage were removed by the Phillips Circuit Court on the 15th of November, 1881, and that at the time this action was commenced more than three years had elapsed, during which he was under no disability. On the other hand, it is contended that the judgment of the circuit court which declared his disabilities removed was void for want of jurisdiction.

The authority to remove the legal disabilities of minors was conferred upon circuit courts by an Act of the General Assembly which was approved February 18, 1869. Mansf. Dig. § 1362. Section 2 of the Act, after providing that circuit courts shall have authority to remove legal disabilities of minors, adds: "Provided, the person praying such relief shall be a resident of the county in which the court to which such application shall be made is held." The Act makes the residence jurisdictional,—a condition upon which the court can remove the disabilities of the minor.

The record shows that Biscoe and Thomas C. Hindman made an application to the Circuit Court of the County of Phillips for the removal of their disabilities, and that their application was granted. It does not appear in their application, or in the order removing their disabilities, that either of them was a resident of Phillips County. Is the order void for want of jurisdiction?

In *Harvey v. Tyler*, 69 U. S. 2 Wall. 328, 842, 17 L. ed. 871, 878, the Supreme Court of the United States uses the following language: "The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. . . . In all cases when the new powers thus conferred are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumption as to the jurisdiction of the court, and the conclusiveness of its action, will be made as in 13 L. R. A.

cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court, and duties required of it, to be exercised in a special, and often summary, manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case."

In *Galpin v. Page*, 85 U. S. 18 Wall. 350, 371, 21 L. ed. 959, 964, the court said: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." To the same effect, see *Pulaski Co. v. Stuart*, 28 Gratt. 873; *Gibney v. Crawford*, 51 Ark. 35; *Foster v. Waterman*, 124 Mass. 592; *Furgeson v. Jones*, 17 Or. 204, 3 L. R. A. 620; *Brown v. Wheelock*, 75 Tex. 385; 1 Black, Judgm. § 279; *Freem. Judgm.* § 123.

The power to remove the disabilities of minors is a special power conferred upon the circuit courts, and is to be exercised in a summary manner, and not according to the course of the common law. The record does not show the fact—the residence of the minors in Phillips County—necessary to give the Phillips Circuit Court authority to remove the disabilities of Biscoe and Thomas C. Hindman, and the order declaring the removal of their disabilities is void.

This action is not barred as to Thomas C. Hindman. He has not ratified the sale of the block in question by receiving any part of the proceeds thereof since he arrived of age. He is entitled to one fourth of the block, and to one fourth of the rents and profits which have accrued since the 11th of October, 1881, the day on which the sale was confirmed by the probate court, and Mrs. O'Conner is entitled to the remaining three fourths of the block, and of the rents and profits. He should be charged, in account with Mrs. O'Conner, with the proceeds of the sale paid to him, or for him to anyone authorized to receive the same, and lawful interest thereon from the date of the payment, and with one fourth of the taxes paid by her on the block since the sale and interest thereon, and one fourth of the value of the improvements made by her on the block since the sale, and credited with one fourth of the rents and profits. If the property can be divided without prejudice to the interest of the parties concerned, it should be partitioned between them according to their respective interests; and if not, it should be sold, and the proceeds of the sale divided according to their interests. Upon an account being stated as to the rents, profits, purchase money received by Thomas C. Hindman, interest, taxes and improvements, the balance should be made a charge on the part or interest in the block, or in the proceeds of the sale thereof, if it be sold for partition, belonging to the party against whom it is found, and the payment of it (the charge) should be enforced according to the rules of equity.

The decree of the court below is therefore af-

firm^d as to Biscoe and Blanche Hindman, and as to Thomas C. Hindman is reversed, and the cause is remanded for proceedings consistent with this opinion.

NEW YORK COURT OF APPEALS.

Edward ROBERTS, *Respt.*,
v.

NEW YORK ELEVATED R. CO. *et al.*,
Appts.

(172 N. Y. 455.)

1. In an action by a landowner to compel a company operating an elevated railroad in the street in front of his property to pay the damage done him by cutting off the easements of light, air and access connected with such property, an expert witness cannot be permitted to state what, in his opinion, the amount of such damage is, nor what would have been the present value of the land if the road had not been built.

2. The admission of incompetent evidence will not be held to be nonprejudicial to defendant in an action to enjoin an elevated railroad company from operating its road until it pays the damage done to an abutting property owner, because the company is not bound to pay the ascertained damages to acquire the easement but may submit to the injunction and proceed to acquire the right by eminent domain.

(October 20, 1891.)

APPPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of the Special Term in favor of plaintiff in an action brought to recover damages for injuries caused to plaintiff's property by the construction and operation of defendants' road. *Reversed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies and Brainard Tolles, for appellants:

The conclusions of the witness upon the very matters which the court had to decide, viz., the existence and amount of damages, were not competent evidence.

McGean v. Manhattan R. Co. 117 N. Y. 219; *Avery v. New York Cent. & H. R. Co.* 121 N. Y. 81. See also *Morehouse v. Mathews*, 2 N. Y. 514; *Clark v. Baird*, 9 N. Y. 188; *Van Deusen v. Young*, 29 N. Y. 9; *McGregor v. Brown*, 10 N. Y. 114; *Marcy v. Shultz*, 29 N. Y. 346; *Teerpenning v. Corn Beach, Ins. Co.* 48 N. Y. 279; *Green v. Plank*, 48 N. Y. 669; *Van Zandt v. Mut. Ben. L. Ins. Co.* 55 N. Y. 169; *Ferguson v. Hubbell*, 97 N. Y. 507; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *People v. Kemmler*, 7 L. R. A. 715, 119 N. Y. 580; *Fish v. Dodge*, 4 Denio, 811; *Lamoure v. Caryl*, Id. 370; *Norman v. Wells*, 17 Wend. 186; *Lincoln v. Saratoga & S. R. Co.* 28 Wend. 425; *Dunham v. Simmons*, 8 Hill, 609; *Paige v. Hazard*, 5 Hill, 608; *Giles v. O'Toole*, 4 Barb. 261; *Cook v. Brockway*, 21 Barb. 381; *Simons v. Monier*, 29 Barb. 419; 18 L. R. A.

Richardson v. Northrup, 66 Barb. 85; *Thompson v. Dickhart*, 66 Barb. 604; *Duff v. Lyon*, 1 E. D. Smith, 536; *Hudson v. Caryl*, 2 Thomp. & C. 245; *Benkard v. Babcock*, 27 How. Pr. 391; *Newton v. Fordham*, 7 Hun, 58; *Fleming v. Delaware & H. Canal Co.* 8 Hun, 358; *Schermerhorn v. Tyler*, 11 Hun, 549; *Re New York, L. & W. R. Co.* 27 Hun, 151; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Van Wagoner v. New York Cement Co.* 36 Hun, 552; *Ranch v. New York, L. & W. R. Co.* 17 N. Y. S. R. 401; *Re New York Elev. R. Co.* 35 N. Y. S. R. 944; *Thompson v. Manhattan Elev. R. Co.* 29 N. Y. S. R. 720; *Malcom v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 741; *Wichita & W. R. Co. v. Kuhn*, 88 Kan. 104; *Burlington & M. R. Co. v. Beebe*, 14 Neb. 468; *Prosser v. Wapello County*, 18 Iowa, 327; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309; *Evanville, I. & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *White v. Stoner*, 18 Mo. App. 540; *Hennes v. Brownlee*, 63 Ala. 277; *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42; *Crane v. Northfield*, 33 Vt. 124; *Tingley v. Providence*, 8 R. I. 498; *Brown v. Providence & S. R. Co.* 12 R. I. 288.

It may be conceded that the current of authority in Massachusetts is in favor of the admission of the opinions of witnesses as proof of the amount of damages in all cases.

Shattuck v. Stoneham Branch R. Co. 6 Allen, 115; *Vandine v. Burpee*, 18 Met. 288; *Swan v. Middlesex County*, 101 Mass. 173; *Tucker v. Massachusetts Cent. R. Co.* 118 Mass. 546.

But the decisions are not uniform.

Wesson v. Washburn Iron Co. 18 Allen, 95; *Burt v. Wigglesworth*, 117 Mass. 302.

Shattuck v. Stoneham Branch R. Co., *supra*, has been followed in Maine, Minnesota, and West Virginia.

Tebbetts v. Haskins, 16 Me. 283; *Portland & R. R. Co. v. Deering*, 1 New Eng. Rep. 475, 78 Me. 61; *Lohmicks v. St. Paul, S. & T. F. R. Co.* 19 Minn. 466; *Sherman v. St. Paul, M. & M. R. Co.* 80 Minn. 227; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 678.

In New Hampshire, Illinois, and Wisconsin the decisions are conflicting and uncertain, with the weight of authority in favor of the exclusion of such evidence. In Arkansas the decisions are uniform to the effect that such evidence should be excluded, except in *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 106, where there is a dictum to the contrary. In Pennsylvania no case can be found which is in point, *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415, really turning on another point. The same is true of Connecticut.

With these exceptions it is believed that every State whose decisions are regarded as of importance has adopted the rule excluding evidence of this character.

See Alabama: *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185; Alabama & F. R. Co.

v. *Burkett*, 42 Ala. 88; *Hames v. Brownlee*, 68 Ala. 277; *Young v. Cureton*, 87 Ala. 727.

Arkansas: *Pierson v. Wallace*, 7 Ark. 282; *Lindauer v. Delaware Mut. L. Ins. Co.* 18 Ark. 461; *St. Louis, A. & T. R. Co. v. Anderson*, 89 Ark. 167.

California: *Collins v. Sullivan*, 54 Cal. 288; *Fleming v. Albeck*, 67 Cal. 226.

Georgia: *Brunswick & A. R. Co. v. McLaren*, 47 Ga. 546; *Gilbert v. Cherry*, 57 Ga. 128; *Central R. Co. v. Senn*, 73 Ga. 705.

Illinois: *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Linn v. Sigbee*, 67 Ill. 75; *Hoener v. Koch*, 84 Ill. 408.

Indiana: *Evansville, I. & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 480; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Yost v. Conroy*, 92 Ind. 464.

Iowa: *Dalzell v. Davenport*, 12 Iowa, 437; *Prosser v. Wapello County*, 18 Iowa, 327; *Russell v. Burlington*, 30 Iowa, 262.

Kansas: *Roberts v. Brown County Comrs.* 21 Kan. 247; *Parsons Water Co. v. Knapp*, 83 Kan. 752; *Wichita & W. R. Co. v. Kuhn*, 88 Kan. 675; *Ottawa, O. C. & C. G. R. Co. v. Adolph*, 41 Kan. 600; *Ottawa, O. C. & C. G. R. Co. v. Fisher*, 42 Kan. 675.

Kentucky: *Muldrough's Hill, C. & C. Turnp. Co. v. Maupin*, 79 Ky. 101.

Louisiana: *Liles v. New Orleans Canal & Bkg. Co.* 11 Rob. (La.) 92; *Holland v. Cammett*, 5 La. Ann. 705.

Missouri: *Belch v. Missouri Pac. R. Co.* 18 Mo. App. 80; *White v. Stoner*, Id. 540; *Hurt v. St. Louis, I. M. & S. R. Co.* 13 West. Rep. 233, 94 Mo. 255.

Nebraska: *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585; *Burlington & M. R. Co. v. Schluntz*, 14 Neb. 421; *Burlington & M. R. Co. v. Beebe*, Id. 463; *Omaha v. Kramer*, 25 Neb. 489.

New Hampshire: *Rochester v. Chester*, 8 N. H. 849; *Peterborough v. Jaffrey*, 6 N. H. 462; *Beard v. Kirk*, 11 N. H. 397; *Hott v. Moulton*, 21 N. H. 586; *Concord R. Co. v. Greely*, 28 N. H. 287.

New Jersey: *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42.

Ohio: *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 568; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Powers v. Hazelton & L. R. Co.* 38 Ohio St. 329; *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309.

Rhode Island: *Tingley v. Providence*, 8 R. I. 493; *Brown v. Providence & S. R. Co.* 12 R. I. 298.

Texas: *Houston & T. C. P. Co. v. Burke*, 55 Tex. 328; *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298, 78 Tex. 169.

Vermont: *Crane v. Northfield*, 88 Vt. 124; *Bain v. Cushman*, 60 Vt. 348.

Wisconsin: *Farrand v. Chicago & N. W. R. Co.* 21 Wis. 435; *Church v. Milwaukee*, 81 Wis. 518; *Churchill v. Price*, 44 Wis. 540.

Reasons for the exclusion of the evidence:

(1) It encroaches upon the functions of the jury or other appointed triers of fact.

Van Deusen v. Young, 29 N. Y. 9; *Van Zandt v. Mut. Ben. L. Ins. Co.* 55 N. Y. 169; *Avery v. New York Cent. & H. R. R. Co.* 121 N. Y. 31; *Fish v. Dodge*, 4 Denio, 311; *Cook v. Brook-*

way, 21 Barb. 331; *Simons v. Monier*, 29 Barb. 419; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Fleming v. Delaware & H. Canal Co.* 8 Hun, 358; *Hudson v. Caryl*, 2 Thomp. & C. 245; *Ranch v. New York, L. & W. R. Co.* 17 N. Y. S. R. 401; *Malcolm v. Metropolitan Elec. R. Co.* 86 N. Y. S. R. 741; *Wichita & W. R. Co. v. Kuhn*, 88 Kan. 675; *Prosser v. Wapello County*, 18 Iowa, 327; *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Hames v. Brownlee*, 68 Ala. 277.

(2) It violates the rule that opinion evidence shall be received only in cases of necessity.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Carter v. Boehm*, 3 Burr. 1918; *Teerpenning v. Corn Each. Ins. Co.* 43 N. Y. 279; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Dolittle v. Eddy*, 7 Barb. 74.

(3) It involves a conclusion of the witness upon a matter of law as to the measure of damages.

Richardson v. Northrup, 66 Barb. 85; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *White v. Stoner*, 18 Mo. App. 540; *Rochester & S. R. Co. v. Buellong*, 10 How. Pr. 289; *Decker v. Myers*, 81 How. Pr. 872.

(4) The formation of such conclusions does not appertain to any science, art, trade, or occupation known to mankind.

Ferguson v. Hubbell, 97 N. Y. 507; *Van Wycklen v. Brooklyn*, *supra*; *Duff v. Lyon*, 1 E. D. Smith, 536; *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42.

(5) The matter is one upon which judges and jurors are as competent to pass as any witness, when the necessary facts as to values and courses of values are placed before them.

Ferguson v. Hubbell, *Reed v. McConnell*, and *Thompson v. Pennsylvania R. Co.* *supra*; *Crane v. Northfield*, 88 Vt. 124.

(6) Such conclusions are conjectural and can have no certain or definite basis of fact.

Marcy v. Schultz, 29 N. Y. 846; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Lamoure v. Caryl*, 4 Denio, 370; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Thompson v. Manhattan R. Co.* 29 N. Y. S. R. 720.

(7) The admission of such evidence tends to induce an omission to prove the facts necessary for an independent and intelligent decision of the question of damage.

Morehouse v. Mathews, 2 N. Y. 514; *Avery v. New York Cent. & H. R. R. Co.* 121 N. Y. 31; *Paige v. Hazard*, 5 Hill, 603; *Giles v. O'Toole*, 4 Barb. 261; *Newton v. Fordham*, 7 Hun, 56.

(8) Such evidence cannot be tested or contradicted by proof of facts.

Cook v. Brookway, 21 Barb. 331; *Ferguson v. Hubbell*, 97 N. Y. 507; *Re New York Elec. R. Co.* 85 N. Y. S. R. 944.

(9) Such evidence affords an ample field for bias and corruption, and is contrary to the policy of the law.

Tracey Peerage Case, 10 Clark & F. 154; *Ferguson v. Hubbell*, 97 N. Y. 507; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *People v. Kemmler*, 119 N. Y. 580, 7 L. R. A. 715; *Re New York Elec. R. Co.*

supra; Evansville, J. & C. S. L. R. Co. v. Fitzpatrick, 10 Ind. 120.

Mr. Henry H. Man, with **Messrs. A. P. & W. Man**, for respondent:

The evidence of expert witnesses was competent as to the diminution of fee and rental value.

Clark v. Baird, 9 N. Y. 188; *People v. McCarthy*, 3 Cent. Rep. 883, 102 N. Y. 639; *Krumm v. Beach*, 96 N. Y. 407; *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289; *Re Rochester*, 40 Hun, 588; *Kenkele v. Manhattan R. Co.* 55 Hun, 398; *Vandenburgh v. Boston & A. R. Co.* 21 N. Y. Week. Dig. 474; *Hine v. New York Elev. R. Co.* 36 Hun, 293; *Reed v. Rome, W. & O. R. Co.* 48 Hun, 231; *Shaw v. Charlestown*, 2 Gray, 107; *Shattuck v. Stoneham Branch R. Co.* 6 Allen, 116; *Suan v. Middlesex County*, 101 Mass. 178; *Snow v. Boston & M. R. Co.* 65 Me. 290; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Carter v. Thurston*, 58 N. H. 104; *Sigafos v. Minneapolis, L. & M. R. Co.* 36 Am. & Eng. R. R. Cas. 675; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 28 Am. & Eng. R. R. Cas. 51; *Yost v. Conry*, 92 Ind. 469; *Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Chicago v. McDonough*, 112 Ill. 85; *Colwill v. St. Paul & C. R. Co.* 19 Minn. 288; *Sherman v. St. Paul, M. & M. R. Co.* 30 Minn. 227; *Lehmcke v. St. Paul, S. & T. F. R. Co.* 19 Minn. 464; *Snyder v. Western U. R. Co.* 25 Wis. 60; *Telephone Tele. Co. v. Forke*, 2 Tex. C. C. § 865; *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 108; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 678.

Peckham, J., delivered the opinion of the court:

The principal question in this case is in regard to the admissibility of the opinions of experts in reference to the amount of damages sustained by the plaintiff by reason of injury to his easements of light, air, and access to his property in Third Avenue, in the City of New York, caused by the building and operation of the defendants' railroad. As the question is one of considerable importance, and arises in each one of this class of cases, and as the number of such cases tried and to be tried is, as we understand, very large, a critical examination of the question is called for. It will be well to have a clear view of the facts existing at the time that the questions in controversy were put to the witness, so that we may determine understandingly the precise point in issue.

It appears that the plaintiff, in November, 1852, became the owner in fee of the premises in question, which consisted originally of six lots on the east side of Third Avenue and on the south side of Ninety-ninth Street, but the plaintiff subsequently sold some, leaving himself with a frontage of about 100 feet on Third Avenue, and about 110 feet in depth. These lots cost the plaintiff about \$500 apiece at the time he purchased them; at which time they were vacant, and they so remained until 1865, when the plaintiff leased them for \$150 per year. The tenant erected a house upon the corner lot, with a stable, which buildings were destroyed by fire about 1877, at which time the tenant gave up his lease, and 18 L. R. A.

the lots remained vacant until 1881. In the meantime the plaintiff filled them in, and graded them. Before filling in, the premises formed a portion of a marsh or swamp over which the tide ebbed and flowed. In 1881 the plaintiff sold these lots under a contract for \$40,000, and the purchaser commenced the erection thereon of the present buildings, five in number, four of which front on Third Avenue and the fifth on Ninety-ninth Street, each house being four stories high, constructed of brick with brown-stone trimmings. The buildings are about forty-seven feet front elevation and sixty-five feet deep, and cost about \$11,000 each. The purchaser had them substantially inclosed and the plastering nearly completed in the spring of 1883, when the plaintiff foreclosed his liens thereon and took them from him, and completed them, so that they were ready for occupancy in the fall of the year 1888. Since the month of October, 1888, the buildings have been leased to tenants, and the rents actually collected from the Third Avenue buildings from January 1, 1884, to January 1, 1889, have been from one house and lot, \$7,058; from the second, \$6,129.11; from the third, \$7,554.50; and from the fourth, \$7,541.66. The defendants' railroad was constructed in Third Avenue in front of plaintiff's lots in the year 1878, and was put in operation in December of that year. The plaintiff in his complaint alleged that the building of the railroad was unlawful, and that the unlawful construction thereof interfered with his access to his premises, and impaired his easement in the street or avenue by depriving him of a large portion of light and air, and of facility of access to them, in the amount of \$75,000, and that by reason of the maintaining and operation and managing of defendants' railways the value and the use and enjoyment of his premises, he alleged, had been depreciated and diminished to the amount of \$5,000 per annum. He demanded judgment against the defendants, restraining them from operating their road through Third Avenue in front of his premises, and also from continuing the unlawful acts set forth in his complaint; and he asked that the damages he had sustained down to the commencement and during the pendency of this action be adjusted by the court, and that he might have judgment therefor against the defendants, and each of them, and that he might have such other relief as should be just and equitable. The defendants joined issue with the plaintiff in regard to many of his allegations, and set up that the defendants were organized under the laws of the State of New York, granting them the right to use the street in question for the purpose of building their railroad, and that they had built it and equipped it, and used and operated it, under such Acts of the Legislature, and in the most careful and skillful manner in which it was possible to construct, use, and operate the same in the street mentioned in the complaint.

Upon the trial of the action the plaintiff was a witness, and after stating the condition of the premises, and the fact that he had erected or caused to be erected buildings upon them at an expense of about \$11,000 each, he said that he had offered the whole premises for sale, including the house on Ninety-ninth Street,

about two years previous, which would have been in the fall of 1887, for the sum of \$105,000, and that in his judgment that was a fair price for them. Here is certainly a very large appreciation in value over the original cost. Would it have been as much if the railroad had not been built? It will be seen that the present buildings were not erected until some two years after the building of the road had been completed, and the operation thereof commenced. Whether the value of the property would have been still greater without the road than it now is with it, was the fact to be found by the court.

Upon the trial a witness was called on behalf of the plaintiff, and testified that he was a real-estate broker, and had carried on that occupation in the City of New York for 28 years; his transactions had extended throughout the whole city, and had involved both leasing and selling; that he knew the property in question, and was familiar with the value of that property, and of the property in the neighborhood; that he had made an examination of the property with a view of seeing what the physical effects to the abutting property were, produced by the railroad and its trains, commencing at least six months ago, on four or five different occasions; that he had given special attention to the effect upon abutting property produced by the elevated railroad, and the passing of its trains; that he had been examined a large number of times as a witness on the subject, and in reference to property scattered all over the city; that he had made it his business to be familiar not only with the selling but the rental values of property along Third Avenue since the railroad came there; that he had informed himself about such transactions, not only in reference to this property, but other property; that, so far as experience from personal transactions was concerned, he had none in that vicinity since the building of the railroad, in renting or in selling; that he had been engaged by property owners for the last three years to make examinations and testify as an expert witness, and it had been a considerable part of his business, and in every case in which he had testified he had testified against the Railroad Company; that he was paid \$100 to come and give these opinions; he did not know but that the property at the upper end of Third Avenue had been benefited to some extent; his opinion was that rapid transit had helped Harlem; that the building up of the upper end of Harlem had been due to the growth and filling up of all the cross-streets; that the growth and filling up of the cross-streets had been due to the rapid transit afforded by the elevated railroad in large part. The following question was put to him: "To what extent, if at all, in your judgment, is the value of Mr. Roberts' four buildings on the Third Avenue—excluding from consideration the house on 99th Street—to what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" Under objection and exception the answer was permitted, and the witness stated that the diminution extended from about \$110,000 to \$80,000, including the loss to the fee value simply. The court then said: "That is, you 13 L. R. A.

think that the four houses fronting on Third Avenue are worth \$80,000 now?" Witness: "Yes, sir." Court: "And that they would be worth \$110,000 if the structure and road were not there?" Witness: "Yes, sir." Question: "What do you estimate the rental value of the property to be, the railroad not being there? I refer to the Third Avenue front only." Same objection and exception. Answer: "\$90,000." Q. "And with the railroad there?" A. "\$6,400; as collectible rents, I mean."

Upon this appeal, the question is: Were these objections of the defendant properly overruled? By resorting to a court of equity, and seeking the aid of such court to prevent the operation of the defendant's road until all his damages consequent upon the illegal construction of its road in front of his premises have been paid once for all, the plaintiff has brought before the court the question, What were the damages to the fee of the premises owned by him, consequent upon this wrongful act of the defendant? The amount of damages thus caused to plaintiff's fee is the precise question which the court or jury must determine, and for such amount the court gives judgment, upon condition of the plaintiff executing a deed to the defendant of the property wrongfully taken or interfered with by it.

The first question asked of this witness, to which exception is taken, as above noted, calls for his opinion as to the amount of such damage; and the second question is of substantially the same nature, except that it refers to the injury of the rental value of the property instead of the injury to the fee. The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is, beyond all question, against the great mass of authority in this and other States. It is now asked that this court, in view of the alleged abnormal character of the litigations growing up in the City of New York over the erection and operation of these elevated railroads, shall sanction in regard to them a departure from well-established rules of law touching the admission of expert evidence. It seems to me that neither the nature nor the extent of the litigation affords the slightest justification for such departure. Expert evidence, so called, or in other words evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries; and the fact has become very plain that in any case where opinion evidence is admissible the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown that it is much safer to confine the testimony of witnesses to facts, in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by Earl, J., in *Ferguson v. Hubbell*, 97 N. Y. 507: "It is generally safer to take the judgments of unskilled jur-

ors than the opinions of hired and generally biased experts." It is the general rule that testimony should consist of facts and not opinions, and the admission of opinions forms an exception to that general rule. *Mr. Justice Cowen* said, in speaking of the opinions of witnesses as to the then present value of real estate, that they were barely admissible, and that to receive them at all was a departure from the general rule of evidence, and that judges who preside at *nisi prius* sometimes have reason to regret that they should in practice form an exception. He referred to *Rochester v. Chester*, 8 N. H. 349, 364-366, where the court refused to receive the opinions of witnesses as to the value of land, even from those skilled in the market. They said the land must be described, and the jury must then judge from facts. See *Re Pearl Street*, 19 Wend. 654. I refer to this, not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon,—that has been decided years ago by this court, and has been continuously approved since that time (see *Clark v. Baird*, 9 N. Y. 183); but I cite it for the purpose of showing the opinion of learned judges regarding evidence of this kind when it first came into practice, and the questions thereon first came up for decision. The only inquiry here is whether this is one of those cases in which the testimony is allowable.

The precise question has been decided by this court as lately as 117 N. Y. 219, and in *McGeen v. Manhattan R. Co.* The question there asked was, "What would have been the fair rental value in the years 1879, 1880, and 1881, if the railroad had not been built?" and we decided it to be improper. It was so held because it is merely speculative, and it is speculative upon the very question and upon the only question which the court or jury is called upon to decide, and the question calls for the opinion of the witness upon that very subject. Some criticism has been made in regard to that case by the learned counsel for the plaintiff herein, and we are asked substantially to review it, and to reverse our decision therein. We have carefully considered the arguments of counsel on both sides, and have again looked through the cases decided in this court upon the subject, and we are unable to see that there has been any error in the *McGeen Case*, but on the contrary we think it is in strict conformity with the law as heretofore laid down by this court.

I shall refer to but a few of the cases cited by the appellant herein to sustain his claim that the court below erred in admitting the question in controversy. They are all contained in his very voluminous brief upon the subject, submitted to us, and out of them the following are all that I deem it necessary to comment upon. *Morehouse v. Mathews*, 2 N. Y. 514, was an action brought by the plaintiff to recover damages for a breach of contract by the defendant in not feeding to the plaintiff's cattle as good hay as had been agreed upon. The plaintiff asked a witness what damage had occurred in consequence of feeding the cattle upon the hay in question instead

of that agreed upon. Under objection the witness answered, and stated that he thought the damage would be \$50. This court reversed the judgment on the ground that the evidence had been erroneously admitted, and stated that the question called simply for the opinion of the witness as to the amount of damage sustained by the plaintiff. *Van Deusen v. Young*, 29 N. Y. 9, was an action under the Revised Statutes to recover treble damages for cutting trees on a certain piece of land owned by the plaintiffs who were remaindermen subject to a life estate. A witness was asked, "What, in your opinion, is the difference in value of the farm by the removal of the timber?" and also, "Would the farm be worth more or less with the timber cut off?" *Davies, J.*, held that the questions were objectionable as calling for a speculative opinion and not for facts, and referred to *McGregor v. Brown*, 10 N. Y. 114; and *Mullin, J.*, said: "It was unquestionably competent for the witness to give his opinion as to the value of the farm with the timber on, and its value after it was taken off. The difference between the two may be the damages, and, in cases where the damages are arrived at by merely subtracting one sum from another, it may seem to be refining overmuch to refuse the witness the right to make the subtraction himself, and declare the result: for this is what he is called on to do when asked to give his opinion as to the amount of damages." The learned judge was speaking of a case where the witness knew the farm in question, knew it when the timber was on it, and knew what its value then was, and, the timber having been cut off, he knew what the value of the land was with the timber thus cut off; and, in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, "What amount of damages had the plaintiff sustained?" The reason is that the rule of damages is a question of law, and the witness upon such a question might adopt a rule of his own, and hold the defendant responsible beyond the legal measure. In *Marely v. Shultz*, 29 N. Y. 346, the court, per *Denio, J.*, held that a witness could not be allowed to state his opinion of the amount of damages. That was in an action for damages for raising a dam so as to overflow the plaintiff's house. The learned judge said the witness could describe the character of the overflow and its effect, and then it would be for the jury to estimate the damages; that what was offered was in substance an opinion as to the amount of the damages which the plaintiff had sustained by the wrongful act of the defendant. This court, in *Green v. Plank*, 48 N. Y. 669, in an action of replevin for a canal boat, reversed a judgment for the plaintiff where the witness had been asked to state the damages for taking and withholding the boat during the time the defendant had it. In *Ferguson v. Hubbell*, *supra*, which was an action for damages for a fire claimed to have been negligently set, from which the plaintiff sustained damage to his land, a farmer was called as a witness for defendant, and asked the question: "What do you say as to whether it was a proper time or not to burn a fallow?"

The testimony was said to have been erroneously admitted. In *Van Wycklen v. Brooklyn*, 118 N. Y. 424, the question of the admissibility of expert evidence is discussed, and held to be allowable only when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form a correct judgment thereon, and no better evidence than such opinions is attainable. In *Avery v. New York Cent. & H. R. R. Co.*, 121 N. Y. 81, which was an action for damages on account of the violation of a covenant to keep a proper opening from the defendant's depot yard, opposite the plaintiff's hotel, the plaintiff was asked this question: "Do you know what the rental value of your Continental property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel, for the convenient access of passengers and their baggage to and from the twenty-foot strip of land lying south of the hotel?" This evidence was held to be improper. Judge Gray, in delivering the opinion of this court, said: "The witness should not have been permitted to give his opinion upon that head. His testimony should have been confined to stating facts. He might have described the condition of his property. He could have given evidence of what the defendant did to or upon the land over which he claimed to possess rights. He could have stated what his business was, and what it amounted to, at times prior and subsequent to any change in the situation and circumstances surrounding its conduct; and it would then be for the jury to draw the conclusions from the facts stated as to whether plaintiff had been injured by the defendant, and what amount of damages he should recover." In *Norman v. Wells*, 17 Wend. 136, it was held by the old supreme court that the amount of indemnity, when it is not capable of being reached by computation, is always a question for the jury. It was stated that, if there be any rule without exception, it is this; and the court was unable to find any instance where the opinion of a witness has been received upon that particular question. The action was on covenant for damages to the plaintiff by the erection of another mill on the same stream with plaintiff's mill, and a witness was asked the damages which in his opinion the plaintiff had sustained by reason of the erection of such mill. The question was allowed at circuit, and a new trial was granted for the error in allowing it.

The learned counsel for the plaintiff has cited a number of cases on his side, which he claims are authorities for the question put to the witness herein. The briefs of both counsel exhibit untiring industry and research, and all the cases that have been decided involving questions of this nature, both in this and other States, would seem to have been found and cited on the one brief or the other. It is impossible to notice them all, and I shall not make the attempt. Special reliance seems to have been placed, by the learned counsel for the plaintiff, upon the cases I now refer to. In *Clark v. Baird*, 9 N. Y. 188, the point decided was that the opinions of a witness

acquainted with real estate, the value of which was in dispute, were competent upon the question of such value. It was an action on the case by the purchaser of a tavern stand against his vendor for fraudulently misrepresenting the boundaries of the land. A witness for the plaintiff testified that he had examined the tavern stand with a view of buying it, and that "it was worth \$1,000 if it extended to the race and trees. The strip taken off would reduce it one fourth." This testimony was objected to on the ground that the amount of damage could not be ascertained by the opinion of the witness. The objection was overruled, and the defendant excepted. Part of the alleged fraud consisted of the statement that the tavern stand extended to the race and trees. The plaintiff claimed that as matter of fact it did not extend so far. The learned judge, in the course of his opinion, said that the witness had in substance stated the value of the stand, including all the land it was represented to include, and also, in contrast with that statement, and as bearing upon the question of damages, had further stated the value of the stand excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff by reason of his want of title. I do not see that the case affords any countenance for the claim of the plaintiff herein. The witness simply stated the value of the tavern as it stood, estimating that a certain amount of ground in plain view was attached to the stand, and then stated what in his opinion was the value of the land with that particular piece of land not included. Within any rule regarding the opinions of experts, we think this evidence admissible. In *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289, which was a proceeding by plaintiff to take defendant's property by the right of eminent domain, the opinion of the general term of the supreme court was delivered by Justice Selden, in 1854. It contains expressions which favor the views contended for here by plaintiff's counsel, and it includes all that can be said in favor of the admission of this kind of evidence. The opinion has not been followed by the courts of this State, and many subsequent decisions of this court, some of which have already been cited, are at war with the doctrines announced by Mr. Justice Selden. The case cannot be regarded as authority in this State at the present time. See also *Harpending v. Shoemaker*, 87 Barb. 270; *Simons v. Monier*, 29 Barb. 419.

In *Hine v. New York Elev. R. Co.*, 36 Hun, 293, which was an action brought to recover damages for the obstruction of light, air and access to the plaintiff's premises by reason of the construction of the defendant's road, a real estate broker was called on the part of the defendant, who, after stating that he was familiar with the premises in question, was asked this question: "What has been the effect, in your opinion, of the Elevated Railroad upon the value of the property, so far as the items of light, air and access are concerned?" Upon the plaintiff's objection the question was excluded, and the court held that this was error. The court in the course of the opinion, which was delivered by Davis, P. J., said that "the answer to the question should have been received. The witness was an expert, and that

fact was sufficiently shown to entitle him to express an opinion on the subject. The opinion called for related to the precise question of damages, which, as will be seen, the court submitted to the jury, and there is no reason why the opinions of experts are not admissible upon those questions." No case is cited in the opinion, and what I have quoted is all the learned judge said in regard to the admissibility of evidence of this kind. The case is not in harmony with the cases in this court, and should not be followed. The evidence is open to all the objections spoken of, in that it puts the witness in the place of the court and jury, and is only his opinion upon the very point to be decided by them.

In *Kenkele v. Manhattan R. Co.*, 55 Hun, 398, an action similar to the one at bar, and where, as here, the defendant had neglected to take proceedings to condemn the property of the plaintiff, the general term of New York held that the measure of damages was the difference, at the time of the trial, between the value of the property to which the easements were appurtenant, with the easements, and its value without them. The manner of proving such difference was not discussed. *Mr. Justice Van Brunt*, in the course of his opinion in that case, after stating what he regarded the true rule of damages to be, said: "We do not think that the court of appeals has as yet condemned the rule. Until they do, justice seems to require that it should be followed." It is stated as one of the grounds for the motion for a new trial in that case that incompetent evidence upon the subject of damages had been given, but it does not appear what that incompetent evidence was. The learned judge said: "The evidence as to the value of these easements is necessarily, from the very nature of the case, somewhat conjectural, and stringent and strict rules are not to be applied where they would deprive the owner of all proof of damage, as we are dealing with the damage done by a trespasser; and, while damages should be proven with reasonable certainty, the rights and interests of the owner of these easements should not be sacrificed." That is undoubtedly true. Continuing, the learned judge said: "What more certain evidence of the value of these easements can be given than by proof of what the property to which they are appurtenant would now be worth with the easements and what it is worth without these easements?" Evidence as to what the value of the property would be with the easements alluded to, unaffected by defendant's acts, is proper. No dispute arises on that point. The controversy arises when the fact of that value is to be sworn to as an opinion by a so-called "expert," and which opinion, speculative and uncertain as it must be, is directed to the very point which the jury is to determine. Evidence upon the subject of this speculative value,—a value which in fact does not and cannot exist,—should be confined to those facts which the court shall hold to be material for a fair and intelligent judgment; and then the inferences to be deduced from them may be drawn just as well by the jury as by the expert, and in all probability much more fairly. This case is one where the facts which form the basis of opinion can be specified, and should

be stated, and the inference to be drawn from those facts should be drawn by the court or by the jury.

A sufficient number of cases have been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority, both in the supreme court and in this court, is against the introduction of this evidence; and, indeed, there is no reason why it should be introduced. Expert evidence of the value of real estate is proper, and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence,—both the value of the fee and the rental value. Both classes of values could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are facts which now exist, or which once existed; and, if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under wholly different circumstances, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which, when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town, and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendants' in front of the property. All this information he could easily impart to the jury. Proof might be made of the filling up of the side streets along the lines of this railroad, and of the incoming of a large population; the erection of buildings somewhat similar to plaintiff's, and their rental and fee value; and finally a general statement of the condition and value of property in the neighborhood of that in question could be proved. All these facts would be of service in determining the question to be submitted to the jury. When they are all stated, and past and present values proved, the jury or the court will then be as fully competent to draw the inference which it is its peculiar province and duty to draw as the expert. This special question is one which all admit is to some extent and in all cases a matter of conjecture and speculation. How much the appreciation of property is itself due to the erection of the road, and the consequent filling up of the neighborhood opened by it, and whether the property without the construction of the road would ever have become as valuable as it is, are questions which, when these various data have been given, can be speculated upon as well by the judicial tribunal as by the hired expert. It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear

in favor of the party calling him, and it may be said he always justified by his works the faith that has been placed in him. This case is a good illustration of what may be almost termed the wholly worthless character, for any judicial purpose, of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been \$80,000 more valuable, while those on the part of the appellant (equally intelligent, it would seem, and equally honest) thought that the value of the property would have been less if the railroad had not been built. The court is not in the least aided by these various guesses of these hired experts. If the facts upon which these gentlemen based their guesses are placed before the court more exact justice will in my judgment be the result if their speculations be excluded, and all speculation as to the damage sustained by a plaintiff be confined to the court, and drawn entirely from the evidence in the case.

It is claimed, however, on the part of the plaintiff, that, even if this question were objectionable, yet the fault was cured by the questions put by the court, in response to which the witness said that the four houses fronting on Third Avenue were worth \$80,000, and would have been worth \$110,000, if this structure and road were not there. If the objection were only to the form of the question, that which was made use of by the court would probably have cured the difficulty. But it is no objection to form that I have been discussing. The objection is to the substance of permitting the witness to state what in his opinion would have been the value of this property at this time in case the railroad had not been built and operated. This objection was not cured by the alteration of the form of the question. It is also claimed that there was sufficient evidence, excluding entirely the evidence of experts under the ruling of the court, upon which this judgment may be sustained. There is some other evidence in the case, but what would have been the result if all this objectionable evidence were eliminated, it is impossible for this court to determine. We went to the very extreme limit in upholding the judgment in the *McGeen Case*, but there the evidence was much more minute, and the objectionable evidence seemed to have been objected to on grounds other than its absolute incompetence. We thought that it was doubtful whether the objection specifically and pointedly raised the question. The objection in this case is not only that it was incompetent, but the question was objected to on the ground that it was for the court alone, and not for the witness, to determine the amount of damage. We think the objection was sufficiently exact to raise the question that has been discussed here.

Lastly, it is alleged on the part of the plaintiff that, even assuming error, it is not prejudicial to the defendant, because the defendant is not bound to avail itself of the privilege granted it by taking a deed of the easement from the plaintiff upon the payment of the amount of the damages found by the court, but may submit to the injunction, and in the mean time take proceedings to condemn the property.

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We do not think this contention can avail the plaintiff. The inquiry into the fee value of the plaintiff's property is predicated upon the idea that the defendant is to take the property at the value found in order to escape the injunction which would otherwise issue, and indeed it would seem that the defendant would have not much choice in the matter, and that it would be substantially bound by the judgment to take the property at the value found by the court or jury. It is idle to talk about a company situated like this corporation submitting to an injunction, and ceasing to operate its road through the avenue for a single day. It might be questionable whether there would be the slightest justification for such stoppage, founded upon any allegation that the amount of damages found by the court was too great. At any rate, the question was tried by both sides for the purpose of determining what the amount of damages really was, and the defendant has the right under the circumstances, where the investigation of such question was proper and material, to claim that it should be made upon competent and legal evidence; and, where improper evidence is admitted to its damage, it has the right to ask the court for relief.

Our conclusion is that for the error in the admission of this evidence *the judgment should be reversed* and a new trial granted, costs to abide the event.

Andrews, Earl, Finch, and O'Brien, JJ., concur.

Gray, J., dissenting:

The errors presented by this record, and upon which the appellants insist as requiring the reversal of the judgments below, consist in the admission by the trial court of certain evidence adduced by plaintiff to show that the maintenance and operation by defendants of the elevated railroad were damaging to his property rights. Witnesses were called who were qualified to speak from business experience, from familiarity with the values of real property in the City of New York, and who professed to be skilled by reason of an especial study of the general effect upon abutting properties of the elevated railroads, and the exceptions arose upon the admission of their opinions in answer to the following questions: "To what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" "What do you estimate the rental value of the property to be, the railroad not being there?" "To what extent, in your judgment, if at all, is the selling and rental value of this property . . . diminished by the presence on Third Avenue of the elevated road, and the operation of the passing trains?" To these questions the defendants interposed objections on several grounds, the only one of which material here is that of the competency of such evidence; but the trial court, nevertheless, permitted the witnesses to answer. The question, which is thus brought prominently before us for decision is, only comparatively speaking, novel; but it assumes very great importance, because not only are the principles of evidence involved, but, as we are informed, a great number of decisions in the courts below, and many recov-

eries, rest upon the theory that the admission of such evidence is necessary and proper in such cases. If we shall say that it is inadmissible, it must be because it is deemed contrary to the principles underlying the law of evidence and to settled rules. The point which is mainly made against the competency of such evidence is that it calls for the conclusions of the witness upon a matter which the court or jury should alone determine, and hence invades their province. It is also suggested that to allow of such evidence is to permit speculation to supply proof. If the proposition were wholly true, it might be difficult to sustain the right of the plaintiff to submit his case to the jury upon such proof. But it seems to me that the argument against this species of proof is inapplicable to cases of this character, where evidence as to the damage suffered by the abutting landowner cannot always be furnished by exact data or in statements of facts, and where, to an intelligent judgment upon the issue, expressions of opinions seem so necessary. Nor is it true that the evidence is forbidden by established rules, whether we consider that question upon its truth, or upon the principles of the law of evidence. These principles cannot be embodied in rigid and lifeless formulas which deny adaptation to new conditions in human affairs. They admit of expansion and of frequent exception, whenever it is needed, in order to demonstrate the truth. A different view of the law of evidence might be extremely subversive of justice. The law of evidence, as a system, is based both upon principles and upon rules which, when not prescribed in statutes, arise out of precedents in decided cases. The rule is an exposition of the principle; but it is based upon judicial experience in the investigation of controversies by means of testimony, and is necessarily influenced by what may be the existing condition of things. It is well, though somewhat elementary, to observe that in the application of the principles of the law of evidence to the investigation of the truth, in a controversy over an alleged matter of fact, the aim is to confine the proofs only within the bounds of what is competent and satisfactory evidence; and that by competent evidence is meant such as the nature of the thing to be proved requires, and that by satisfactory evidence is meant such as shall suffice to satisfy the unprejudiced mind. 1 Greenl. Ev. § 1. If some rule of evidence is alleged to militate against the competency of the species of proof offered, I suppose that it should comply with two conditions, to satisfy the mind as to its force. It should appear that it was established upon a sufficient precedent, fitting the case, and that the nature of the thing to be proved did not require any exception to or modification of the supposed rule. In this case the matter of fact, the truth of which is the subject of judicial investigation, is whether the maintenance by the defendants of an elevated railroad structure, and the operation of its trains upon the street in front of the plaintiff's premises, have caused any damage to him by which the value of his property rights has been impaired. The controversy is over that fact, and the question of the damage. Such a condition of things in the street is a new use, and affects certain rights in and over the street,

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which are considered as appurtenant to the abutting lands. It constitutes a taking of the easements, which the property holder is legally or beneficially entitled to; and, if he can establish that the acts of the defendants have caused damage to him by depreciating the value which his estate in the abutting land would otherwise have, he is entitled to recover from them, as trespassers, damages to the extent of the injury suffered by his estate. It is very plain that the value of these easements cannot be arrived at by exact proof. Judge Van Brunt, in delivering the opinion of the general term of the supreme court in *Kenkele v. Manhattan R. Co.*, 55 Hun, 898, well said: "How are we to arrive at the value of these easements taken by the defendant? To the plaintiffs they are of no value except because of the enhanced value which they give to the property they own fronting upon the streets. By themselves they are worthless,—have no intrinsic value." Hence he reasoned that the more certain evidence of their value was in proving what the property would be worth with the appurtenant easements, and what without them. I think that reflection, and a careful consideration of the real bearings of the evidence and of the circumstances of the case, must induce the conviction that the evidence does not usurp the province of the court or jury, and that there are ample and cogent reasons for its admission.

The admissibility of opinions as proof of the marketable condition and value of property, where it is not practicable to give more definite knowledge, has been long settled, and has formed one of the admitted exceptions to the rule which excludes the opinions of witnesses as evidence. 1 Greenl. Ev. § 440a; *Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 85 N. Y. 91. The ground of the exception is not because the persons who give such opinion evidence are superior in scientific capacity or attainments, but because they are shown to have a knowledge of such matters which jurors have not, and the value of property is actually a mere matter of opinion. If, then, expert or skilled evidence is admissible to prove generally the value of real property, why should it be deemed inadmissible to prove its value under different circumstances; that is to say, not only what is its value as at present circumstanced, but what would be its value if circumstanced differently, and under ordinary conditions of street uses? And why is an opinion not proper as to the extent of the damage, if any, to the value of the land, as being often the best attainable evidence? The mere objection of incompetency is no longer available to exclude opinion evidence, because upon the fact in controversy, in a case where more definite knowledge is not to be had. There is the strongest reason for admitting the opinions of witnesses to prove the extent of damage sustained by reason of the defendant's acts in the circumstances and necessities of the case. Without the aid of the opinions of persons experienced in the subject of real estate values in a metropolitan center like New York, it would be rarely, if ever, possible for the plaintiff to make a satisfactory or sufficient case for an intelligent judgment by courts or jurors. The values of real estate are fixed by and depend

upon many considerations. The factors of value in the particular locality, in the character of the neighborhood, and in the tendencies of trade or of residence, are indefinite, and are not matters of common knowledge. A new and different use of the street may affect the growth in value of a city lot favorably or adversely; but as to which way and to what extent is a matter largely of opinion, based upon study and experience, and not of exact knowledge from definite facts. It is not a matter requiring any particular intellectual attainments to understand, but it involves an acquaintance with affairs and the possession of knowledge acquired through habits of observation and business, which must be essentially peculiar, and it would be stretching presumption rather far to assume that the knowledge is common to all persons. In the growth of a city and the increase of its business and wealth are causes for a steady enhancement of its real estate values, though its direction may be erratic and incapable of being foreseen. That the value of the plaintiff's property upon the Third Avenue might be greater to-day than it was before the defendants built their railroad structure, if the street remained in its earlier condition, is a possible if not a natural assumption. But it is a fact incapable of definite knowledge, and plainly, as it seems to me, best ascertainable through the opinions of persons whose familiarity with the neighborhood and habits of business observation in such respects could qualify them to speak to the issue. The question before us is not like that of a trespass once committed upon property rights, where the value before the trespass and the value after its commission might sufficiently express the facts, from which jurors could deduce conclusions as to any damage. Here the continuing trespass upon and the deprivation of appurtenant property rights introduce an element, the aggregation of which is to be considered in connection with possible general benefits conferred and in relation to municipal growth under normal or usual conditions. Whether the elevated railroad enhanced the values of the abutting property over what they would have become in its absence is a fact which is best and most intelligently determined from competent opinions.

An earlier and leading case in the reports of the decisions of this court is *Clark v. Baird*, 9 N. Y. 188, which was an action on the case for fraud in misrepresenting the boundaries of property sold by defendant. The premises consisted in a tavern stand, and the representation made was that they extended to a certain mill-race and tree. A witness who had examined the property with a view to purchase was permitted, under objection, to testify that "it was worth \$1,000 if it extended to the race and trees. The strip taken off would reduce it one fourth." This testimony was objected to upon the ground that the amount of damage cannot be ascertained by the opinion of the witness. The opinion of the court was flattered by Judge A. S. Johnson, a most learned and able jurist, and was directed to the discussion and elaboration of the question of the competency of opinions upon such a question. This is clear from an observation of the judge, who said: "The evidence was pointed solely

to the question of damages, and the objection was undoubtedly understood by the court to relate to the competency of opinion upon the question of value." Many cases in this and other States were considered, and with such particularity as to render it quite unnecessary to repeat the labor here. The propriety of the evidence objected to was sustained upon the ground of necessity and of superior convenience. The opinion summed up a general discussion in this wise: "Upon this ground [*i. e.*, of necessity], as well as upon that of superior convenience and the constant reception of such testimony upon trials without objection,—a tacit but strong proof of its propriety,—it must be deemed established that upon a question of value the opinion of a witness who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury."

In *Robertson v. Knapp*, 35 N. Y. 98, *Clark v. Baird* is referred to with approval as authority for the rule that opinions are admissible "as to the value of property in cases where the value was properly the subject of inquiry." The point of the objection in *Clark v. Baird* is precisely the same in principle, if not in its facts, as the one now presented.

In the early case of *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289 (which was decided in 1854, a year later than *Clark v. Baird*), the opinion of a witness was held competent to show what would be the injury to the appellant's farm, arising from the construction of the railroad, and what would be its diminution in value from the same cause. The general term of the supreme court, at which the case was decided, was composed of Justices Selden, Welles and Johnson, and the opinion was delivered by Justice Selden. The evidence was held admissible upon the ground that unless questions involved a subject, knowledge of which is presumed to be alike common to all men, skilled opinions were proper. The authority of these cases has sufficed for the views of courts in other States, though it must be admitted that judges have not uniformly agreed. Some of these cases are cited in the respondent's brief; but extended reference to them seems unnecessary. The proposition must commend itself upon obvious grounds of necessity and of right, as well as because it is sanctioned by authority in the courts of this State. But I may refer to some cases in the Supreme Court of Massachusetts, where the question has been pertinently discussed.

In *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115, where lands were taken for a railroad, testimony as to the amount of damage done to the petitioner's estate was allowed upon the theory that, where the amount of damage done to property is in controversy, opinions by persons acquainted with the value of the property may be given. It was there observed that, "as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety;" and the opinion cites *Clark v. Baird*, *supra*. In *Swan v. Middlesex County*, 101 Mass. 173, where land was taken for widening a street, the admission of such opinions was justified upon like reasoning and "rather

from necessity, upon the ground that they depend upon knowledge which anyone may acquire, but which the jury may not have, and that they are the most satisfactory and often the very best attainable evidence of the fact to be proved." It was there said: "The witnesses, being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic, which of those two values was the greater; in other words, whether the petitioner's estate was benefited or injured." And see *Sexton v. North Bridgewater*, 116 Mass. 200.

The decisions in our own State, which I have mentioned, have been relied upon by several text-writers. See *Lawson, Exp. Ev.* p. 451; *Rogers, Exp. Test.* § 152; and also *Whart. Ev.* § 450. In *Rogers' work* it is remarked: "That there is no such inherent distinction between questions of value and questions of damages, if from the latter is excluded all idea of any legal rule or measure of damages, as brings the one within and the other without the province of the opinion of witnesses." And in *Wharton's work* it is remarked, with respect to the facts upon which a witness bases his opinion as to the depreciation in value, that "when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by witnesses." The following authorities are in point, and may be referred to in connection with this discussion: *Snow v. Boston & M. R. Co.* 65 Me. 280, 281; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 294; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Snyder v. Western U. R. Co.* 25 Wis. 66, 70; *Lehmiecke v. St. Paul, S. & T. F. R. Co.* 19 Minn. 464 (Gil. 406).

As against the weight of authority in the cases of *Clark v. Baird*, *supra*, and *Rochester & S. R. Co. v. Budlong*, *supra*, I find no case since, in this court, which compels a different view. *Van Deusen v. Young*, 29 N. Y. 9, was an action of trespass for damages caused by cutting down and taking away trees from land, and a witness was asked, "Would the farm be worth more or less with the timber cut off?" The impropriety of this question was deemed to exist in its being irrelevant to the issue, and as calling for a speculative opinion. Clearly this is not authority for the case at bar. *Judge Mullin*, who delivered an opinion in the case, in discussing the competency of opinion evidence as to value, most pertinently says: "There are cases in which it is necessary to put to the witness the very question how much damages the plaintiff has sustained by reason of the act or neglect of the defendant. These are cases in which no data can be given which could enable a jury to arrive at the measure of damages, because the amount of the damage is known and can be properly appreciated and measured only by persons of skill in the business or matter to which the damage in the case relates. For a full and accurate examination of the cases on the question, see *Clark v. Baird*, 9 N. Y. 183."

Marley v. Shultz, 29 N. Y. 356, was an action for damages for the overflowing of the plaintiff's land from a mill-dam, and a question discussed related to the offer to ask the

plaintiff (himself a witness) what the value of the use of the house was per annum before the raising of the dam. This was deemed objectionable because the value of the rent was not important, "except argumentatively." It was remarked, however, that "if the house had been kept for renting, and something in the nature of a market price for the use could have been proved, it might have been competent." *Teerpenning v. Corn Eack. Ins. Co.*, 43 N. Y. 279, was an action on a policy of insurance for the loss of goods by fire, and cannot be deemed to be, either in fact or in principle, controlling. *Clark v. Baird* is there cited with this observation, "that upon questions of value the opinions of witnesses are admissible, but with the qualification that the witnesses must have peculiar knowledge of the article in question and its value."

I do not think other authorities cited from the decisions of this court call for discussion, until we come to the recent cases of *McGean v. Manhattan R. Co.*, 117 N. Y. 233, and of *Avery v. New York Cent. & H. R. R. Co.*, 121 N. Y. 81. The first of these cases might be deemed upon a cursory consideration, decisive of a contrary view. The decision of that case, however, did not turn nor depend upon the point as to the competency of the evidence as to value, nor was the question altogether the same as in the present case. There was no discussion by counsel of the point, except in the brief of the appellant's counsel, and the case of *Clark v. Baird* was not alluded to at all. The case was affirmed upon other considerations; and, as our decision did not involve any necessary determination as to the principle of evidence in question, there is no valid or just reason why we should be limited in our present discussion by the *McGean Case*, especially when the point becomes important, and the determination of the question essential. In the other case, of *Avery v. New York Cent. & H. R. R. Co.*, the plaintiff was a witness, and he was asked this question: "Do you know what the rental value of your property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite to your hotel for the convenient access of passengers and their baggage to and from the twenty-foot strip of land lying south of the hotel?" The propriety of such a question was denied upon several grounds. It was held that the witness had not been shown to be qualified to give such an opinion, and that the question assumed the insufficiency of the opening. It was said that it was an attempt "to prove through the witness that he was prejudiced by the existing condition of things as to the opening in the fence, and, under the guise of giving his knowledge, to elicit his opinion that the value of his business to him would have been greater if something different in the way of an opening had been maintained." Therefore, and on the strength of authorities mentioned in the opinion, the question was condemned as usurping the province of the jury. There was no question nor discussion as to the competency of expert evidence, or as to opinions of persons possessing a knowledge of a subject which in its nature is peculiar, and cannot be assumed

to be common to all. The plaintiff was conducting a hotel and restaurant business, and was a lessee of the premises. Whether his business was injured or not was the subject of definite knowledge, and capable of being testified to by exact data. The present case, therefore, differs in its facts, as in its principles, from the cases relied upon, and is only appositely met by the authorities of *Clark v. Baird* and *Rochester & S. R. Co. v. Budlong*, *supra*. Here we have a new structure in the streets, which was a perversion of a street use, and which the Legislature could not authorize nor sanction without providing for compensation to the abutting property owner for the value of the appurtenant easements appropriated, if shown to have a value to him greater than any particular benefit conferred upon his estate by the presence of the structure. How, in the nature of things, is such a matter susceptible of exact proof by facts? Is not the effect upon the plaintiff's estate from the presence of the defendant's structure and its operation of trains, and any damage sustained thereby, best shown by receiving in evidence the opinions of those persons who, by reason of experience, observation, and familiarity with the various and more or less inexact and indefinite causes which operate upon real estate values, are skilled or expert upon the subject? How can the value of the property, if enjoyed in a usual manner and if subjected to ordinary street uses, be ascertained except by way of such evidence? There is no application of any new principle of evidence. *Clark v. Baird* is sufficient authority for the reception of opinions in evidence upon questions of value and damage. But there is, in a changed and new condition of things, a new reason for the admission of ex-

pert opinions as to the extent of damage sustained by an abutting landowner from the presence of these elevated railroads. This court has decided that their structures destroyed the ordinary uses for which a street was intended, and appropriated certain easements of the abutting property owners, wherefore they should make compensation in damages for any injury which may be proved to have been suffered. Is not that injury, under the extraordinary circumstances of the case, more intelligently proved through the opinions of persons shown to be competent to express such opinions? The witness' evidence does not conclude the court or jury; and it is still left to them to decide, with the aid of such skilled opinions, as to the measure and amount of damages which should be awarded by way of compensation. And, if the witness is asked for his opinion as to the extent to which the plaintiff's estate has been damaged, it seems an overrefinement of argument to deny the propriety of allowing him to state the result of a mere subtraction of the values assigned to the premises with and without the structure. The judgment of the court or of jurors is not limited to the opinions given, but is formed from the consideration they may give to the evidence, and is simply aided by the information they may have derived from the skilled opinions in the case. Upon the grounds of superior convenience, of necessity, and of an obvious propriety, and if we would have intelligent and just decisions of such issues, I think the evidence objected to is admissible in such cases, and therefore that the judgment below should not be reversed for the errors alleged.

Ruger, Ch. J., concurs.

UTAH SUPREME COURT.

A. W. WERTZ, *Respt.*,
v.
WESTERN UNION TELEGRAPH CO.,
Appt.

(.....Utah.....)

A stipulation in a telegraph blank exempting the company from liability for

mistakes and delays in the transmission of un-repeated messages will not prevent recovery of the full damages occasioned by a mistake resulting from the negligence of the company's servants.

(July 1, 1891.)

A PPEAL by defendant from an order of the District Court for the First District setting

NOTE.—*Telegraph companies; effect of stipulations in contract to transmit.*

A telegraph company cannot limit its liability for the plain and palpable negligence of its operators and agents. *Garrett v. Western U. Teleg. Co.* (Iowa) 10 Ry. & Corp. L. J. 115.

It is not relieved from liability for failing to forward a message, by a stipulation that it shall not be liable for errors or delays or for nondelivery. *Ibid.* See *Western U. Teleg. Co. v. Collins*, 10 L. R. A. 516, 45 Kan. —.

Its liability for mistakes or delays in delivering telegrams written not on the company's blank forms is not limited by stipulations in such forms, the terms of which were not actually known to the sender, although he had been in the habit of sending messages on those forms. *Pearshall v. Western U. Teleg. Co.* 124 N. Y. 266.

A stipulation on a telegraph blank that the company will not be liable for delays arising from un-

avoidable interruption in the working of its lines, does not embrace a temporary, exclusive usurpation of the wire in sending out train orders. *Western U. Teleg. Co. v. Rosentreter* (Tex.) March 24, 1891.

A stipulation in a printed form upon which messages are required to be written before being accepted for transmission that the company shall not be liable for mistakes or delays or for nondelivery of un-repeated messages beyond the amount paid for their transmission is contrary to public policy and void so far as it seeks to relieve the company from liability for negligence. *West. Union Teleg. Co. v. Short*, 9 L. R. A. 744, and *note*, 68 Ark. 434; *West. Union Teleg. Co. v. Stevenson*, 5 L. R. A. 515, 128 Pa. 442; *Kiley v. Western Union Teleg. Co.* 11 Cent. Rep. 585, 109 N. Y. 381.

Where the message was properly transmitted and transcribed and the loss was occasioned by failure to promptly deliver, a stipulation on the blank lim-

aside a verdict favorable to defendant and granting a new trial in an action brought to recover the damages caused by a mistake in the transmission of a telegraph message. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Evans & Rogers for appellant.

Messrs. Smith & Smith, for respondent.

Notwithstanding the terms of the blank, the Company was not released from liability for the negligence of its servants.

Gillis v. Western U. Tele. Co. 4 L. R. A. 611, 61 Vt. 461; *Western U. Tele. Co. v. Fopet*, 8 L. R. A. 224, 118 Ind. 248.

This question is also substantially controlled by the decision of the Supreme Court of the United States in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

The telegraph company occupies the same relation to commerce as a carrier of messages that a railroad does as a carrier of goods.

Western U. Tele. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187.

The Company is liable for the full damage incurred.

Pepper v. Western U. Tele. Co. 4 L. R. A. 660, 87 Tenn. 554; *Alexander v. Western U. Tele. Co.* 8 L. R. A. 71, 66 Miss. 161; *Western U. Tele. Co. v. Griswold*, 87 Ohio St. 301; *Thompson v. Western U. Tele. Co.* 64 Wis. 531; *Fowler v. Western U. Tele. Co.* 80 Me. 881; *Western U. Tele. Co. v. Crail*, 38 Kan. 679; *Brown v. Western U. Tele. Co.* (Utah) June 21, 1889.

Telegraph companies are in all respects bound by the same rules that control common carriers, and it is held that they cannot contract with their employers for exemption from liability for the consequences of their negligence.

Southern Exp. Co. v. Caldwell, 88 U. S. 21 Wall. 269, 270, 22 L. ed. 558, 559.

Zane, Ch. J., delivered the opinion of the court:

The plaintiff delivered to the defendant, at its office in Ogden City, Utah, to be transmitted to Eagle Rock, the following message: "To

Geo. H. Storer, Eagle Rock, Idaho: I will give one thousand cash, ball, six months. Answer." Which was delivered to the addressee at Eagle Rock in the following language: "I will give one hundred cases, balc six months. Answer." In consequence of the change, the evidence tended to show that the plaintiff lost a contract for the conveyance for \$4,000 of real estate then worth \$5,500. The message was written on a blank, on which was printed a condition that the Company would not be liable for mistakes and delays in transmission, from negligence of its agents or otherwise, unless the message should be repeated, and requiring therefor an additional charge of one half the regular rate. The message was not repeated. The jury returned a verdict under the charge of the court for the amount received for transmission, which the court, upon the motion of the plaintiff, set aside. From this order the defendant has appealed, and assigns the same as error. The cause of the failure to transmit the message as delivered is not expressly shown; but the probability is that the defendant's agents knew precisely how the failure occurred. If they did not, the defendant had the best means of finding out. If it was not the Company's fault, it should have shown it. The presumption from the evidence is that the negligence of the defendant's agents caused the failure. This brings us to the question, Did the contract exempt the defendant from liability for the negligence of its agents? If the senders of dispatches and telegraph companies were the only parties interested in such transactions, they might make such contracts. The public has an interest in the telegraph service. The property employed belongs to the Company, as well as the proceeds of the business; but the property is used and business is conducted for the accommodation and convenience of the public. Public policy forbids contracts by telegraph companies exempting them from the consequences to others of the negligence of their agents in transmitting messages for their employers. Such liability promotes promptness, skill, and care in that branch of business.

iting the company's liability in case of unrepeatd messages is no defense to a suit to recover damages for the loss. *Western U. Tele. Co. v. Lowrey* (Neb.) 49 N. W. Rep. 707, citing *Guif, C. & S. F. R. Co. v. Wilson*, 69 Tex. 789; *Western U. Tele. Co. v. Broesche*, 72 Tex. 664; *Western U. Tele. Co. v. Way*, 83 Ala. 542; *White v. Western U. Tele. Co.* 14 Fed. Rep. 710; *Western U. Tele. Co. v. Tyler*, 74 Ill. 168; *Western U. Tele. Co. v. Henderson*, 80 Ala. 510; *Guif, C. & S. F. R. Co. v. Miller* (Tex.) Feb. 14, 1888.

A stipulation in a telegraph blank limiting the liability of the company for mistakes or delays in transmitting or delivering unrepeatd messages is void under Neb. Comp. Stat., chap. 89, § 12. *Western U. Tele. Co. v. Lowrey* (Neb.) 49 N. W. Rep. 707, citing *Kemp v. Western U. Tele. Co.* 28 Neb. 661, distinguishing *Becker v. Western U. Tele. Co.* 11 Neb. 87.

Such a stipulation does not protect the company from its negligent delay in transmission. If it has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight. *Thompson v. Western U. Tele. Co.* 107 N. C. 449.

A printed stipulation in a telegraph blank, that no claim for damages for negligence in transmit-

ting the telegram shall be valid unless presented in writing within thirty days, is reasonable and obligatory. *Beasley v. Western U. Tele. Co.* 39 Fed. Rep. 181.

It is binding on the party injured where the damages were known within three days from the sending. *Western U. Tele. Co. v. Culberson*, 79 Tex. 66.

The rule that a telegraph company cannot stipulate against its own negligence will not prevent a stipulation requiring a claim to be presented within a certain time. *Western U. Tele. Co. v. Daugherty* (Ark.) 11 L. R. A. 102.

A stipulation contained on the blank of a telegraph company, that the company will not be liable for damages where the claim is not presented in writing within sixty days after sending the message, does not apply when suit is commenced before the expiration of the sixty days. *Western U. Tele. Co. v. Trumbell* (Ind.) April 14, 1891.

Such a stipulation does not require any notice or demand to fix the liability of the company, where there is a total failure to transmit the message. *Western U. Tele. Co. v. Yopet*, 8 L. R. A. 224, 118 Ind. 248. See note to *Gillis v. Western U. Tele. Co.* (Vt.) 4 L. R. A. 611.

Such companies may by contract exempt themselves from loss or damage to others not from their own fault. Notwithstanding such conditions, the companies are liable for ordinary negligence in transmitting dispatches. *Western U. Teleg. Co. v. Grinstead*, 87 Ohio St. 801; *Gillis v. Western U. Teleg. Co.* 61 Vt. 461, 4 L. R. A. 611; *Thompson v. Western U. Teleg. Co.* 64 Wis. 581.

In the case of *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556, the court said: "Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of

their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier." And in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, the same court held that a common carrier cannot lawfully stipulate for exemption from responsibility from the negligence of himself or his agents. If the plaintiff lost the difference between the contract price of the land and its actual value at the time because of the negligence of defendant's agents, that difference was his damage.

The decision of the court granting the new trial is affirmed, and the cause is remanded to the court below.

Anderson and Blackburn, JJ., concur.

INDIANA SUPREME COURT.

Board of COMMISSIONERS OF ALLEN COUNTY, *Appl.*,

v.

Millard W. SIMONS *et al.*

(....Ind.....)

1. To sustain a tax upon land which is shown to have been legally exempt from taxation for a long period prior to the year for which the tax was assessed, the burden is on the tax officers to show that something had occurred before such year to remove the exemption.
2. Art. 3 of U. S. Ord. July 13, 1787, providing that lands and property of Indians shall never be taken from them without their consent, is in force in Indiana.
3. The land of an Indian who has retained his tribal relations cannot be taxed by a State in which U. S. Ord. July 13, 1787,

art. 3. is in force, although it has been patented to him in fee simple without restraint on alienation.

(September 22, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Allen County in favor of plaintiffs in an action brought to recover money paid at a tax sale for lands which were alleged to have been legally exempt from taxation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bell & Morris for appellant.

Messrs. Randall & Vesey, W. G. Cole-rick, S. R. Alden and Colerick & Oppenheim for appellee.

Coffey, Ch. J., delivered the opinion of the court:

The central question in this case relates to

NOTE.—Taxation, exemption of Indians from.

The right of Indians in the land is merely a right of occupancy, the fee being in the United States, subject only to such right of occupancy. *Johnson v. McIntosh*, 21 U. S. 8 Wheat. 574, 5 L. ed. 689; 1 Kent, Com. 257; *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 48, 8 L. ed. 42.

Possession when abandoned by the Indians attaches itself to the fee without further grant. *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 17, 8 L. ed. 81.

But where by treaty the Indian title is extinguished, with provision for their removal, the lands are assessable. *Fellows v. Denniston*, 28 N. Y. 420; *State v. Miami County Comrs.* 68 Ind. 497; *Franklin County Comrs. v. Pennock*, 18 Kan. 579; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667; *Peck v. Miami County Comrs.* 4 Dill. 370; *Pennock v. Franklin County Comrs.* 108 U. S. 44, 36 L. ed. 367.

The lands belonging to an Indian tribe are not taxable. *The New York Indians*, 72 U. S. 5 Wall. 761, 18 L. ed. 708; *State v. Miami County Comrs.* 68 Ind. 497.

So long as the tribal organization is recognized by the national government, lands in possession of the Indians are not subject to state taxation. *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667; *Boyer v. Dively*, 58 Mo. 510; *Morgan v. McGehee*, 5 Humph. 18; *Wall v. Williams*, 11 Ala. 836.

13 L. R. A.

Indians and their property exempt from taxation by treaty or statute of the United States cannot be taxed by any State. *United States v. Rogers*, 45 U. S. 4 How. 567, 11 L. ed. 1105; *United States v. Holliday*, 70 U. S. 8 Wall. 407, 18 L. ed. 182; *The Cherokee Tobacco*, 78 U. S. 11 Wall. 616, 20 L. ed. 227; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. ed. 846; *Crow Dog's Case*, 109 U. S. 556, 27 L. ed. 1000; *Hastings v. Farmer*, 4 N. Y. 238.

Where the consideration of an exemption was the cession of the Indian title to a tract of land, the exemption was a part of the purchase price of the land ceded. *New Jersey v. Wilson*, 11 U. S. 7 Cranch, 164, 3 L. ed. 308.

State lands purchased from the Indians may be exempt from taxation in the hands of purchasers; but where for many years the purchasers had paid taxes without question this fact raises a conclusive presumption that by some convention with the State the right of exemption had been surrendered. *State v. Wright*, 41 N. J. L. 478.

The language used in treaties with the Indians should never be construed to their prejudice. If words are used susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *Worcester v. Georgia*, 31 U. S. 6 Pet. 581, 8 L. ed. 508, followed in *Choctaw Nation v. United States*, 21 Ct. Cl. 92.

the right to tax certain lands in Allen County. The cause was tried in the circuit court before a jury, who returned a special verdict. Among others, the following facts appear by the verdict, viz.: That John Baptiste Richardville, prior to the year 1818, and until his death in 1841, was the principal chief of the Miami Tribe of Indians. For some time prior to the year 1818 he had, with the consent of his people, and under their law, resided upon and held exclusive possession of the land in controversy, the same being the property of the tribe of which he was principal chief; which included three sections of land described in the third article of the Treaty of 1818 between the United States and the Miami Nation of Indians. By that Treaty, the United States agreed, in consideration of the cession, by the tribe, of certain lands to the United States, to grant or release the three sections to Richardville in fee simple. The Treaty was signed by Richardville as one of the parties thereto; and pursuant to its terms, letters-patent were issued to him on the 24th day of September, 1823. By another treaty made on the 6th day of November, 1838, the United States granted to Richardville and his family the privilege of remaining in Indiana when his tribe should remove from the State, and stipulated that he and his family should receive the annuities due them, under the terms of the Treaty, at Fort Wayne.

In the year 1846, all the Miami Nation of Indians, except the family of Richardville and some other families granted a similar privilege, removed from the State to the then Territory of Kansas. Richardville remained in the undisturbed possession of these three sections of land until his death. By his last will he devised the land to his daughter, La Blonde, or Mary Louise Richardville. The daughter and other descendants of Richardville remained in the possession of the land until the daughter's death in the year 1847. By her last will she devised the land to her son, Ke-la-ke-wa-ke-ah, *alias* George Aussum, and her daughter, Mon-go-se-quah, *alias* Archange Godfrey. Both wills were duly probated. Ke-la-ke-wa-ke-ah died and left his portion of the land to his sister, Mon-go-se-quah and his son, Me-che-ke-no-quah, *alias* William Cass. In the year 1856, Mon-go-se-quah and Me-che-ke-no-quah, by order and judgment of the Common Pleas Court of Allen County, had partition of the land between themselves. Before the death of Richardville, Mon-go-se-quah intermarried with James R. Godfrey, son of Francis Godfrey, the war chief of the Miamis, who, with his family, was also permitted by the United States to remain in Indiana. Mon-go-se-quah and her husband resided with Richardville on this land, and she and her descendants continued to reside there until her death, which occurred in the year 1865. Her husband is still living, and continues to reside on the land. Ke-la-ke-wa-ke-ah and his son, Me-che-ke-no-quah have, since the death of La Blonde to the present time been in the possession and occupancy of their portion of the land. There has been born to

Mon-go-se-quah and her husband thirteen children, five of whom are still living, and, with their families, have ever resided on this land. The families of Godfrey and Me-che-ke-no-quah are among the families mentioned in the Treaty of 1854 between the Miami Indians and the United States, and after that Treaty the United States annually took a census of the family and placed upon the list Che-ke-no-quah, James Godfrey, Mon-go-se-quah and all their children and grandchildren, as provided by that Treaty, and annually paid to each of them, at Fort Wayne, their portion of the annuities provided for by that Treaty, and in the year 1882 paid to them their portion of the amount of the principal sum agreed by the Treaty to be paid. They have at all times resided upon and owned the land patented to Richardville, being his descendants. The government of the United States has never consented that they should put off their tribal relations. By all the treaties made before his death, the United States recognized Richardville as the principal chief of the Miami Nation, and as a member of that tribe. He executed, as chief of the Miami Nation, the Treaty of 1795, and every subsequent treaty with that nation, until the time of his death. The tribe and the whites who came among them treated and recognized him as a Miami Indian, and the principal chief of the nation. James M. Godfrey is a Miami Indian and has always been treated as such by the United States. All the above named and their descendants have been treated with by the United States and known as the Miamis of Indiana, and have been so enumerated. The chiefs and head men of the nation, in the west, from time to time called upon them and consulted with the descendants of Richardville whenever any question between them and the United States arose requiring the presence, at Washington, of representatives of the Miami Nation. None of the owners of this land have ever become citizens of the United States or any State therein. The Miamis of Indiana wear such clothing as is usually worn by the white people in the neighborhood where they reside. Some of them have been married by Catholic priests and some by justices of the peace, under licenses procured from state authority. In 1886, 1887 and 1888, the children of Me-che-ke-no-quah attended public school, and in 1880, George Godfrey, a son of Mon-go-se-quah voted at the presidential election. They speak both the Indian and English languages. In her lifetime, Mon-go-se-quah caused the lands received from her mother, La Blonde, to be platted into lots numbered from one to nine inclusive; but the title and possession of the lots has never been out of the descendants of Richardville since his death. For the years 1871, 1872, 1873, 1874, 1875, 1876 and 1877, lots one to nine inclusive were placed upon the tax duplicate of Allen County and assessed for state and county purposes, and were duly returned delinquent. On the 18th day of February, 1878, they were bid in for delinquent taxes by Charles H. Aldrich. The

land not having been redeemed, the auditor executed to him a deed. Aldrich conveyed to the appellee in this case and assigned to him all his rights in the premises. Aldrich brought suit in the Allen Superior Court, after receiving his deed, to enforce a tax lien against said lands; but after the determination of the case, *Wau-pe-man-quā*, reported in 28 Federal Reporter, 489, holding that the land was not subject to taxation, his suits were dropped from the docket without any final adjudication. This suit was brought against the Board of Commissioners of Allen County to recover the amount paid for taxes by Aldrich, under the assumption that the lands above named were not subject to taxation.

It is contended by the appellant that as these lands were granted and patented to Richardville in fee simple, without any restraint upon alienation, for his own use, and not to any nation or tribe of Indians, or for their benefit, that they are subject to taxation as any other lands in the State.

On the other hand, it is contended by the appellee that the Indian title to these lands was never extinguished, and as the owners of the same have kept up their tribal relations with the Miami Nation and have never become citizens of the United States, the lands are within the purview of article 3, Ordinance 1787; and are not, therefore, subject to taxation by the State.

So far as we are informed by the record, no effort was ever made to tax these lands prior to the year 1871. Long acquiescence in the imposition of taxes, unexplained, raises a presumption of a surrender of the privilege of exemption. *Given v. Wright*, 117 U. S. 648, 29 L. ed. 1021.

As it does not appear in the special verdict that these lands, prior to that date, had been assessed for taxation, we think it should be assumed, for the purposes of this case, that they had not paid taxes for the support of the state and county government up to that time. If for any reason they had been legally exempt from taxation between the year 1818 and the year 1871, the burden of showing that something had occurred between those dates which rendered them liable to taxation rested upon the appellant. Such reason is not found in any change in our Statute upon the subject, for the statutes declaring what lands in the State shall be subject to taxation have remained substantially the same from 1848 to 1881.

It is earnestly contended by the appellant that the Ordinance of 1787 is not in force in the State of Indiana; but it has been judicially determined that the third article of that ordinance is in force in this State. *Me-shing-go-mesia v. State*, 36 Ind. 310; *Wau-pe-man-quā v. Aldrich*, 28 Fed. Rep. 489.

The third article of that ordinance contains this clause: "The utmost good faith shall always be observed towards the Indians. Their lands and property shall never be taken from them without their consent; and in their property rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; 13 L. R. A.

but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done them and for preserving peace and friendship with them."

In the month of April, 1816, Congress passed an Act which provided that the people of the Indian Territory might form a constitution and be admitted into the Union; provided that the same when formed should be republican, and not repugnant to the articles of the Ordinance of July 13, 1787, which are declared to be irrevocable between the original States and the people and the States of the territory northwest of the River Ohio, etc. On the 10th day of June, 1816, the Territorial Legislature of Indiana enacted the following: "That we do for ourselves and our posterity agree, determine, declare and ordain that we will and do hereby accept the proposition of the Congress of the United States as made and contained in their Act of April nineteen, eighteen hundred sixteen, etc."

It will thus be seen, as adjudged in the cases above cited, that Indiana made a solemn compact with the United States by the terms of which certain portions of the Ordinance of 1787, among which is the clause above set out, was kept in force. This clause is a provision in favor of the Indian tribes residing on Indian territory, and as such is to be liberally construed in their favor. *Choctaw Nation v. United States*, 119 U. S. 27, 30 L. ed. 314; *United States v. Kagama*, 118 U. S. 388, 30 L. ed. 231; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667.

It takes no argument to prove that if the State of Indiana can tax these lands, and sell them for the nonpayment of such taxes, it may deprive the owners of such lands of their title and use without their consent. This the clause of the Ordinance of 1787, above set out, prohibited.

It is claimed, however, by the appellee that this case does not come within the rule laid down in the case of *Me-shing-go-mesia v. State*, *supra*, for the reason that it was patented to Richardville in fee simple, without any restraint upon alienation and for his own use, and not for the benefit of a tribe of Indians. The cases relied upon by the appellee as sustaining this position, viz.: *Taylor v. Vandergrift*, 126 Ind. 325; *Lovory v. Weaver*, 4 McLean, 82; *Pennock v. Franklin County Comrs.* 103 U. S. 44, 26 L. ed. 367; *Langford v. Monteith*, 102 U. S. 147, 26 L. ed. 54; *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. Rep. 740; *Hilgers v. Quinney*, 51 Wis. 62; *McMahon v. Welsh*, 11 Kan. 290; *Miami County Comrs. v. Brackenridge*, 12 Kan. 114; *South Western R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626,—are not, in our opinion, in point in this case. Those bearing upon the question under immediate consideration turn upon the construction of particular treaties and statutes; but none of them bear upon the construction to be placed upon the Ordinance of 1787. There is nothing in the language used in the clause here involved limiting it in the manner contended for by the appellee. The language is broad enough to cover the claim of individual Indians,

and titles held in fee simple, acquired by treaty or otherwise from the United States. We are unable to discover any substantial reason for depriving an Indian of his land without his consent, where he owns a fee-simple title, when he would be permitted to hold it if his title were less than a fee. The question as to whether these lands are subject to taxation by the State does not, we think, depend so much upon the question as to whether the owners hold the fee or a less estate, as it does upon the question of their tribal relations. That the owners of this land constituted a part of the Miami Nation and have kept up their tribal relations is abundantly shown by the special verdict before us. They are not citizens of the United States; and, indeed, could not rid themselves of their allegiance to their nation and become citizens without the consent of the United States. *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643.

At the time the lands were granted to Richardville, he was the principal chief of the Miami Nation. It has been held by this court that the lands granted to Meschingomiesia, an inferior chief, were not subject to taxation by the State. It is not reasonable to presume that it was the intention of Richardville and of the government to place his lands where they could be taken without his consent, while all the other lands reserved to the Miamis were placed beyond the reach of the State. In our opinion, the lands described in the complaint in this case were not subject to taxation for state and county purposes during the period for which they were assessed. What the status of this land is now we are not called upon to decide. We are not unmindful of the fact that the conclusion here reached is in seeming conflict with the case of *State v. Miami County Comrs.*, 63 Ind. 497. That was an action by the State on the relation of Godfrey, to compel the Board of Commissioners of Miami County, by writ of mandamus, to refund certain taxes alleged to have been illegally assessed and collected. It was held that mandamus was not the proper remedy. It was also held that the complaint was bad for the further reason that it did not allege that the land upon which the tax had been assessed was reserved to the Indians as a band, and not to them individually; but the question of the effect of the Ordinance of 1787 upon the lands assessed was not decided; and, so far as we know, was not considered. However, the question as to whether these lands are exempt from taxation under the treaties and laws of the United States is a federal question, and it was expressly held in the case of *Wau-pe-man-gus v. Aldrich*, *supra*, that they are not subject to taxation, and that the particular tax involved in this suit was void. The reasoning in that case seems to us to be sound, and we know of no reason why we should hold the opinion rendered by the federal court erroneous.

Judgment affirmed.

McBride, J., took no part in the decision of this case.
18 L. R. A.

Thomas HYLAND, Auditor of Clay County,
et al., Appts.,
v.

CENTRAL IRON & STEEL CO.

(....Ind....)

Taxation of the excess in value of the capital stock of a corporation over that of its tangible property subjected to taxation is not prohibited by a statutory provision that when the tangible property of a corporation is, its shares of capital stock shall not be, listed and assessed for taxation.

(September 15, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Clay County in favor of plaintiff in an action brought to enjoin defendants from collecting a tax assessed on plaintiff's capital stock by the County Board of Equalization. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. William B. Schwartz, James A. McNutt and Hiram Teter*, for appellants:

The right to assess the franchises or capital stock of individuals or corporations is a conceded or adjudged principle, and has ceased to be a subject of discussion or argument.

Cooley, Taxn. pp. 82, 379, 383; *People v. Astor*, 1 Cent. Rep. 770, 100 N. Y. 597.

It is nowhere averred that appellee has tendered the taxes properly chargeable to it, and there is nothing in the complaint showing any intention to ever pay any taxes, and the appellee can therefore have no standing in equity.

Logansport v. McConnell, 121 Ind. 416.

There are two entirely separate and distinct quantities in relation to every private business corporation, that may become the object of assessment for the purposes of taxation, to wit, the corporate property in its proprietary sense to the corporation as owner, and the capital stock, representing the aggregate of the shares held by the individual owners. These two separate quantities may be regarded as distinct legal units not in any manner alike, but in contemplation of law and in fact possessed of independent attributes and values.

And since the board assessed the value of said capital stock of corporation and therefrom deducted the assessed value of all the tangible property, there is in this case no double taxation in any sense.

Wright v. Stiltz, 27 Ind. 841; *Cooley*, Taxn. §§ 223, note, 226, 218, 230, 232, and cases cited on pp. 226, 227; 9 Am. Law Rep. 73; *La Salle*

NOTE.—Taxation; shares of capital stock.

Stock means not only stock subscriptions but the actual tangible property of the corporation. *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Floyd County v. New Albany & S. R. Co.* 11 Ind. 570; *State v. Hamilton*, 5 Ind. 310; *State v. Branin*, 23 N. J. L. 484; *McKeen v. Northampton County*, 49 Pa. 518; *Whitesell v. Northampton County*, 49 Pa. 523.

Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property. *Seward v. Rising Sun*, 79 Ind. 351. See 1 *Deady*, Taxn. 351-353.

Taxation of corporate stock. See note to *People v. Coleman* (N. Y.) 12 L. R. A. 762.

& *P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27; *St. Louis Bridge & T. R. Co. v. People*, Id. 627; *People v. Coleman*, 52 Hun. 98, 115 N. Y. 178; *Lee v. Sturges*, 46 Ohio St. 153; *People v. McCarthy*, 3 Cent. Rep. 833, 102 N. Y. 630; *People v. Asten*, 1 Cent. Rep. 770, 100 N. Y. 597; *Humphreys v. Nelson*, 115 Ill. 45; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Chicago, P. & S. W. R. Co. v. Raymond*, 97 Ill. 212; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632, 18 L. ed. 904.

Messrs. George A. Knight and A. W. Knight, for appellee:

The complaint avers that the entire capital stock of appellee was invested in tangible property, all of which was listed and assessed for taxation; that its capital stock represented its tangible property and was of the value of it and no more, that it had no surplus or accumulations. This being true, to tax all the tangible property, under its own proper designation, and then to tax the capital stock invested in that property, is to tax the same property, owned and held by the same person, twice for the support of government. This cannot be done under our Constitution and laws.

Const. art. 10, § 1; *Loftin v. Citizens Nat. Bank*, 85 Ind. 345, 346; *Richmond v. Scott*, 48 Ind. 568; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Bright v. McCullough*, 27 Ind. 228; Rev. Stat. 1881, §§ 6305, 6308.

A statute which exempts the shares of stock from taxation exempts the capital stock from taxation also.

King v. Madison, 17 Ind. 480; *Cooley*, Taxn. 212.

There are four recognized methods of taxation of corporate interests: (1) tax on franchise; (2) on capital stock; (3) on real and personal property; (4) on shares of stocks in hands of stockholders.

Cook, Stock & Stockholders, § 561.

The action of the board of equalization in this case cannot be justified or upheld upon the ground that its assessment of appellee's stock is a tax on the franchise, for the reason that under our tax laws the board of equalization has nothing whatever to do with assessing it.

Rev. Stat. 1881, §§ 6303, 6336. See also *Taylor*, Priv. Corp. 2d ed. § 477a; 2 *Waterman*, Corp. § 251.

A tax assessed on the capital stock of a corporation is a tax on the property of which such capital is composed.

Whitney v. Madison, 28 Ind. 335, 336; *Com. v. Standard Oil Co.* 101 Pa. 119. See also *Fox's App.* 3 Cent. Rep. 561, 112 Pa. 337; *Scotland Co. v. Missouri*, 1. & N. E. Co. 65 Mo. 123; *People v. Badlam*, 57 Cal. 594.

Our statute expressly forbids assessing the shares of stock where the capital stock or the tangible property of the corporation is assessed. Our law-makers recognized this as double taxation and hence expressly forbade it.

State v. Cumberland & P. R. Co. 40 Md. 22; 2 *Waterman*, Corp. pp. 330, 331. See also *State v. Hamilton*, 5 Ind. 810; *Floyd County v. New Albany & S. R. Co.* 11 Ind. 570; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 330; *Cooley*, Taxn. p. 339, note 3.

18 L. R. A.

To tax a bank on its property and also the stockholders on their shares, is duplicate taxation.

Gordon v. Baltimore, 5 Gill, 231; *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 238.

The capital of a corporation is represented by the property in which it has been invested.

Cooley, Taxn. note 1, p. 225.

Although the State may elect to tax either the capital stock or the real and personal property of a corporation, yet it cannot tax both.

2 *Waterman*, Corp. pp. 330, 331, 335, note 2 to p. 336; *State v. Hannibal & St. J. R. Co.* 37 Mo. 265; *People v. Badlam*, 57 Cal. 594.

The capital stock takes its value from what remains of the property after the payment of its debts.

2 *Waterman*, Corp. p. 320.

An offer to pay taxes is not necessary where the validity of every portion of them is denied.

Wells County Comrs. v. Gruver, 115 Ind. 224; *Logansport v. McConnell*, 121 Ind. 419; *Cooley*, Taxn. pp. 763, 764, note 1; *Albany City Nat. Bank v. Maher*, 9 Fed. Rep. 884; *Clement v. Everett*, 29 Mich. 19.

Elliot, J., delivered the opinion of the court:

The facts in this case are similar to those presented by the record in *Hyland v. Brazil B. Coal Co.* (Ind.), 26 N. E. Rep. 672; but there is one material fact presented by the record now before us, which was not presented by the record in the case cited. Many of the questions presented here were decided in the case to which we have referred, and it is unnecessary to again discuss those questions in detail; but it is perhaps proper to speak very briefly of one of them. It was not decided in the case of *Hyland v. Brazil B. Coal Co.* that a tax-payer might enjoin the collection of taxes where his property was subject to taxation, although part of the taxes are illegal, without tendering the part for which his property is liable: on the contrary, it was expressly declared that where the property is subject to taxation, the collection of the tax cannot be enjoined without paying or tendering the amount for which the property is liable, although part of the amount levied may be illegal. The cases of *Logansport v. Case*, 124 Ind. 254, and *Morrison v. Jacoby*, 114 Ind. 83, 12 West. Rep. 187, were there fully approved and so they are here. What was decided in *Hyland v. Brazil B. Coal Co.* is, that where the property is not subject to taxation at all, and there is no jurisdiction to levy any part of the tax assessed on the particular property, no tender is necessary. There was no departure from the long and firmly settled doctrine that where the property is subject to taxation, but is irregularly assessed, or assessed beyond its value, a tender of the amount for which the property is liable is always indispensable.

The fact which we have said appears in this record, but was not contained in the record in *Hyland v. Brazil B. Coal Co.*, *supra*, is this: The schedule made out and verified

by the appellee contains these statements:

"Actual value of stock	\$150,000
Total amount of indebtedness except for the indebtedness for the current expenses, excluding from such expense the amount paid for the purchase and improvement of property	284,761
Assessed value of lands	7,485
" " " personal property	27,880
Total assessed valuation of all tangible property of said Company	35,315."

It thus appears from the appellee's return of property for taxation, that the tangible property is of less value than the capital stock; inasmuch as the actual value of the capital stock is \$150,000, while the tangible property is of the value of \$35,315. This fact clearly and decisively discriminates the present case from *Hyland v. Brazil B. Coal Co.* inasmuch as in that case, according to the confessed allegations of the complaint, the entire capital stock was invested in and represented by the tangible property returned for taxation. We there said that "the question whether an assessment may be levied upon capital stock to the extent to which it exceeds in value the tangible property is not presented by the complaint; nor is the question whether corporate franchises may be taxed where they have a value over and above the capital stock presented for our decision." The question which we declared not then before us is now presented.

It seems quite clear that no tax-payer can be twice taxed upon the same property, and so the authorities declare. *State v. Hannibal, & St. J. R. Co.* 37 Mo. 265; *People v. Badlam*, 57 Cal. 594; *State v. Cumberland, & P. R. Co.* 40 Md. 22; *Cooley*, Taxn. 225.

Where the property once pays its full share of taxes to the State or county, it cannot be subjected to a greater burden for the same purposes, although it may be subjected to special taxes in the form of assessment for local improvements, or to municipal corporation taxes in common with other property. Where there is an attempt to doubly tax property, there is a violation of law. Our Statute provides that "in all cases where the tangible property of an incorporated company is listed and assessed under this Act, the shares of capital stock of such incorporated companies shall not be listed and assessed." Rev. Stat. 1881, §§ 6305, 6308.

This provision was intended to prohibit double taxation and enforces the principle stated by us. We cannot, however, hold that the provision quoted is to be considered apart from other provisions of the Statute and construed as prohibiting the taxation of capital stock in all cases; on the contrary, we hold, as was held in *Hyland v. Brazil B. Coal Co.*, *supra*, that it is to be considered in connection with other provisions of the Statute, and that, when so considered, it does not exclude the taxation of capital stock where it is not invested in and fully represented by tangible property subjected to taxation. If the capital stock exceeds in value the tangible property subject to taxation and assessed for

taxation, then, to the extent of its value in excess of the value of the tangible property, it may be listed and assessed; for it is apparent that in such a case there is not double taxation. It cannot be assumed that the tangible property necessarily represents the value of the capital stock, for the business of a corporation owning comparatively little tangible property may be so profitable as to impress upon its stock a value much beyond its tangible property; or it may be the owner of a franchise which gives the stock a value much greater than that of the tangible property of which it is the owner. A corporation which, in its sworn return, values its capital stock at almost five times as much as its tangible property, cannot successfully assert that the taxation of its tangible property entirely absolves its capital stock from liability. It is, at all events, entirely clear that where it affirmatively appears, as it does from the evidence in this case, that the tangible property is not equal to the value of the stock, the stock is taxable to the extent that it exceeds in value the tangible property. The only evidence as to the value of the capital stock, as well as the only evidence of the value of the tangible property, was that contained in the tax list or schedule; and that certainly does not prove, or tend to prove that there was double taxation, since the actual value of the capital stock is shown to exceed that of the tangible property more than \$100,000.

The record affirmatively shows that there was authority in the board of equalization to act upon the list returned by the appellee, for there was such a list placed before it, and the statute vests it with jurisdiction over the subject. Rev. Stat. 1881, §§ 6305-6308, 6357, 6358, 6359; *Hyland v. Brazil B. Coal Co. supra*.

The list showed that the capital stock was subject to taxation to the extent that it exceeded in value the tangible property; so that there was not, as in *Hyland v. The Brazil, B. Coal Co.* an attempt to subject property to taxation which was not taxable. Here there was jurisdiction, for here there was a list placed before the board of equalization as the law requires; that list disclosed property subject to taxation, and on that property, the capital stock, the Statute expressly makes it the duty of the board to place a value. It may well be doubted whether the courts can interfere at all in such a case as this; for the rule supported by the weight of authority is, that where there is jurisdiction and no principle of law is violated, the valuation of the board of equalization is conclusive. *Cooley*, Taxn. 747, 748; *Small v. Lawrenceburgh (Ind.)* (May 1, 1891). *Pulaski County Comrs. v. Senn*, 117 Ind. 413. There is here no evidence that the valuation of the board was erroneous; and certainly no reason for setting it aside, even if the courts had power to do so. If the board had placed a much greater value upon the capital stock than that fixed by the appellee in the schedule, its action could not, under the rule referred to, be disturbed, unless it was made to appear that some principle of law was violated; but the

board did not increase the valuation; on the contrary, it placed the value of the capital stock at \$60,000, and from this deducted the value of the tangible property, \$27,880; thus leaving subject to taxation \$32,170 as the value of the capital stock.

The trial court erred in finding for the ap-

pellee upon the evidence adduced; for upon that evidence the law is with the appellants.

Judgment reversed, with instructions to award a new trial.

Coffey, Ch. J., did not take any part in the decision of this case.

TENNESSEE SUPREME COURT.

R. H. DEMING *et al.*

v.

MERCHANTS' COTTON-PRESS & STORAGE CO. *et al.*,
and Other Cases.

(.....Tenn.....)

1. A cotton compress company which receives cotton for compression and storage under a contract, either express or implied from usage, to insure the same to its full value for the owners' benefit is liable to the latter for its full value in case it is destroyed by fire while, through the company's negligence, it remains uninsured, although the company is free from negligence in caring for it.
2. A carrier which by contract or by usage selects a compress company as its agent to receive cotton that is to be shipped over its road, and issues bills of lading therefor on presentation of the compress company's receipts, is in possession of the cotton when the bill of lading has been executed so as to be liable for its loss by fire.
3. The ordinary exemption clause in a bill of lading exempting the carrier from liability of the shipper's property by fire will not cover cotton while in the warehouse of a com-

press company which has received it as the agent of the carrier.

4. Carriers making a through contract for the shipment of merchandise, whether through an initial line agreeing to ship beyond its own road or through a transportation company having no line of its own, but simply authorized to ship over connecting lines, may insert therein a fire exemption clause, although no offer is made to assume the risk for additional compensation, since there is no common-law liability to make the through shipment.
5. If one, who delivers his cotton to a compress company under an agreement by the latter to procure insurance on it does not rely on the obligation so imposed, but procures other insurance thereon in solvent companies, he cannot, in case of the destruction of the cotton, recover from the compress company because of its failure to procure insurance.
6. Where a compress company fails to comply with its agreement to procure insurance on cotton which it has received as agent for a carrier, and the cotton is destroyed, covered only by insurance procured by its owner, if the owner's insurer pay the loss the amount may be recovered, for its benefit, from the carrier if he is unprotected by an exemption contract, or from the compress company if the cotton was de-

NOTE.—Common carrier may limit his responsibility by special agreement.

A common carrier is bound to transport for a reasonable remuneration, and if he offers to do so and at the same time offers to carry on condition that he shall assume no liability, and holds forth, as an inducement, a reduction of price, or some additional advantage which he does not give to those who employ him with a common-law liability, the conditions thus offered are reasonable. *Peek's Case*, 10 H. L. Cas. 473.

A contract exempting the carrier from liability for a loss by fire not due to negligence, and based upon a sufficient consideration, the shipper having the right to elect between a liability with or without the fire clause, is valid. *Dillard v. Louisville & N. R. Co.* 2 Lea, 238; *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

The authorities are practically unanimous concerning a loss by fire under a bill of lading containing a fire clause, and they establish the identical relation of bailor or bailee. *Hutchinson, Carr.* 767, 768; *Schouler*, *Balim.* 44 439, 478, 578; 2 *Am. & Eng. Encyclop. Law*, 904, and authorities cited; *Momphils & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 906; *Clark v. Barnwell*, 53 U. S. 12 How. 274, 13 L. ed. 935; *Western Transp. Co. v. Downer*, 73 U. S. 11 Wall. 129, 20 L. ed. 160; *Wheeler, Carr.* 254, 255.

Clauses similar to those considered in the principal case, when based upon a sufficient consideration, have, by the Supreme Court of the United States, been held to be valid, and to protect the company from liability for loss by fire, caused oth-

erwise than by the negligence of the company or its agents. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Dillard v. Louisville & N. R. Co.* 2 Lea, 238. In the case last cited the court said: "A lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation." *Dillard v. Louisville & N. R. Co.* 2 Lea, 238.

It is now well settled that the common-law liability of carriers may be limited by special contract, even to the extent of denuding them of the character of insurers, except as against their own negligence, and the limitation may be embraced in the bill of lading. To be valid, it must be fairly obtained, and just and reasonable. Under the *English Railway and Canal Traffic Act of 1854*, such stipulations are called "conditions" and are upheld only when they are . . . just and reasonable." The same criterion is uniformly applied in this country, and no limitations of the carrier's common-law liability will afford protection unless "just and reasonable" in the eyes of the law. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hart v. Pennsylvania R. Co.* 112 U. S. 398, 28 L. ed. 720; *Marr v. Western U. Teleg. Co.* 85 Tenn. 542.

The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it. *Redman, Carr.* 2d ed. p. 66, citing *Lewis v. Great Western R. Co.* 47 L. J. N. S. Q. B. 181.

stroyed through its negligence; but no recovery can be had because of the compress company's failure to procure insurance.

7. **Any advancement of money by an insurer to the assured** for the loss of property in possession of a bailee who had failed to comply with his agreement to procure insurance on it, which recognizes the insurer's liability for the loss, constitutes a payment so as to prevent a recovery for the bailee's failure to procure insurance, whether the advancement was a loan to be repaid upon recovery from the bailee, or was borrowed from a third person on the insurer's credit, or was provided for in the insurance contract.
8. **The taking of an obligation by an insurer**, in complying with its contract to, in case of loss, advance money to the assured pending the collection of the claim from the one primarily liable, for a return of the money, not if the insurer was not liable, but in case some other person should prove to be so, will be held to be a concession of liability on the part of the insurer.
9. **The dates of the policies, and not the times of attachment of the risks**, must govern in determining the priority of insurance under a clause in an open policy providing that insurance "prior in date to this policy" shall be first applied in payment of a loss.
10. **Where a bailee's agent, under contract to procure insurance on the property, insures only part of it** for the benefit of itself, its principal and the owners, and part of the owners insure their interests in a separate company for their own benefit, in case of loss, the first insurance will be applied to the risks covered by it alone, to wit: those of the bailee and owners uninsured by the other company and thus incidentally to the benefit of the agent, before contribution will be enforced in favor of the second insurer towards paying the loss of the owners insured by it.
11. **Where, in attempting to remove a car loaded with merchandise, from the proximity of a burning building**, a draw-bar breaks, in consequence of which the fire reaches and destroys the merchandise, the carrier is liable for its loss, notwithstanding a clause in the bill of lading exempting it from liability for loss by fire, unless it can show that the breakage was caused by a latent defect or other cause sufficient to excuse it.
12. **No rights of a shipper growing out of a contract between the carrier and its agent** that the latter shall procure insurance on the shipper's property while in its possession as such agent, can be adjusted, as between the shipper and agent, in case of the loss of the property by fire, unless the carrier has been sued and its liability for the loss established.

(June 5, 1891.)

CROSS-APPEALS from a decree of the Chancery Court for Shelby County in a suit brought to recover the value of certain cotton which was destroyed by fire while in the possession of the defendant storage company as agent for certain transportation companies. *Modified and affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Julius A. Taylor and W. H. Carroll, for complainants, *R. H. Deming & 13 L. R. A.*

Co., The Jackson Co., Tremont & Suffolk Mills, Dwight Mfg. Co., E. H. Coates & Co., Whitefield Mills, Union Mfg. Co., Hooper & Buffington Shove Mills, Providence Washington Ins. Co., and Lancaster Mills:

The limitation of the carrier's liability by contract is necessarily confined to the services contracted for, and the carriers who were parties to it.

Babcock v. Lake Shore & M. S. R. Co. 49 N. Y. 496, 497.

The bill of lading of defendants does not give the privilege of compressing, or embrace the peril of a fire except transportation fire perils.

See *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470.

Exemptions must be clearly and unambiguously expressed.

Hutchinson, Carr. §§ 275, 276.

It cannot be ruled that a peril entirely distinct from the transportation perils is to be interpolated into contracts for transportation unless they are to be read in the light of a local usage known and assented to. The contract should be construed very strictly, and where it in terms embraces only a portion of the risks of transportation, responsibility in other respects should be held as at common law.

2 Redfield, Carr. p. 82; *Merchants Bank v. Union R. & Transp. Co.* 69 N. Y. 873; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Liverpool & G. W. S. S. Co. v. Phenix Ins. Co.* 129 U. S. 441, 32 L. ed. 792.

In New York a carrier may stipulate against a liability for a loss by negligence. A consideration of the adjudged cases in that State will lead to the conclusion that a loss by fire in a press is not within the conditions of the contracts expressed in the general bill of lading.

Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 278; *Magnin v. Dinmore*, 56 N. Y. 168.

When the particular dangers or risks against which the carrier has specially guarded himself are preceded by general or more comprehensive words of exemption, the former are to be construed to embrace only occurrences *ejusdem generis* with those subsequently enumerated, unless there be clear intent to the contrary.

Hutchinson, Carr. § 275; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 802; *Barter v. Wheeler*, 49 N. H. 9.

If there was an established custom by which it was generally understood by carriers and shippers that when there was a general exception against a loss by fire in a bill of lading it included as well the peril of a fire at or in a press, as it did those attending transportation, it would not be binding on those appellants to whom it was not known.

Lawson, Carr. § 125; *Grisson v. Commercial Nat. Bank*, 3 L. R. A. 273, 87 Tenn. 358.

The rule "the expression of the one is the exclusion of the other," limits the "fire clause" of the Blue Line bill of lading to fires "in transit," *i. e.*, those which occur while cotton is being transported and to fires at stations, *i. e.*, at the depots or station houses of the railways.

Lawson, Carr. § 151.

Under the circumstances the condition limit-

ing the carrier's liability for loss by fire in a press is not valid, nor supported by any consideration.

Is a condition valid that the carrier shall not be liable for a loss by fire while the cotton is in a press, where it was lodged for compression by such carrier, for its benefit, when the costs, i. e., insurance, compression, warehousing, and loading on cars are charged as part of the freight in the tariff of the carrier, and collected from owners?

The defense relied on to sustain the reasonableness of this exception is, it is contained in a through contract. The argument is, that any such condition inserted in a through contract is reasonable because the carrier need not make one. The argument in support of it has no merit.

New York Cent. R. Co. v. Lockwood, 84 U. S. 17, Wall. 357, 21 L. ed. 627.

The shippers in this case could not have had a common-law contract if they had desired. The carrier cannot, by a valid stipulation, contract against liability for his or his servants' negligence; neither can he limit liability under circumstances that render the limitation unjust and unreasonable.

Ibid.; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 397.

It is not every special contract that is effective. To be valid it must be fairly obtained, founded upon a consideration, and be just and reasonable.

Louisville & N. R. Co. v. Gilbert, 7 L. R. A. 162, 86 Tenn. 430; *New York Cent. R. Co. v. Lockwood*, *supra*; *Hart v. Pennsylvania R. Co.* 112 U. S. 338, 28 L. ed. 720; *Marr v. Western U. Teleg. Co.* 85 Tenn. 542; *Merchants Dispatch Transp. Co. v. Bloch*, *supra*.

The shipper should have the alternative of shipping under the common-law liability, or a less or restricted liability, at his option.

Peek's Case, 10 H. L. Cas. 473; *Louisville & N. R. Co. v. Gilbert*, *supra*; *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703; *Beal v. South Devon R.* 3 Hurlst. & C. 337-342; *The Montana*, 129 U. S. 397, 32 L. ed. 788.

A condition to be reasonable must be coupled with compensating advantages.

Clayton v. Corby, 2 Ad. & El. 819.

It may not contravene public policy.

Ibid.

It must be fairly obtained.

Rooth v. Northeastern R. Co. L. R. 2 Exch. 173.

The common-law and charter duty required the several carriers to carry and to have adequate facilities for the transportation of the cotton destroyed in the compress fire.

Scofield v. Lake Shore & M. S. R. Co. 2 Inters. Com. Rep. 67.

The measure of carriers' duty to transport goods is determined, not by the line of carriers' railways, but by the public, and professed habits of such carriers. He is bound to carry goods from and to such places as his public profession has connected his trade with.

Browne, Carr. § 290.

Carrying beyond his own line, or guaranteeing a through rate of freight, may furnish an adequate consideration for limitations upon his common-law liability, but neither of those circumstances affects the conditions of limitation.

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If it were otherwise, then the limitation would not be dependent upon its being just and reasonable, but on its being in a bill of lading granted by a carrier for transportation of goods beyond its own line.

It would consequently follow that a provision exempting carriers from liability for negligence would be valid if the contract was to transport the goods beyond carrier's line. That condition of limitation is not valid, because it is not a reasonable one.

East Tennessee, V. & G. R. Co. v. Nelson, 1 Coldw. 272; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271; *Dillard v. Louisville & N. R. Co.* 2 Lea, 286; *Merchants Dispatch Transp. Co. v. Bloch*, *supra*.

The several carriers engaged in the traffic of cotton each had its own line; but in connection with other lines of an association of carriers, continuous lines were formed, for which carriers' agents solicited shipments and granted through bills of lading for one sum, that consignees paid, and the carriers divided among them; therefore as to third parties with whom they contracted, the several carriers in association are liable for a loss taking place on any part of the whole line.

Barter v. Wheeler, 49 N. H. 9; *Bradford v. South Carolina R. Co.* 7 Rich. L. 201; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duvall, 4; *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339; *Chouteaux v. Leech*, 18 Pa. 224; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77; *Hart v. Rensselaer & S. R. Co.* 8 N. Y. 37; *Evansville & C. R. Co. v. Androscoggin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Coates v. United States Exp. Co.* 45 Mo. 238; *Gass v. New York, P. & B. R. Co.* 99 Mass. 220; *Aigen v. Boston & M. R. Co.* 132 Mass. 423.

Being thus associated they are obligated to carry cotton through from Memphis to eastern points by their vocation and holding out.

Merchants Dispatch Transp. Co. v. Bloch, 86 Tenn. 398; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 680, 28 L. ed. 296.

If the carrier demands and receives compensation additional to that usually charged for transportation with restricted risk, the agreement for restriction would seem to be *nudum pactum*.

Wheeler, Carr. 228, 224; *Buckland v. Adams Exp. Co.* 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462.

The test of the right to appropriate the proceeds of the insurance is determinable upon the interest of the bailee in the property. The policies supply the place of the property.

Stillwell v. Staples, 19 N. Y. 406; 1 Wood, Ins. §§ 269, 297.

If a carrier is not liable for the loss, he has no right to share in the proceeds, because he has no interest.

Fire Ins. Asso. of England v. Merchants & M. Transp. Co. 6 Cent. Rep. 437, 66 Md. 339; *California Ins. Co. v. Union Comp. Co.* 133 U. S. 416, 33 L. ed. 738.

The policies are not worded so as to cover

even the liability of the Merchants Cotton Press & Storage Company.

Rogers v. Traders Ins. Co. 6 Paige, 590, 8 L. ed. 1114.

Insurance by shippers and by the carriers does not entitle one lot of insurers to contribution from the other.

Royster v. Roanoke, N. & B. S. B. Co. 26 Fed. Rep. 492; *California Ins. Co. v. Case, supra*.

The first beneficiaries of the compress policies are the railroads, who are liable for the cotton destroyed by the fire.

North British Ins. Co. v. London, L. & G. Ins. Co. L. R. 5 Ch. Div. 581.

Messrs. H. C. Warinner, C. W. Frayser, and Beard & Clapp also for complainants.

Messrs. William M. Randolph & Son and Gantt & Patterson, for the Blue Line, defendant:

The cotton was in the exclusive custody and control of the Merchants Cotton Press & Storage Company when destroyed by fire, the Blue Line had no possession of it, or control over it, and the transportation it undertook by its bills of lading had never been begun, and consequently there is no liability on the Blue Line for the cotton.

St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077; *California Ins. Co. v. Union Comp. Co.* 138 U. S. 887, 33 L. ed. 780; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 228, 35 L. ed. 154.

Proof of the mere fact of the loss of the cotton by fire, without more, raises no presumption of negligence against the carrier, and the plaintiff must in such a case aver and prove affirmatively that the loss by fire resulted from the carrier's negligence, before he can have a recovery.

Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 658.

A common carrier may by actual expressed contract to that effect, clearly made, divest himself of all responsibility for loss of his consignor's goods by any fire happening without his own fault.

Schouler, Bailm. p. 454; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 104, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 376, 377, 21 L. ed. 689; *Louisville & N. R. Co. v. Manchester Mills, supra*.

The cotton destroyed was, by the consent of the owners, and indeed, by their own act, in a warehouse or compress, and subject to the control of the Compress Company, and no duty or responsibility of any carrier had in fact attached, or could in the nature of things attach.

Butler v. East Tennessee & B. R. Co. 8 Lea, 82.

Through transportation beyond the terminus of the railroad of the railroad company undertaking the carriage, as well as a lower rate of freight, is a sufficient consideration for the stipulation for the exemption.

Dillard v. Louisville & N. R. Co. 2 Lea, 288; *Louisville & N. R. Co. v. Manchester Mills, supra*; *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 480.

The carrier need not in every case show that 13 L. R. A.

he made a special offer to carry under his common-law liability in order to render a special contract exempting him from that liability valid.

Louisville & N. R. Co. v. Sowell (Tenn.) March 3, 1891.

In *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 484, 485, the court spoke only "of a company standing before the public as a common carrier, and enjoying advantages and franchises as such," and applied to a carrier so circumstanced the rule "that he must be ready to do the business of a common carrier with the full measure of responsibility imposed by the common law."

In the present case the Blue Line is not such a common carrier. Where it appears that the goods had been destroyed by fire when in the actual custody and control of a person other than the carrier, the carrier need not prove affirmatively that he was not responsible for the fire.

Louisville & N. R. Co. v. Manchester Mills, supra; *Lancaster Mills v. Merchants C. P. & S. Co.* 89 Tenn. 1.

Mr. Thomas H. Jackson, for Phoenix Insurance Co., defendant:

The insertion in the marine policies of the clause intended to prevent shippers from accepting bills of lading with what is known as the insurance subrogation clause releases the companies from liability for cotton covered by Blue Line bills of lading which contained the subrogation clause.

Inman v. South Carolina R. Co. 129 U. S. 132, 32 L. ed. 615.

The assured warrants that the policies are not to cover the common-law liability of the common carrier.

The peril of a fire in transit, or at stations, or depots or in presses or warehouses or on landings or wharves at points of delivery, before delivery, is one for which the carrier issuing the bill of lading is liable at common law, whether caused by his negligence or by an accident as to which he is without fault.

California Ins. Co. v. Union Compress Co. 138 U. S. 887, 33 L. ed. 780; *The Lancaster Mills Case, supra*; Schouler, Bailm. § 411.

The peril which destroyed the plaintiffs' cotton is not one covered by the marine policy.

See 18 Ins. L. J. 483.

The warranty is an agreement antecedent to the contracts evidenced by the bills of lading, and therefore, if there was contained in each of them a subsequent agreement that the carriers should have the benefit of the insurance by subrogation, the policy would be void.

Carstairs v. Mechanics & T. Ins. Co. 18 Fed. Rep. 473; *Wheeler, Carr*, 840.

For insuring this specific risk the fire insurers received an adequate premium, and the Merchants Cotton Press & Storage Company, for their superadded obligation to effect full insurance, also received compensation, for their charges included it.

Coates' Case, 90 Tenn.—; *California Ins. Co. v. Union Compress Co. supra*.

The clause on the margin does not necessarily control the interpretation nor destroy the limitation contained in the clause covering a fire risk on shore.

All the stipulations in a policy, both printed

and written, are to be given effect if it can be done without defeating the written stipulations.

Goss v. Citizens Ins. Co. 18 La. Ann. 97; *Barget v. Orient Mut. Ins. Co.* 3 Bosw. 885; *Stettiner v. Granite Ins. Co.* 5 Duer, 594; 1 Wood, Fire Ins. p. 143.

Under the marine policy covering freight "at and from," the risk ordinarily begins when the freight is contracted for shipment.

Flint v. Fleming, 1 Barn. & Ad. 45. See *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 648.

The proofs sustain the wrongful delay and detention, the unreasonable length of time which the cotton was detained, and the carrier in fault is liable and so are the fire insurers.

Phœnix Ins. Co. of Brooklyn v. Erie & W. Transp. Co. 117 U. S. 824, 29 L. ed. 879; *California Ins. Co. v. Union Compress Co.* 133 U. S. 414, 33 L. ed. 737.

Enhancing the risks or varying from them discharges the underwriters from their liability for loss.

1 Phillips, Ins. § 979.

The doctrine of deviation is applicable to river and lake navigation.

Gazzam v. Ohio Ins. Co. Wright (Ohio) 202; *Jolly v. Ohio Ins. Co.* 1 Ohio, 539.

An unreasonable delay in performing the voyage insured will discharge a policy of marine insurance.

Chitty v. Selwyn, 2 Atk. 359; *Pulmer v. Marshall*, 8 Bing. 161; *Odier v. Jennings*, 1 Campb. 505; *Smith v. Surridge*, 4 Esp. 25; *Hull v. Cooper*, 14 East, 479; *Mount v. Larkins*, 8 Bing. 122; *Park, Marine Ins.* 71, 72.

The marine insurance policies, in order to be required to contribute to this loss, must cover the same risks and upon the same interest in the cotton and in favor of the same person as the fire policies.

California Ins. Co. v. Union Compress Co. 133 U. S. 421, 33 L. ed. 739; *North British & M. Ins. Co. v. London, L. & G. Ins. Co.* L. R. 5 Ch. Div. 569; *Wood, Fire Ins.* 1st ed. 352; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591.

Messrs. Metcalf & Walker, Holmes Cummings and Turley & Wright also for defendants.

Snodgrass, J., delivered the opinion of the court:

At the last term of this court two cases, *Lancaster Mills v. Merchants' Cotton-Press & Storage Co.* and *Coates v. Merchants' Cotton-Press & Storage Co.*, were decided. The first of these is reported in full in opinion by Judge Lurton, 89 Tenn. 1. In that opinion, which fully states many of the facts now being considered, and not necessary to be restated here, it was mentioned that the case was "one of a series of suits [and the *Coates Case* was another] involving the liabilities of the Compress Company and various railroad companies for the loss of [about] 14,000 bales of cotton, valued at \$700,000, burned on the night of November 17, 1887, while in press No. 4 of the defendant Compress Company at Memphis, Tenn." In the case now being considered are presented the 13 L. R. A.

questions undisposed of in those two cases, and nineteen others herewith consolidated, together with all other questions arising on bills then pending in the chancery court, and amended, and cross-bills subsequently filed against the Compress Company, and various railroad and transportation companies and insurance companies, to determine the several rights and liabilities of all such parties to complainants sustaining the loss, and *inter sese*.

Obviously, it is impossible, within the limits to which an opinion must of necessity be confined, to take up *seriatim* and state the pleadings and facts of each particular case embraced in a record of 4,500 pages, nor is it necessary, for the determination of certain questions disposes of the suits in classes, many of them depending upon the same questions, and to be determined upon adjudication of certain general principles, applicable alike to these, and, in certain instances, to all the classes. Nor is it necessary to state in full the decree of the chancellor. The modifications of that decree (which was an entirety in all the cases now consolidated), indicated as a result of the principles now settled by this opinion, determine the proper decree to be drawn as a settlement of the questions raised in each particular case. It is sufficient to say that the skill and ability of the eminent counsel representing the different parties in the pleadings there, and assignments of error here, have so presented, and the forceful and far-reaching comprehension of the chancellor has so determined, the various questions involved, as to enable us to review them all as a series of general questions; and we proceed to present and discuss them in the most natural order in which they arise, incidentally noticing, of course, and applying, those already settled in the *Lancaster Mills Case*.

The principal question of primary liability of the Compress Company for loss on account of negligence was settled in the *Lancaster Mills Case* on evidence not materially supplemented in this record, on the verdict of the jury finding that the Company was not liable. The same result was reached in the several other cases now before us by decree not upon verdicts; and with this result we are entirely satisfied, and to this extent the decree is affirmed. Another question practically determined in that case was that the effect of the contracts of the Compress Company with the several railroads and transportation companies, and impliedly with all persons dealing with the Compress Company as depositors of cotton, was to make that Company liable to railroads and transportation lines who had such contracts, and to owners of cotton deposited with it for compression, not as an insurer, but upon its agreements, express and implied, to procure insurance in good and solvent companies, sufficient to cover any loss while such cotton was under the control of the Compress Company, and until loaded on cars for transportation. The inception of the liability thus assumed was in the contracts it made with carriers. One of these contracts is set forth in full in the *Lancaster Mills Case*, and

the others stated to be, as in fact they are, in substance identical.

Another contract involved in this case we quote in full, for the purpose of more specific statement on points to be herein considered: "This agreement is made and entered into on this 24th May, 1887, between the Cairo & Vincennes Railroad Co., . . . termed the party of the first part, and the Merchants' Cotton-Press & Storage Company, termed the party of the second part, witnesseth: *First.* The party of the first part hereby agrees to give to the party of the second part all cotton to compress that they carry out of Memphis compressed. The party of the second part bind themselves to properly and promptly compress all of said cotton, and shall insure the same for the benefit of the first party; and the price to be paid therefor by said first party shall be at the rate of 12½ cts. per 100 pounds, bill of lading weights, for all cotton compressed, etc., on and prior to 31st Aug. 1887, and 10 cts. per 100 pounds, bill of lading weights, for all cotton so compressed, etc., thereafter during the term of this agreement. This compensation covers compressing and insurance, as well as the use of the second party's grounds, sheds, platforms, steamboat landing, and all services rendered by said second party in and about such cotton delivered it hereunder until the same is delivered either in cars or to steam-boats to the first party by the second party. *Second.* Such insurance shall be taken for the benefit of the first party, in good and solvent companies, so as to cover any loss while such cotton is under the second party's control, and until delivered to the first party. *Third.* The second party shall be liable for any loss arising from negligence or lack of care in any wise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire, and for any such loss shall pay the first party all damages and costs, or the first party may retain any dues to the second party to cover such loss; this, however, not to be limited to the amount of such dues. *Fourth.* The first party hereby constitutes the second party its agent to receive such cotton for it, and sign receipts on which bills of lading may be issued, when cotton is delivered in their compresses on the ground located at its river landing. *Fifth.* So far as it can legally do so, the first party agrees to establish no other compress agency, nor employ any other compress to do its compressing of cotton, at Memphis, Tennessee, during the term of this contract. *Sixth.* All bills for compressing cotton shall be paid weekly. *Seventh.* This contract is to continue in force until the 31st of Aug. 1896, said rate of 12½ cts. per 100 pounds being for one year from the 1st day of September, 1886, and said rate of 10 cts. per 100 pounds for the remaining nine years; and this contract is to relate back to said 1st day of Sept., 1886, and is to cover as to its terms all compressing of cotton by the second party for the first party since that date."

The first of these contracts was made with the Louisville & Nashville Railroad, and when the facilities for warehousing and compression of the Merchants' Cotton-Press

& Storage Company were very limited. But the Company built other presses, enlarged its facilities, and extended its contracts until all the railroad and transportation companies doing business in Memphis, and having an initial carrier there, were included in the contractual arrangement under which it did business. It was originally contemplated that all cotton received into its various compresses should be "permitted" by the various carriers in the manner described in detail in the *Lancaster Mills Case*, but this contemplated method was not adhered to, and cotton was received from owners without permits; when so delivered the Compress Company receipting therefor, and agreeing, either in face of receipts or understood to do so as fully when such receipts were not executed, to cover all cotton delivered with insurance. Such we hold to have been the actual fact of their several special contracts, and the effect of their reception of cotton for compression, according to the understanding between themselves and owners. The usage as to all was in substantial accord with special agreements as to some of the patrons of the Company, as before explained; that is, to insure for carriers by contracts expressly made, and owners expressly made in the carrier contracts and dray receipts, contracts or usage. It therefore follows that the Compress Company, not being liable to any for negligence in suffering the cotton to be burned, is liable to all interested as carriers by express contracts made with them, or owners under such express contracts, and those evidenced as made with owners by dray receipts and usage, for the failure to procure insurance sufficient to cover any loss that occurred. The Compress Company had in fact procured insurance only to the amount of \$801,750, while the entire loss was about \$700,000. Before going to other questions involved, it is proper to consider here the relation which this Company occupied to the railroad and transportation companies with which it had contracts, and in what sense delivery of cotton to its compresses is to be taken as delivery to these carriers. For them it is argued, on the one hand, that, where cotton was delivered to the Compress Company, and its receipts executed therefor, and these given up to the railroad or transportation companies, and bills of lading by them issued for such cotton, there was no actual delivery to the carriers; and, on the other hand, that, if there was in such event a delivery to them, then the cotton was in their depots or stations, within the meaning of certain exemption clauses in their bills of lading, wherein, in various forms, they have stipulated against liability in cases of fire in their depots, stations, or places of transshipment. Both of these contentions are unsound. The carriers selected by contract, and by usage (as to those who had no contracts), the Compress Company as their agent, and agreed to be bound on delivery to it when they executed bills of lading. It was competent for them to do this, and they did it; and, while doing so, those who had contracts with the Compress Company, recognizing it as a special risk before the

cotton came actually into their own depots or cars, stipulated with their agent (the said Compress Company) to carry insurance for their indemnity, as they also had the right to do, while those who had no such contract took this special carrier risk without it, as they also had the right to do. But the compresses of the Company did not thereby become depots, stations, or places of transshipment of the carriers, even of those who had none of their own in Memphis, because they contracted, where such carriers issued bills of lading, with reference to intended shipment over lines which did have, and the same rule applies to them as to initial lines, either alone or in association with others.

The compresses were not in fact depots or stations of the railroad or transportation companies, and in no contract entered into do they purport to be. Each road leading from Memphis had its own depot, and each transportation company not having any contract to use these lines which they did as agents, and hence their "depots" and "stations" are those meant in contemplation of the carrier contracts into which they entered. The presses were alone those constructively, as in fact, of the Merchants' Cotton-Press & Storage Company, and this Company reserved the right to charge storage on cotton after a stated time, and, in receipts given for cotton to be surrendered to the carriers, in lieu of which bills of lading were issued by them, it was stipulated that, "if held in press over fifteen days before bills of lading issue, or if sold while in press, 50 cts. per bale per month charges will be collected before delivery or shipment." The form is not given as of all receipts, though it would seem it was so, nor is it deemed very material. It is only one of the evidences (about which, perhaps, the well-understood fact on this point called for none) that nobody contracted for or understood the Compress Company to be a depot or station or place of deposit of any company other than the corporation which owned it. The carriers which had contracts with the Compress Company contracted only that the Compress Company should represent them as agents, and receive in its warehouse or press, and hold until actual delivery to them, while those who had no contracts with the Compress Company had, of course, no agreement to use the Compress Company's warehouse or press as a depot. Therefore no exemptions not in terms embracing a loss by fire in warehouse for compression or other cotton-press include this loss. General clauses of exemption from loss by fire will be construed to relate alone to loss in depots, stations, on the cars, or in places of transshipment of the carrier after actual custody of the cotton, and held inoperative to excuse from liability for this loss. These limitations upon the common-law liability of a common carrier are not favored. They are to be strictly construed, and limited to the general risk of the carrier after actual custody of the cotton, unless the terms thereof expressly extend to a special risk. Where, therefore, a carrier has effected an arrangement with a Compress Company to act as the carrier's agent, and receive cotton in the

agent's press, and accepts delivery there by the shipper, instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton-press. Such a clause will not cover a special risk like this.

The Kanawha Despatch is therefore the only carrier entitled to exemption on account of its carrier contracts. The bills of lading of the Kanawha Despatch, so far as material to this question, read as follows: "It is further mutually agreed that no carrier shall be liable for loss or damage of any article or property whatever by fire or other casualty, in or at any cotton-press, or during transportation to or from press, or while in transit, while in depots or on wharves awaiting shipment, transshipment, or delivery, or fire from any cause, on land or water." The Louisville, New Orleans & Texas Railway Company, which the chancellor held not liable, and the Newport News & Mississippi Valley Company, the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, the Cairo, Vincennes & Chicago Line, and the Blue Line, which he held liable, are all liable under the principle settled.

The bill of lading of the Louisville, New Orleans & Texas Railway Company, so far as material to this question, is as follows: "Neither of said carriers shall be liable for leakage of any kinds of liquids, nor for losses by the bursting of casks or barrels of liquid, arising from expansion or other unavoidable causes; breakage of any kind of glass, carboys of acid, or articles packed in glass, stoves and stove furniture, casting machinery, carriages, furniture, musical instruments of any kind, packages of eggs; or loss or damage of hay, hemp, cotton; or the evaporation or leakage of liquids of any description; leakage of grain in bulk; or for damages to personal property of any kind, occasioned from delays from any cause or change of weather; or damage by fire; or loss or damage on sea or rivers."

The bill of lading of the Newport News & Mississippi Valley Company on this point is as follows: "That this company shall not be liable . . . for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried in open cars; nor damage of perishable property of any kind, occasioned by delays from any cause or change of weather; nor for loss or damage on any article of property whatever, by fire or casualty while in transit, or while in depots, or places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation, while on seas, rivers, lakes, or canals."

The bill of lading of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, after acknowledging in the usual form the receipt of the goods, proceeds: "Which they agree to deliver at Cleveland, Ohio, station, with as reasonable dispatch as the general business will permit, subject to

the conditions mentioned below, in like good order (the dangers incident to railroad transportation, loss or damage by fire while at depots or stations, loss or damage of combustible articles by fire while in transit, and unavoidable accidents excepted), upon the payment of charges. . . . It is agreed, and is a part of the consideration of this contract, that neither this nor any company or carrier to whom the same shall be delivered, in the course of transportation to the place of final destination, is to be responsible for loss or damage to goods occasioned by providential causes, or by fire from any cause whatever, while in transit or at stations."

The bill of lading of the Cairo, Vincennes & Chicago Line, as to this question, is as follows: "That the C., V. & C. Line, and the forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils, or any other kinds of liquids, breakage of any kind of glass, earthen, or queen's ware, carboys of acid, or articles packed in glass, stoves, stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for rust of iron and iron articles, or for loss or damage by wet, dirt, fire, or for loss of weight, or for condition of bailing on hay, hemp, or cotton, or for loss or damage of any kind on any article whose bulk requires it to be carried in open cars; nor for loss or damage on any article of property whatever by fire or other casualty, while in transit, or while in depots or other places of transshipment, or at depots or landings at points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals."

Like clause in the bill of lading of the Blue Line reads: "It is agreed and is a part of the consideration of this contract, that the Company will not be responsible for leakage of liquids, breakage of glass or queen's ware, the injury or breakage of looking-glasses, glass show-cases, picture frames, stove castings, or hollow ware; nor for the injury to the hidden contents of packages; nor for the loss of weight or otherwise of grain and coffee in bags, or rice in tierces; nor for the decay of perishable articles; nor for damage arising to any article carried from the effects of heat or cold; nor for the loss of nuts in bags, or lemons or oranges in boxes, unless covered with canvas; or loss or damage to goods occasioned by providential causes, or by fire from any cause whatever, while in transit or stations; nor will the companies be responsible for damage on tobacco, unless it is proved to have occurred during the time of its transit over this line, and notice must be given within thirty hours after the arrival of same."

Settling thus the effect of the exemption clauses in the several bills of lading, we reach the main question made against them all, and that is that they are void, because (1) without consideration, and (2) unreasonable.

Taking up these divisions of the question in order, we consider that of consideration first. And here we observe that again the 18 L. R. A.

pleadings have been so amended as to meet the difficulty suggested in the *Lancaster Mills Case*, that there was an omission of allegation in the pleadings there that the clause was without consideration, imposed by duress, or unreasonable. In that case it was held that such a stipulation in a bill of lading, wherein a through rate was granted for carriage over lines of more than one carrier, will be presumed to be upon a sufficient consideration, and reasonable. It is now alleged and insisted that the carrier has charged and received compensation additional to that usually taken for transportation, with restricted risk, and that, in effect, the shipper has been made to pay the insurance premium. It is true that for effecting insurance of the special risk of the compress holding, and agreement to procure carriage beyond the line of particular carriers, the charge was slightly greater, but there were additional benefits conferred which justified it, and this was no more than just consideration therefor.

The argument that the stipulation for exemption is unreasonable is based, not alone upon the idea that one line of road may not stipulate for such exemption in consideration of its procuring carriage beyond its own line, but it is said that here the various carriers were in combination, forming a continuous line from Memphis to points of distribution; or transportation companies sued as carriers having no line leading from Memphis were in association with initial lines there, and contracting as a continuous line to carry from Memphis to such destination, as the Kanawha Despatch, or transportation companies having no lines and no initial carriers in Memphis were contracting as through lines to carry from Memphis to points of destination, as the Blue Line, which, without a road, contracted to carry from ocean to ocean. It is argued that the effect of such agreement as was made by the several lines and transportation companies is the same as though made by a carrier owning the line from Memphis to destination point. That such a carrier could not have stipulated for exemption from fire loss, unless it had been ready and willing to have made the shipment under its common-law liability, which included such loss, and that the evidence shows that none of the companies or associations sued were prepared or willing to so ship. The evidence does show that none of them would have issued bills of lading such as these, omitting the fire clause, but that all the initial carriers and lines leading from Memphis would have done so over their own lines, but had no arrangement authorizing them to do more.

The question thus presented is the most serious in the case. If complainant be right in assuming that these lines or companies shipping by special contract over and beyond any one initial carrier's line, stand upon the same footing as would a carrier owning the entire line over which the shipment was made, then it follows, from the fact that they were not ready and willing to execute a contract for shipment under common-law liability, the stipulation for exemption against fire loss would be void, for it is well settled

in this State that such a clause is only valid when it was optional with the shipper to ship upon or without such agreement. The option need not be in fact offered to the shipper. It is sufficient if it would have been given had he demanded it. *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 638.

Before determining this question it is necessary to notice here a division of it arising upon differences in the character of carrier lines assuming the obligations. These, though they are susceptible of more, may be, for the purpose of this statement, divided into two classes, one being that of an initial carrier having a line leading from Memphis to a given point, and a traffic arrangement or combination with connecting lines, whereby it is authorized to make (and make only) the contract in question as to shipment beyond its own line; the other being a transportation company having no initial carrier or line, but offering to make such special contract only, and not having power to execute any other, proposing to use initial and connecting roads for one continuous shipment. Respecting the character of these companies and liability assumed, we hold they are the same. Both but in fact proposed to use agencies which they did not profess to own, and contracts made with one are governed by the same rules of law as those which control the other. In the case of *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 392, a transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf, in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, was held to be a common carrier, and subject to all the responsibilities attaching to that character, and that the carriers employed by such transportation company were its agents, and not the agents of the shipper or consignee. In this view each could make any contract which the other could lawfully make, and would be bound by the same agreements, and be exempted from the same responsibility, in like contracts.

This being true, the contract must be regarded as though made by one line for itself and as agent to make the special contract for others. The through bills of lading issued were for the performance of the service of transportation by several successive carriers, no one of which was under any common-law obligation to enter into any contract at all for through carriage over all. It is no longer doubted that each carrier in the connection could have made a contract for itself, whereby it limited its liability for loss by fire. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 360, 21 L. ed. 634; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288.

These were all cases in which the contract was for delivery at a point beyond the terminus of the line of the contracting carrier. It was presumed, in the first case cited, though there was no evidence to that effect, that the initial carrier had rates proportioned to the risk assumed from the nature of the 18 L. R. A.

goods carried, and that losses by fire must necessarily have affected the compensation demanded. But the court said: "Be this as it may, the consideration expressed was sufficient to support the entire contract made." Here it is proven that they had no charge for the entire route agreed upon with other carriers, and ready to be proposed to the shipper, without limitation of responsibility; but it is proven that they had such a rate on their own initial lines; and, in the absence of proof, it may be presumed that the connecting carriers each did have such a rate under the authority cited. But, be this as it may, as they were under no common-law liability to agree to ship at all beyond their own lines, they may make such a special contract, and, if otherwise reasonable (as in each of these cases it was) such contract is not void, but must be upheld.

Having determined, in the order in which they most naturally arise, the relation which the Compress Company occupied towards owners and carriers under its contracts and usage, with its liability for failure to procure insurance, and its non-liability for negligence, we are brought to the questions which arise upon the insurance contracts effected by it, and to others arising upon insurance contracts effected by owners, and to those of contribution between the several insurers. The \$301,750 of insurance procured by the Compress Company was distributed in forty-four companies. In all policies procured the Merchants' Cotton-Press & Storage Company was named as the assured, and in each of them the risk was set forth on a printed slip, pasted in the body of the policy, reading: "On all cotton in bales received by them [it] as agents [agent] for the benefit of railroads, transportation lines, or owners in the boundaries of the Merchants' Cotton-Press & Storage Company's West Navy-Yard Compress. . . . The liability of the insurers is to begin on the receipt of said cotton on the premises of the assured as herein described, for compressing, and is to cease and terminate when removed from the platforms of the Merchants' Cotton-Press & Storage Company for transportation." The greater part of the cotton in the compress was covered by marine policies of insurance in favor of special owners. They aggregated about \$700,000. The amount of cotton destroyed was about 14,000 bales, of the value of \$700,000. Of this amount there was \$52,472.26 worth for which no bills of lading had been issued, and upon which there was no other insurance. The other cotton destroyed was covered by marine policies, and the amounts due the several parties thereunder have been paid or advanced to them by the several companies issuing these policies. In respect to all these companies except those represented and claiming through Deming & Co. in their suit the chancellor held there could be no recovery against the Merchants' Cotton-Press & Storage Company, because of a breach of its contract to fully cover by insurance; the theory upon which this holding was made being that announced in the *Lancaster Mills Case*, that an owner not relying upon the obligation of the Com-

press Company to carry insurance, and having for himself effected other insurance in good and solvent companies, would not be heard to say that he had been damaged by the failure of the Compress Company to do for him that which he had done for himself. This proposition was not actually decided in that case, the necessity for it being obviated by the fact of payment. The owner, therefore, not only having insured in solvent companies, but having in fact received payment from them, could not complain that he had been injured by the failure of the Compress Company to cover his cotton with other insurance. Not having been injured by such failure, he acquired no right, and, of course, his insurer could obtain none on this account. But the proposition was law, and the chancellor might properly have adjudged additionally, as we now do, that the transactions by which the marine insurance companies advanced money in full of the several losses, subject to be repaid only upon the contingency that the assured should recover from bailee or carrier primarily liable for negligence, or, in the latter case, for loss without exemption in bill of lading, were for all purposes of these suits payments, and that thereafter neither the assured nor their insurers had any right, original or by subrogation, against either Compress Company or carrier, unless the Compress Company was primarily liable for negligence, or the carrier was primarily liable for the fire loss, unprotected by bill of lading exemptions. And this is true as to the arrangement effected by Deming & Co., which the chancellor held was not a payment upon the particular facts now to be stated. After the loss, and when the insurance company was fully informed concerning the circumstances thereof, the president of the Phoenix Insurance Company procured, for and through Deming, of banks, the full amount of insurance of Deming & Company, and an amount additional sufficient to purchase claims of co-plaintiffs in that suit. This borrowing was done in the name of Deming, but it was absolutely secured by an actual deposit of the insurance company, and with the understanding that Deming was only to pay it out of the recovery against the carrier; or, to put it differently, that the insurance company was to pay it if Deming & Company failed to recover in this case. Then, if no recovery could be had against the carrier, it was a payment. This is its legal effect. It concedes liability fixed by the loss, and that the policies extended to and covered it. As to the questions that it now attempts to make, that its policies did not cover this risk, and that it was not in fact liable, the company is concluded by the arrangement and understanding with Deming. These companies all stand on the same footing. But, having paid the assured, they are entitled to be subrogated to his right against parties primarily liable,—that is, against the Compress Company, if the loss was occasioned by its negligence; and against any carrier primarily liable for the loss,—that is, one not protected by valid exemption from liability on account of loss by fire.

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We have elsewhere shown what carriers were primarily liable, and this is all we need say in this connection.

Another question was made and determined by the chancellor against the liability of the Marine Insurance Company, Limited, of London, for 305 bales of cotton, on account of "shore risk" clause, whereby its risk of fire "on shore," prior to shipment, was to cover a period not exceeding ten days. This money had been advanced to the assured by the insurance company, but the chancellor held it not to be a payment, because of the following agreement contained in its policy, to this effect: "It is understood and agreed, between Warren Manufacturing Company and the Marine Insurance Company, Limited, of London, that when said Warren Manufacturing Company shall present to Marine Insurance Company, Limited, proof that any cotton shipped, or purchased for shipment, by said Warren Manufacturing Company, has been lost, damaged, or destroyed while in the custody or control of any carrier, or while any carrier or other bailee was liable to said Warren Manufacturing Company therefor, said Marine Insurance Company, Limited, shall advance to said Warren Manufacturing Company, or to the holder of the certificate issued by said Warren Manufacturing Company, against such shipment, an amount equivalent to the insured value of the cotton so lost, damaged, or destroyed, pending the collection of the claim against the carrier or other bailee, said Warren Manufacturing Company agreeing to refund said advance immediately upon collection of said claim. It is further understood and agreed that, upon the first advice of such loss, said Warren Manufacturing Company shall notify said Marine Insurance Company, Limited, and shall select as their representative to deal with the carrier, or other bailee, such person or persons as the said Marine Insurance Company, Limited, may designate. War-ranted that this agreement to advance and the policy of insurance to which it applies, shall not in any way inure to the benefit of any carrier or other bailee. This agreement to be binding so long as policy No. 502, issued by said Marine Insurance Company, Limited, to said Warren Manufacturing Company shall remain in force." It was held that the 305 bales were not covered by the policy, and that advancement of the amount of its insurance did not, in legal effect, amount to payment, or estop the company to deny its liability, or insist that the policy did not cover the loss, and that, by reason of said agreement, the company had the right to advance it, and still contest the liability.

The reasoning of the learned chancellor on this point can be best presented by quoting it. It is as follows: "The owners of cotton holding the policies of the Marine Insurance Company, Limited, of London, were not insured by those policies to the extent of all cottons that remained in the compress exceeding ten days before the fire, and to this extent the complainants will take decree against the compress company for breach of its liability to insure, and for shares of insurance actually taken by it. Under the

terms of the agreements attached to the policies of this company, and forming parts thereof, the advances of money to the assured cannot be regarded either as payments of the losses or as evidences of admissions of liability on the policies. These agreements expressly provide that, when proofs of loss merely are presented, the insurance company shall advance 'an amount equivalent to the insured value of the cotton so lost or destroyed, pending the collection of the claim against the carrier or other bailee, the insured agreeing to refund said advance immediately upon collection of said claim.' Here was an advance actually made under a valid stipulation of the policy, and not a payment in the guise of an advance, made under a new arrangement after the loss, independent of an obligation of the company to make it. Why was the advance made? Clearly, because the contract imposed the obligation to make it. Why was it received at that time by the assured? Clearly, because at that time he was not under the contract entitled to anything more. Without elaboration, I think it is entirely clear that this feature of these policies distinguishes them, in respect of the point under consideration, from all the others where the loans or advances were made without stipulation in the policies to that effect, and without obligation on the part of the company, under *post nati* arrangements, which bear unmistakable signs of cloaking the real purposes of the parties."

The agreement on which the money, after loss, was advanced, was as follows: "Whereas by certain contract or contracts of insurance made and concluded on or about the 5th day of November, the Marine Insurance Company, Limited, of London, insured Messrs. Warren Manufacturing Company and their assigns against loss or damage to certain cotton therein described, and the said assured warranted that the said insurance should not in any way inure to the benefit of any bailee of said cotton, and the said assurer undertook that, in case of loss or damage to any of said cotton while in the custody or control of any bailee, that it would lend to assured, or to their assigns, an amount equivalent to the insured value of the cotton so lost or damaged, pending the collection of the claim for the loss or damage from the bailee or bailees liable therefor; and whereas, certain cotton claimed by the said assured to be so insured has been damaged or destroyed while in the custody or control of the bailees thereof, to wit, a loss by fire amounting in its insured value to the sum of twenty-five thousand one hundred and three and thirty-seven one hundredths dollars: Now, therefore, this agreement witnesseth that the undersigned, the above-named assured, have this day borrowed from the above named, the Marine Insurance Company, Limited, of London, the sum of money last above written, upon the express condition that the said sum shall be by them returned to the said the Marine Insurance Company, Limited, upon the collection of the claim for the loss or damage to the cotton from the bailee or bailees liable therefor, and payment thereof

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to the undersigned. Dated December 29th, 1887. [Signed] Warren Manufacturing Company. John Waterman, Treasurer."

It will be seen that the chancellor reached this conclusion, and took this case out of the rule herein announced, respecting payment, by the assumption that this advance was agreed to be made at all events in the policy, and that, the subsequent advance having been made in pursuance of the original contract, it was not payment or concession of liability, because the policy covered the loss sustained. In this conclusion we do not concur. The original agreement, properly construed, only required an advance in case the loss was at a time and under such circumstances as made the company liable therefor; and, when the amount to cover a loss was advanced only to be returned upon collection from the bailee or bailees liable therefor, it was a concession that the loss was covered by the policy, and but reserved the right of the insurance company to recover of the bailee through the owner. If the bailee was not liable to the owner, there was to be no return, and there could be no subrogation. There was nothing in the policy, properly construed, which required this advance, whether the policy covered the loss or not. There was nothing to prevent the insurance company requiring, as a condition of advancement, that the assured should guarantee a return, if for any reason the insurance company turned out not to be liable, or, at least, agree to return the money in that event. It chose to advance without taking any guaranty or agreement for restitution, if it should thereafter appear that the insurance company was not liable for the loss, but took, instead, an obligation to return it, not if it were not liable, but if someone else, the bailee, should be made so. This must be held, in legal effect, to concede that the loss was covered by the policy, and that the insurance company was liable therefor, and to reserve only the right of subrogation to assured's claim against the bailee for negligence, and carrier unprotected by fire clause, and hence primarily liable,—a right existing without such contract. This advance was therefore a payment. If the insurance company could not have been held to make it, it has chosen voluntarily to do so and thus put the owner in a situation in which he cannot be damaged by reason of failure of the compress company to insure for him. Not being able to establish this, he has no right to a decree against the Compress Company, and, of course, his insurer has none. The only thing not conceded by the payment was the right which payment gave of subrogation to owner's right against one primarily liable for negligence or loss by fire without exemption.

There is still another special question which arises in the marine insurance policies, proper to be disposed of here before coming to the last insurance question we will present,—that of contribution. The question indicated is the construction of what is known as the "American clause" contained in some of the marine policies. It would be a useless increase of the volume of this statement to quote that clause from all of the said poli-

cies. They are all in substantially one form. We quote two of them, to wit: (1) That of the Phenix Insurance Company, held by R. H. Deming & Co.: "Provided, always, and it is herein further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Phenix Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Phenix Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And, in case of any insurance upon the premises, subsequent in date to this policy, the said Phenix Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent assurance had been made." (2) That of the British & Foreign Marine Insurance, Limited, of Liverpool, is as follows: "Provided, always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured as they shall be, by such prior assurance, exonerated from; and in case of any insurance upon the said premises, subsequent in day of date to this policy, the said assurers shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day of this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more than a ratable contribution, in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

Under the terms of this, the American clause, as contained in the various marine policies, it was held by the chancellor that the question as to whether the fire insurance preceded, was contemporaneous with, or was subsequent to, the marine insurance, was to be determined, not by the dates of the respective policies, but by the date of the attaching of the risk under each, and, holding that the risk attached contemporaneously under each, it was held that the principle of contribution must govern. To fully understand the chancellor's view, and reasons therefor, it is proper to quote his admirable statement in full on this point. It is as follows: "I am of the opinion that, under the American clauses of the marine open policies, there was no insurance until the cotton

was brought within their terms, and became the subject of insurance. An open policy does not, *ex vi termini*, insure property until the property is brought within its terms. Hence there is no insurance until then. The rule making the date of the policy the date of the insurance applies to valued policies, but not to open policies. Here confessedly, under this rule, the risks under the marine open policies and the fire open policies were concurrent, and the American clauses do not operate."

The proposition of fact upon which this is based is denied, and it is insisted that there was a period of time, however brief, after purchase before deposit in the compress when the cotton was covered alone by the marine policy, and such seems to be the fact. But, waiving this, we hold that the date of the policy, and not of the attaching of the risk, must govern. It is so agreed in express terms, and no reason is perceived why such an agreement might not be made in contemplation of open policies. It is true that ordinarily the date of a contract is not material, but this is not true when it is specially made so in terms,—where it is, among other things, an object contracted about. The insurer, for whose advantage in one sense it is, may well contract to assume an entire liability, and retain an entire premium against contemplated additional insurance as well as existing insurance. No case has been found adjudging the contrary, and, although none has been produced in which the question was in terms raised and disposed of, several have been cited where, upon the facts, it arose and was taken for granted, as we decide it, neither counsel nor court disputing its correctness, and where it was necessarily applied in effecting the result. *American Ins. Co. v. Griswold*, 14 Wend. 399; *Whiting v. Independent Mut. Insurance Co.* 15 Md. 297.

That the actual date controls is assumed and taken for granted in previous cases. *Lee v. Massachusetts F. & M. Ins. Co.* 6 Mass. 208; *M'Kim v. Phenix Ins. Co.* 2 Wash. C. C. 95; *Columbian Ins. Co. v. Catlett*, 25 U. S. 12 Wheat. 383, 6 L. ed. 664; *Seamans v. Loring*, 1 Mason, 146. While in others it has been held, if policies bear same date, evidence might be received to show actual time of execution of each. Opinion by Judge Story, *Potter v. Marine Ins. Co.* 2 Mason, 476.

This last contingency was provided for in one of the policies quoted, which made other insurance of the same day as that policy, "simultaneous" therewith, a strong evidential fact to show that the date of the contract was regarded as controlling, and that it is now construed as then understood. It will be seen further on that the purpose of the clause was to alter the common-law rule of contribution, as announced in a case to be cited, and to make the policies liable successively in the order of their respective dates. If it be now determined that the date does not control, but the date of the attaching of the risk under open policies determines, the rule of contribution, which the clause was intended to avoid, would in all its force be reinstated. We think it clear

that it can have no such construction as would defeat the purpose for which it was originated. In view of the origin and purpose of this clause, this construction is all the more manifestly correct. Its object, as deduced from its effect, seems to have been to meet a modification or change made in the law of insurance as it had been understood to exist before in England, by a decision of Lord Mansfield in *Newby v. Reed*, 1 W. Bl. 416. It is thus stated by Chancellor Walworth in the case hereinbefore cited of *American Ins. Co. v. Griswold*: "By the continental law of Europe, and the law of English insurance as it existed previous to the decision of Lord Mansfield in *Newby v. Reed*, *supra*, if there were several policies of different dates upon the same subject, and the amount of insurable interest was insufficient to cover the whole amount insured in both policies, so as to constitute a case of double insurance, the second policy only attached upon or covered so much of the insurable interest as was not covered by the first policy; and the second underwriter was only entitled to retain the premium *pro tanto*, where the commencement and termination of the risk and the perils insured against were the same. 3 Kent, Com. 281; Vanderl. Com. p. 655, b. 4, chap. 16, § 7; Miller, Ins. 366. By this ancient English rule and the continental law the second underwriter was, as he ought to be, merely substituted in the place of the assured, as to the uninsured interest of the latter, which was not covered by the first policy; so that the rule of apportionment between the first and second sets of insurers, where both policies, when taken together, were sufficient to cover the whole insurable interest, was precisely the same as it would have been between the underwriters in the first policy and the assured, if the second insurance had not been made. If the object of the American clause was to restore this ancient rule of apportionment between the underwriters in successive policies, as it originally existed in the Mercantile Law of England as well as the rest of Europe, it is hardly possible to do it in more appropriate and explicit language than is used in the last paragraph of this clause. That language is that, in case of an insurance subsequent in date to the first policy, the underwriters in the first policy 'shall nevertheless be answerable for the full extent of the sum by them subscribed, without the right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made:' that is, that they are to have no right to claim a contribution from the subsequent assurers, and are to be answerable to the assured in the same manner as if the subsequent insurance had not been made, as well as to retain the premium in the same manner. It appears to be impossible, therefore, under this policy, that the circumstance of there being subsequent policies underwritten by others could make any difference as to the apportionment of the loss as between the underwriter in the first policy and the assured, or those who represented the insur-

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able interest of the goods on board at the time of the loss not covered by that policy." Id. pp. 481, 482.

We have presented the quotation, with the argument and statement of the purpose for which it is made, and do not deem it necessary to add more on that question.

We come now to the question of contribution between the insurers or co-insurers, the fire and marine companies. The nominal assured in the fire policies was the Compress Company; the designated beneficiaries were the railroad companies, transportation lines, and owners. The two former (the Compress Company and carrier risks) were not included in the marine policies. Nevertheless it is insisted that the owners' risk covered in the marine policies was the same as owners' risk covered in the fire policies, and that contribution must therefore be enforced between these companies. The insuperable objection to this, so far as the Compress Company and carriers are involved, is that as to their risks they are not covered by the marine policies, while they are covered by the fire policies. It follows, therefore, that, so far as the Compress Company or the carriers may be held liable, the fire companies must respond to that liability, and there can be no contribution as to owners' insurance until that liability is extinguished. If this were not true, the very purpose for which the fire policies were procured—that of indemnity to the assured—would fail. The object of all such insurance is indemnity, and no equity of contribution can defeat it. Indemnity is the prime object of insurance. Every other rule is subordinate, and in no case will contribution be enforced so as to deny indemnity and equity to all the assured.

In application of this rule the Compress Company insists that the fire insurance must be so appropriated as to leave no party included among the assured in these policies unprotected. Recognizing that the effort to protect its own interest had been made without specification, except that it was assured, and that carriers' and owners' interest specially insured must be taken into consideration, and be provided with full indemnity before it is affected, and to prevent its being injuriously affected, it insists that it has the right to have the fire insurance fund so applied as to indemnify carriers and uninsured owners, and thus protect itself as one of the assured, which it insists it is in this sense and to this effect, because the object of being an assured was to derive any benefit properly or in any contingency occurring in consequence of insuring these special interests; that being thus insured, then it, as assured, is a beneficiary to any extent which such insurance so applied makes it, when their protection and its own is secured by such application. It does not insist that it can in any event take a benefit under these policies over an owner, but it claims the right to have the fire insurance appropriated to uninsured owners because the others are not damaged; and, if they are, then the compress company is liable to them under its contract, express or implied, to procure insurance, and the money it receives in such appropriation

would have been at last appropriated to owners when needed for their indemnity. It is insisted, however, in this contingency which has now arisen, where certain owners are damaged by the loss, and others not, that equity requires the appropriation in the carriers' favor to the loss of the otherwise uninsured owner; that such appropriation cannot injure an assured owner, for he gets his full insurance from that source, and, if it fails, the Compress Company is liable, and the protection it receives in the appropriation claimed goes to his benefit; that this result cannot be defeated in favor of contribution, by the intervention of owners' insurer claiming subrogation. He is not entitled to subrogation to the owner's claim against the Compress Company for failure to procure insurance. This right would only exist as to that procured, nothing else preventing; but here it must not be construed to extend to that, and thus defeat the application of the policies procured to indemnity of the assured. The claim of the Compress Company is not that it escapes liability to the owner for default in not procuring insurance, or that it is entitled to thus escape it, but it is that, to the extent the Compress Company did take out such insurance, the insurance can and must be applied before any contribution is invoked, so as to protect the Compress Company to that extent, and that is done by applying this insurance to the carrier liability and to cover loss of the otherwise uninsured owner.

In this view we concur, disagreeing with the chancellor, who held all owners entitled primarily to participate, and their insurers to do so by subrogation. This was one of the questions not before the court in the *Lancaster Mills Case*. There it was said, while taken out for the benefit of carriers (meaning contracting carriers), the cotton itself was insured, and this we again repeat here. But the question of contribution and subrogation now arising did not arise in that case; what was then said was not in that view. Leaving, therefore, that question, we return to the question of contribution among others.

The rule of contribution among co-insurers is one which equity has evolved out of conditions of contemporaneous liability for the same loss. Like all others of such origin, it is the application of common sense and natural justice to situations, and the solution of difficulties not provided for by fixed rules of law. Its object is to do justice, and it will not be, under any circumstances, a correct application of it if the result is injustice to any of the assured affected by the application. If the property which was the subject matter of insurance was the same, interest the same, and risks identical, the contribution consequent is obviously that which would be proper as between co-sureties for the same obligation. But here the fire policies were on two interests and risks (that of contracting carriers, and of the Compress Company, as shown), not covered by the marine policies, and the fire insurance fund must therefore be first applied so as to protect these. If in such application it is ex-

hausted in indemnifying the carriers held liable and uninsured owners, then there will remain no fund for contribution. If not, the marine insurers, not having the American clause, are entitled to have contribution, as the fire insurance was for all owners, including those covered by the marine policies (excluding, of course, Hall, who did not consent to procuring of fire insurance for him, but forbade it). To do equity, the fire insurance must be appropriated to cover carrier liability and otherwise uninsured owners. As it is insufficient for this purpose, it will result that there will be no contribution.

One of the claims involved in this record, that of Paton & Co. for twenty-nine bales of cotton, stands on different ground from that of others discussed. The bill of lading of the Kanawha Dispatch, held for this cotton, had a valid fire-clause exemption; but this, of course, did not operate to excuse the company from liability, if the loss was occasioned by negligence, and it is insisted the loss was so occasioned. There was no special allegation that the twenty-nine bales referred to were burned after they were loaded on the cars, but such was the fact, as proven upon general allegation of liability of the company for its loss. The evidence was proper under the general allegation, and, if it makes but a case of negligence, the Kanawha Dispatch is liable notwithstanding the fire clause exemption. The testimony of witness Wheaton, introduced by defendant, shows that this cotton was in the second section of a train made up to leave about 7 o'clock. That this section stood near the compress. The train should have been made up and pulled away from there from one half to three quarters of an hour before leaving time. He says leaving time was 7 o'clock or 7:30; "about 7." He was asked by counsel of the company to examine his (witness') office records, and see if he can find the schedule then in force, and give it to said counsel, and answered, "I will do so." Whether he did or not does not appear. If so, counsel did not file it. It may be therefore fairly presumed that the starting time was not later than 7. He was asked by complainants' counsel if the leaving time was 7 o'clock, and if that custom had been followed would not the compress track have then been cleared; and answered, "It would have been cleared of the loaded cars." It thus and elsewhere appears in his testimony that the cars were left where they burned later than ordinary. But, added to this, the witness shows that, while taking off the first section of the train, the "engine in starting broke a draw-bar about the middle of the car of the first section. The key came out, and they had to throw that car on the main line, and go back and get the rear part of the train, and pull that out." That this breakage caused a delay of at least 7 to 10 minutes. In the meanwhile, before reaching the second section, it had taken fire, and in that condition was removed. Even after this, two cars attached to this one, containing the twenty-nine bales of cotton, were put out with buckets of

water. This one could not be, and was lost. Upon the facts the chancellor found this issue in favor of defendant.

It is insisted here, in support of the finding, that neither the delay nor the breakage of the train, but the fire, was the proximate cause of the loss. In this we do not concur. Granting that the slight delay would not of itself have made the company liable, here we have, in addition, the breaking of the train machinery when the effort is made to remove the cotton, but for which it might have been saved notwithstanding the fire. This, we think, was therefore the proximate cause of the loss. The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter; illustrating by these facts: It is true that the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train while it was being removed happened, so that but for this fact the cotton would have been saved. This must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it. The complainant must show negligence. He proved a delay of the train caused by breaking of machinery. It then devolved upon the carrier to show that this resulted from a latent defect or other cause sufficient to excuse it. Failing to do this, the carrier was liable, and the liability is here adjudged, reversing the decree of the chancellor on this point.

There was a question decided by the chancellor as to appropriation of the share of insurance of a carrier not before the court, which it is necessary to notice, and we will do so in the summary of results of modifications of his decree, this being a most material one; for we disagree with the chancellor that this fund can be here disposed of under the principles settled. To indicate the modifications resulting, we add a more specific statement of loss and relations to it of various carriers. The figures given are from the briefs of counsel assumed to be accurate, without actual verification from the record. There were 14,009 bales of cotton in all in the compress when burned. Of this number, 2,124 bales were never sued for, the Compress Company or its insurers having paid for 1,088 bales to owners, and no suit was brought as to the remaining 1,086 of the 2,184. Of the remaining 11,885 bales, 2,226 were in the compress shed under permits and compress receipts, but covered by no bills of lading. The other 9,659 were in the compress shed, and under bills of lading of various railroad companies and transportation lines; but some have disappeared, leaving about 9,579 bales covered by bills of lading of cotton involved in these and suits heretofore heard, with 29 bales belonging to Paton & Co., covered by bills of lading of Kanawha Dispatch, and burnt on cars of Newport

News & Mississippi Valley Company, making, in all 9,608 bales now in suit. The following carriers had executed bills of lading for same, to wit:

Cairo, Vincennes & Chicago Line	5,087	bales	cotton.
Kanawha Despatch (or Newport News & Mississippi Valley Company)	2,358	"	"
Newport News & Mississippi Valley Company	477	"	"
Louisville, New Orleans & Texas Railroad	464	"	"
Indiana, Bloomington & Western Railroad	455	"	"
Cleveland, Columbus, Cincinnati & Indianapolis Railroad	410	"	"
Blue Line	357	"	"
	9,608		

The Kanawha Despatch is held not liable in all suits except that of Paton & Co. In the contribution therefore 2,329 bales are eliminated, so far as the carrier liability is concerned. There is consequently no recovery to be had against the Compress Company, through this carrier, by owners in favor of marine insurers. The recovery of marine insurers through owners depends upon the establishment of the primary liability of the carriers having contracts with the Compress Company, to cover cotton with insurance, and thus, by and in consequence of such recovery, reaching the Compress Company. It is indispensable, therefore, to that result that the carrier be sued, and judgment be rendered against it. The Cairo, Vincennes & Chicago Line is not sued, and therefore there can be no recovery in favor of the owners through that carrier against the Compress Company. This eliminates 5,082 bales, for which no recovery can be had against the Compress Company. The chancellor thought, by reason of declaring a liability without adjudging it against this Company not before the court, he could pass over it, and appropriate so much of the fire insurance fund as he might thus determine belonged to it. We are of opinion this cannot be done. There was no service on the Cairo, Vincennes & Chicago Company; no appearance entered by or for it; no attachment of property and publication; and hence it is not actually or constructively before the court for the appropriation of any property or fund in which it has an interest. No appropriation of any fund can be made to an extent which, under any holding in a suit against it, might result in showing that it is injured. It cannot be injured by the appropriation of that proportion of the fire insurance fund, which, as between itself and other carriers, would not belong to it under any ruling. Hence, in appropriating so much of that entire fund to the liability of other carriers as their proportion of the liability is to its share, no injustice can be done, and this is the extent to which we can go in this case. The Compress Company is entitled to hold that fund in trust for the absent carrier, to indemnify it (and to that extent to protect the Compress Company), in case the carrier is sued, and its liability fixed, and it sues the Compress Company.

In view of the fact that only contracting carriers (that is, those having contracts with the Compress Company to carry insurance),

were enumerated as being entitled to participate in the insurance fund, it is deemed superfluous to say that non-contracting carriers—as the Blue Line—are not so entitled, and will be by decree excluded from such participation.

We are aware that, long as this opinion is, it is necessarily too brief in many particulars. The number of cases and the multitude of questions involved have made the whole presentation a matter of extended writing, even after elimination of many special questions, the result of the decision of certain general ones, but for the same reason have occasioned us to deal in too brief a manner with most, if not all, of them, to do justice to the able and elaborate arguments which have been addressed to us. But after all, it must be remembered that what is desired of a court is a solution of difficulties,—a correct decision of questions,—rather than elaborate statement or discussion of them, particularly when, from their number or variety, an opinion of much length must necessarily be short in particulars. It would have given us much pleasure to have, with

each question, restated at length the various positions and arguments of counsel *pro* and *con*, and to have reviewed the many authorities collected with so much industry, and pressed upon us with so much force; but time is inadequate to the task, and we have been obliged to content ourselves with determining, upon due considerations, the application of the law as in our judgment it is best settled amid the views presented. If, in reflecting the judgment of the court, I have done it with reasonable accuracy and correctness, I have accomplished the purpose chiefly desired, and better than would have been done by elaboration of statement and inaccuracy of conclusion. *The decree of the chancellor will be modified as herein indicated.* The costs of both courts will be divided in the several suits in which they are respectively involved between the marine insurance companies and the Compress Company. Costs of special recovery, as that of Paton & Co. against defendant, held specially liable, and complainants cast in suits will pay costs thereof.

OREGON SUPREME COURT.

J. W. COOK, *Appt.*,

v.

PORT OF PORTLAND *et al.*, *Repts.*

(.....Or.....)

1. A corporation composed of the inhabitants of the territory situated around the mouth of a public navigable river, which is charged with the duty

of maintaining therein a ship channel of sufficient width and depth, and empowered to levy taxes to raise the necessary funds, is created for municipal purposes within a constitutional provision permitting the creation of such corporations by special laws.

2. Placing the burden of maintaining a harbor upon those living in its immediate vicinity does not violate a constitutional requirement that all taxation shall be

NOTE.—Taxation, general and local, must be for public purpose.

Taxation may be either general or local; but, whether general or local, it must be for a public purpose and not a mere private purpose. *McBean v. Chandler*, 9 Helsk. 249; *Astor v. New York*, 7 Jones & S. 120; *People v. Brooklyn*, 4 N. Y. 419; *People v. Salem Twp. Board*, 20 Mich. 452; 1 *Desty*, Taxn. 14.

Municipal corporations, other than cities, towns and villages, may be vested with powers to assess and collect taxes for corporate purposes, but such taxes must be uniform as to persons and property within the district created. *Udike v. Wright*, 81 Ill. 58; *Board of Directors v. Houston*, 71 Ill. 318; *Harvard v. St. Clair & M. L. & P. Drainage Co.* 51 Ill. 130; *People v. Salomon*, 51 Ill. 37; *Gage v. Graham*, 57 Ill. 144; *Heesler v. Drainage Comrs.* 53 Ill. 105.

The essential requisite of all taxation is that it be for public purposes, whether the penalty be payable to the State or to individuals. The purpose must be public. *Silsbee v. Stockle*, 44 Mich. 561; *Scammon v. Chicago*, 44 Ill. 269; *Wauwatosa v. Gunyon*, 25 Wis. 271; *Hanson v. Vernon*, 27 Iowa, 47; *Sharpless v. Philadelphia*, 21 Pa. 168; *Curtis v. Whipple*, 24 Wis. 350; *Williams v. Newfane School Dist. No. 6*, 83 Vt. 271; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 668; *Freeland v. Hastings*, 10 Allen, 579; *Hammett v. Philadelphia*, 65 Pa. 152; *Allen v. Jay*, 60 Me. 124.

A state purpose must be accomplished by state taxation, a county purpose by county taxation, and a public purpose for any inferior district by 13 L. R. A.

taxation of such district. *Cooley*, Taxn. 2d ed. 141.

A corporate purpose is a purpose necessary or proper to carry into effect the object of the creation of the corporate body. *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268; *Livingston County v. Darlington*, 101 U. S. 417, 25 L. ed. 1019.

A public governmental use or purpose is essential to the validity of a tax. *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; 1 *Desty*, Taxn. 14.

Equality and uniformity of taxation.

The provision of the State Constitution requiring equality and uniformity in taxation is not a restriction on the absolute power of taxation, but affects only the mode of its exercise. *Beals v. Amador County*, 35 Cal. 624.

A tax is not unconstitutional when it is equal and uniform throughout the taxing district. *East Portland v. Multnomah County*, 6 Or. 62.

That the rule of taxation shall be uniform, means that the course or mode in levying or laying taxes shall be uniform; that each step taken, the valuation and the rate, must be uniform. *New Orleans v. Davidson*, 30 La. Ann. 555; *Weeks v. Milwaukee*, 10 Wis. 242; *Knopilton v. Rock County Suprs.* 9 Wis. 410.

Local taxation.

Local taxation must be for a local as well as a public purpose. See 1 *Desty*, Taxn. § 9; *Nichols v. Bridgeport*, 27 Conn. 459; *Williams v. Cammack*, 27 Miss. 209.

The Legislature may make local improvements, or authorize the same to be made, and a tax on a

equal and uniform, although the entire State will be benefited thereby, if its maintenance is positively necessary to the existence of the settlements upon its shores.

(Strahan, Ch. J., dissents.)

(July 8, 1891.)

APPEAL by complainant from a decree of the Circuit Court for Multnomah County in favor of defendants in a suit brought to test the validity of an Act creating defendant a municipal corporation. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Dolph, Bellinger, Mallory & Simon for appellant.

Mr. Ellis G. Hughes, for respondents:

The meaning of "municipal" is, in legal effect, the same as public, or governmental, as contradistinguished from private.

Worcester, Dict.; Webster, Dict.; Burrill, Law Dict.; Bouvier, Law Dict.

Kent does not even use the word "municipal" in his division of corporations into classes, but he does use the word "public" as its equivalent, which it in fact is.

2 Kent, Com. *274, 275. See *State v. Leffingwell*, 54 Mo. 458; *Horton v. Mobile School Comrs.* 43 Ala. 598, 607; *People v. Salomon*, 51 Ill. 37.

Local district for such improvements is constitutional. *Daily v. Swope*, 47 Wis. 387; *Williams v. Cammack*, 27 Miss. 209.

Where lands are improved by legislative action, on the ground of public utility, the cost of such improvements may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity, receive a peculiar advantage. *Hanscom v. Omaha*, 11 Neb. 37; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 527.

A statute delegating power to charge the property of individuals with the expenses of local improvements must be strictly pursued, and any substantial departure will vitiate the proceedings. *Merritt v. Portchester*, 71 N. Y. 300.

The Legislature may provide for the construction of a free bridge over a river, and require the expense to be borne by taxation of the city into which it leads. *Philadelphia v. Field*, 58 Pa. 320, citing *Thomas v. Leland*, 24 Wend. 65; *Norwich v. Hampshire County Comrs.* 13 Pick. 60; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 353; *Board of Wardens of Port of Phila. v. Philadelphia*, 42 Pa. 209.

Municipal taxation for local purposes.

A town, under its general authority to vote taxes for township purposes, cannot raise money for public improvements outside its territorial limits (*Riley v. Rochester*, 9 N. Y. 64; *Denton v. Jackson*, 2 Johns. Ch. 336, 1 L. ed. 400; *North Hempstead v. Hempstead*, 2 Wend. 136); but a town, if authorized specially by the Legislature, may do so on the ground of special local benefits. *Talbot County Comrs. v. Queen Anne County Comrs.* 50 Md. 245. See *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582; *Concord v. Boscawen*, 17 N. H. 465, cited in *Cooley*, Taxn. 2d ed. 163.

So it is competent by legislation to provide a special water precinct in a city for waterworks, and levy a tax within the same. *Brown v. Concord*, 56 N. H. 375.

So it may be authorized to construct gas works for public purposes. *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 185.

Or it may be required to contract for corporate necessities with private corporations or persons. *Nelson v. La Porte*, 38 Ind. 258.

13 L. R. A.

Bean, J., delivered the opinion of the court:

This suit involves the constitutionality of an Act of the Legislative Assembly of this State entitled "An Act to Establish and Incorporate the Port of Portland, and to Provide for the Improvement of the Willamette and Columbia Rivers in said Port and between Said Port and the Sea." Laws 1891, p. 791. This Act, in terms, creates a separate district, with defined boundaries, which embraces substantially what was at the time of the passage the Cities of Portland, East Portland, and Albina, and now the City of Portland, to be known as the "Port of Portland," and the inhabitants thereof are constituted and declared to be a corporation by the name and style of the "Port of Portland," and as such to have perpetual succession, and by said name to exercise and carry out all the corporate powers and objects by said Act conferred and declared, make all contracts, hold, receive, and dispose of real and personal property, such as may be necessary, requisite, or convenient in carrying out the objects of said corporation, as therein set out and expressed, and sue and be sued, plead and be impleaded, in all actions, suits, and proceedings brought by or against it. By said Act it is declared that the object, purpose, and occupation of such

The constitutional provision inhibiting the incorporation of towns and villages by special charter has no reference to quasi municipal corporations. *Cathcart v. Comstock*, 56 Wis. 580.

When a statute confers power upon a corporation, to be exercised for the public good, its exercise is not merely discretionary, but imperative. The words "power" and "authority" in such cases may be construed "duty" and "obligation." *Alleghany Co. P. S. Comrs. v. Alleghany County*, 20 Md. 449.

Special taxing district.

As distinct from its power of local assessment, the Legislature may create special taxing districts, which may include one or more subdivisions of the State or parts of such subdivisions without making such districts correspond with their territorial limits. 1 *Deady*, Taxn. § 58.

It has power to impose a tax on such local district for the construction of local improvements, and to levy assessments for benefits conferred; but this power is in some States subject to the limitation that local burdens cannot be imposed without the consent of the taxpayers to be affected thereby. *Id.* § 59.

Works of public improvement which may be an advantage to the whole State, as a canal, may be constructed at the expense of the local district where it was likely to confer local benefits on the locality specially taxed. *Thomas v. Leland*, 24 Wend. 65; *Revenue Comrs. v. State*, 45 Ala. 309.

The interest of the district must be the true test, whether an object is or is not a proper object of district taxation, as in the case of the erection of city waterworks. *Goddin v. Crump*, 8 Leigh, 120.

Several towns may for a common purpose be united into a single district, and commissioners of the district may be invested with taxing powers for district purposes. *People v. Salomon*, 51 Ill. 37; *West Chicago Park Comrs. v. Western U. Tele. Co.* 103 Ill. 33.

Local taxes may be levied on different systems in different districts, even when they are for the benefit of the whole State. *People v. Central Pac. R. Co.* 43 Cal. 808; *Bright v. McCullough*, 27 Ind. 223; *Merrick v. Amherst*, 12 Allen, 500; *Alleghany Co. P. S. Comrs. v. Alleghany County*, 20 Md. 457.

corporation shall be to so improve the Willamette River at the Cities of Portland, East Portland, and Albina, and the Willamette and Columbia Rivers between said cities and the sea, as that there shall be made and permanently maintained therein a ship channel of good and sufficient width, and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than twenty-five feet. So far as is necessary, requisite, or convenient to carry out the said object, this corporation is given full control over said rivers at and between said cities and the sea, so far and to the full extent that this State can grant the same, and in carrying on said work is given the same power of eminent domain as exists under the laws of this State in favor of corporations organized for the construction and operation of railroads. For the purpose of providing funds necessary for such improvement said corporation is authorized from time to time to borrow money in such sums as may be found necessary, not exceeding the sum of \$500,000, and to issue its promissory notes or bonds therefor; and is given power to assess, levy, and collect taxes upon all property, real and personal, within its boundaries, and which is by law taxable for state and county purposes, not exceeding the rate therein provided. The power and authority given to the corporation, the Port of Portland, is vested in and to be exercised by a board of commissioners named therein, and their successors in office, chosen as in said Act provided, who shall serve without salary or compensation, except for actual expenses incurred by any commissioners while engaged in the actual work of the corporation.

At the outset it is well to observe that every court approaches with hesitancy the question of declaring a law unconstitutional, and never exerts its power so to do while doubt exists. Every intendment must be given in favor of its validity. As was said by Lord, J., in *Cline v. Greenwood*, 10 Or. 241: "Before a statute is declared void in whole or in part its repugnancy to the Constitution ought to be clear and palpable, and free from doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject. Chief Justice Marshall in *United States v. Peters*, 9 U. S. 5 Cranch, 128, 3 L. ed. 57; Chief Justice Parsons in *Kendall v. Kingston*, 5 Mass. 584; Chief Justice Tilghman in *Farmers & M. Bank v. Smith*, 3 Serg. & R. 72; Chief Justice Shaw in *Norwich v. Hampshire County Comrs.*, 13 Pick. 61, and Chief Justice Savage in *Ex parte McCollum*, 1 Cow. 564,—have with one voice declared that it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts be considered void. The opposition between the Constitution and the law should be such that the people feel a clear and strong conviction of their incompatibility with each other." Keeping these views in mind, we proceed to the examination of the question before us. It is first contended by plaintiff that the Act incorporating the defendant, the Port of Portland, is repugnant to section 2 of article 11 of the Constitution, which provides that "corporations may be formed under general

laws, but shall not be created by special laws, except for municipal purposes." Under this section there can be but one question: What is a corporation created for municipal purposes? No corporation can be created by special Act except for municipal purposes, but there is no limitation on the creation of corporations for municipal purposes by special Act. Any corporation for municipal purposes may therefore be thus created. If, then, the Port of Portland is a corporation created for municipal purposes, the Act creating it is not repugnant to this section of the Constitution. The whole question, therefore, turns upon the meaning of the phrase "municipal purposes," as used in the Constitution. The word "municipal" is defined by the lexicographers as belonging to a city, town, or place; having the right of local government; belonging to or affecting a particular State or separate community; local; particular; independent. It is usually applied to what belongs to a city, but has a more extensive meaning, and is in legal effect the same as public or governmental, as distinguished from private. Burrill, Dict. title *Municipal*. Thus we call municipal law not the law of a city only, but the law of the State. 1 Bl. Com. 44. Municipal is used in contradistinction to international. Thus we say an offense against the law of nations is an international offense, but one committed against a particular State or separate community is a municipal offense. And so are municipal affairs public affairs, and municipal purposes are public or governmental purposes, as contradistinguished from private purposes. A corporation, therefore, created for municipal purposes, is a corporation created for public or governmental purposes, with political powers to be exercised for the public good in the administration of civil government, whose members are citizens, not stockholders; an instrument of the government, with certain delegated powers, subject to the control of the Legislature, and its members, officers, or agents of the government for the administration or discharge of public duties. A city, or purely municipal corporation, is perhaps the highest type of a corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers; but there is another class of corporations, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features are but so many agencies or instrumentalities of the State to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes. It would be a narrow and unwarranted construction of the language to say that "municipal purposes" means only city, town, or village purposes. The Constitution of this State evidently contemplates the creation of counties under the direct supervision of and by special Act of the Legislature, yet no direct power is given to create them, and the section under consideration contains a direct prohibition against doing so, unless the word "municipal" covers this class of corporations. We thus perceive that the word "municipal" not only applies to cities, towns, and villages, but has a broader and more general signification relating to the State or nation. And therefore the words "municipal corporations," as applied

to incorporated cities or towns, and "municipal purposes," are not synonymous. The latter embrace, by the common speech of men before and since the days of Blackstone, state or national purposes. And therefore, while cities, towns, and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class. It was in the broader and more general sense of the term that the words "municipal purposes" were used in the Constitution of this State. This is evident from section 9 of the same article of the Constitution, wherein it is provided that no county, city, town, or other municipal corporation, by a vote of its citizens or otherwise, shall become a stockholder in any joint-stock company, corporation, etc. Here is a direct interpretation from the Constitution itself. A municipal corporation is not necessarily a county, city, or town. Were it so, the added words, "or other municipal corporations," would be without meaning. Clearly a corporation for municipal purposes is one composed of citizens, as distinguished from stockholders; a public, as distinguished from a private, corporation.

In *Curry v. Sioux City Dist. Twp.*, 62 Iowa, 104, it is said: "The word 'municipal,' as originally used, in its strictness applied to cities only. But the word now has a much more extended meaning, and, when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably." In *Horton v. Mobile School Comrs.*, 48 Ala. 598, an Act had been passed which repealed all prior laws upon the subject of taxation except those created for municipal purposes, and it was held that these are not words of technical import, and should be construed to apply to a corporation to carry on a public free school, and to raise funds for its support.

In *People v. Salomon*, 51 Ill. 37, under an Act of the Legislature providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district; and the people of the towns affected by the Act having by a vote accepted its provisions, the board of park commissioners thereby created, and appointed by the governor, to whom was committed the entire control of the park, was held to be a municipal corporation, in whom it was competent for the Legislature to vest the power to assess and collect taxes within the park district so created for the special corporate purpose of its creation, and this was under a constitutional provision similar to ours. *Mr. Chief Justice Breese*, on page 52, says: "One of the counsel for respondent asks: Of what character is the corporation thus endowed with extraordinary, unheard-of, and unknown powers and privileges, and, after defining the several kinds of corporations, he asks: To which of these divisions of public corporations does the South Park Commissioners belong? The answer is ready and obvious. By the vote of the people within the jurisdiction of their action they became a corporate authority, quasi municipal; the object of their creation being of a municipal character, and of that alone. They became a public municipal corporation." So in *People v. School Trustees*, 78 Ill. 136, *Mr. Justice Walker*, in treating of the 18 L. R. A.

power and authority of school townships under the Constitution of that State to subscribe for the capital stock of railway companies, says: "These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage school funds of the township, and pay the teachers of schools taught in their jurisdiction. This was the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose; nor are they provided with the officers or the power to exercise the functions of government." The test of a corporation for municipal purposes, adopted by the court, seems to have been the right or power to exercise some of the functions of government, and this we apprehend is the true test. In the case of *State v. Leffingwell*, 54 Mo. 458, cited and relied on by counsel for plaintiff, the same principle is clearly recognized, under a constitutional provision similar to ours. In the first opinion there is a tendency to hold that nothing but a city, or some corporation connected therewith, and instituted for the purpose of carrying out some of the known objects of the municipality, is a corporation created for municipal purposes; but in the opinion on a motion for a rehearing, after citing the provisions of the Constitution, this language is used: "From these provisions it is manifest that the Legislature is prohibited from creating any sort of corporation by special Act except such as are for municipal purposes. A corporation for municipal purposes is either a municipality, such as a city or town, created expressly for local self-government, with delegated legislative powers; or it may be a subdivision of the State for governmental purposes, such as a county, a school or road district, etc. These subdivisions are sometimes called 'quasi corporations,' but they are nevertheless corporations within the meaning of the Constitution. It was therefore eminently proper in framing the Constitution that there should be no express or implied prohibition against creating such subdivisions or quasi corporations for municipal purposes. The phrase 'municipal purposes' was intended to embrace some of the functions of government, local or general; and no corporation, not exclusively designed for this end, can be properly denominated a corporation for municipal purposes." And again: "The aim of the Constitution was to prevent the creation of corporations by special legislation, except for a particular purpose. In framing this prohibition it was necessary to exclude the idea that quasi corporations or subdivisions of the State for municipal purposes were to be embraced among the inhibited Acts of the Legislature. No language could have expressed this more clearly than the phrase 'except for municipal purposes,' as used in the Constitution." We have not overlooked the cases of *Low v. Mayssville*, 5 Cal. 214, and *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, cited by counsel for plaintiff, but we do not think they conflict with the doctrine we are attempting to announce. In the former the court held that a private corporation, organized to run steamboats, with one of its

termini in the City of Marysville, was not a corporation created for municipal purposes, so that the Legislature could authorize the city to subscribe for its stock; and in the latter it was held that the Legislature could not confer on a private corporation by special Act the right or duty to supply the City of San Francisco with water. The purposes and powers of the Port of Portland are all public, political or governmental. It possesses none of the features of a private corporation. There is no stock to be subscribed. Its members are citizens, not stockholders. There is no acceptance necessary, and its powers and very existence are at the will of the Legislature. The sole object of the corporation is to so improve the Willamette and Columbia Rivers at the City of Portland, and between that point and the sea, as to create and maintain a ship channel of a specified depth; and for this purpose it is given full power over these rivers, so far as the State can grant the same. There is no power to take tolls, or make profit of any kind. No private interests of any kind are granted or acquired. The highway to be created or improved belongs to the public, and is open to the whole public, to be used at will, and with such means of navigation as taste, pleasure, or convenience may dictate. No one questions that the establishment and improvement of highways and the opening facilities for access to market are within the governmental powers of every State or nation, and that, among the most important of these highways, are to be classed navigable rivers. These things are necessarily done by law. The State may directly levy taxes to improve such highways, or it may apportion and impose the duty, or confer the power of assuming it, upon the municipal divisions of the State, or create a municipal division locally benefited for that express purpose. These municipal corporations or divisions exist only for the convenient administration of the government. Such organizations are instruments of the State to carry out its will. When they are authorized to levy a tax or appropriate its proceeds, the State is doing through them indirectly what it might do directly. The rivers placed under the control of this corporation are not only navigable but are the great convenient highway, not only of this State, but largely of the entire northwest. The only powers conferred upon the Port of Portland, except the necessary incidental powers of holding the property and making the contracts necessary to carry out the main purpose, are the control and improvement of this public highway, and the levy and collection of taxes therefor. The Port of Portland, and the commissioners who exercise its powers, are nothing more than the agents of the State, delegated to exercise one of its highest prerogatives—the taxing power—in carrying out one of its best known and recognized objects and most important duties—the improvement of a great and important public highway.

It is also contended that this Act is unconstitutional as being in violation of section 32, art. 1, of the Constitution, providing that "all taxation shall be equal and uniform." Counsel for plaintiff admits the general rule that a tax is not unconstitutional for lack of uniform-

ity, when levied for local purposes, if it is equal and uniform throughout the taxing district; but his contention is that, to authorize the Legislature to lay a tax upon one district or subdivision of the State alone, the purpose for which it is laid must not only be public, but, as regards the people of such district or subdivision, it must also be local. This is admitted by counsel for respondent to be the correct rule, but he contends—and, we think, correctly—that the power of taxation here under consideration is not subject to objection under this rule. It is a fact of which this court will take judicial knowledge, that the Port of Portland, a district which is now the City of Portland, is the commercial metropolis of the State of Oregon, if not of the whole Pacific northwest. It is the center of trade and commerce for a vast section of country, simply because here the commerce of land and sea meet, and through this city the country trades with the world at large. It holds communication with the sea, the great highway of commerce, by the Willamette and Columbia Rivers, and can only retain its commercial supremacy by the maintenance in these rivers of a ship channel of sufficient depth to enable the largest sea-going vessels to find anchorage at its wharves. Its present prosperity is due to the fact that it is a center of trade and commerce, which it would not be were these rivers closed, and which in all probability it will not remain if the improvement contemplated is not made. It is not surrounded by any fertile farming districts, rich mines, or vast forests, to make it a local center, but depends entirely upon its trade and commerce. Counsel has well said; "That the maintenance of this great commercial center at this point is of advantage to the whole State is witnessed by the fact that it does its business here. That anything that will cheapen the handling of what the country exports and imports will be a benefit to all is a self-evident fact, and leaves no doubt of the public interest in this improvement. But the public might find other centers of trade, or channels of export and import, presumably not so advantageous, or it would now use them but still capable of use at need. But the center of trade and commerce, the Port of Portland, cannot go elsewhere. It must live or die here. In the public the interest is general,—the improvement and maintenance of an advantageous channel of trade. To the metropolitan district, center of trade and commerce, city, cities, or what you will, embraced in the Port of Portland, the interest is one of life and death." The people of the Port of Portland, therefore, will reap the principal benefit from the proposed expenditure, and it is not unconstitutional that they should bear the burden. As was said by *Mr. Justice Strong in Chicago, B. & Q. R. Co. v. Otos County*, 83 U. S. 16 Wall. 676, 21 L. ed. 381: "The Legislature has the undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section, if, in its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital." It is not unjust, therefore that they should alone bear the burden. This subject has so often been

discussed, and the principles we have asserted so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions.

It follows, therefore, that the Act incorpo-

rating the Port of Portland is constitutional and valid, and the decree of the court below must be affirmed.

Strahan, Ch. J., dissents.

COLORADO SUPREME COURT.

Re Mary Sternberg THOMAS.

(....Colo.....)

1. **Women will be admitted to the bar** on equal terms with men in the absence of a statutory or constitutional provision to the contrary.*
2. **The use of the masculine pronoun exclusively** in the statutes relating to applicants for admission to the bar and to licensed attorneys is not sufficient to show a legislative intent to exclude women from the bar.
3. **Attorneys-at-law are not civil officers** within the meaning of a constitutional provision that no person except a qualified elector shall be elected or appointed to any civil or military office.

(September 14, 1891.)

APPPLICATION by Mary Sternberg Thomas for admission to the bar. *Granted.*

The facts are stated in the opinion.

Mr. J. Warner Mills, for petitioner:

Speaking of women as deputy clerks of county courts, the court said in *Jeffries v. Harrington*, 11 Colo. 194 (1887): "It was not the intention to declare such avenues of employment closed to women, and, until some clear expression to that effect has been made by constitutional or legislative provision, the courts should not declare against the employment of women in such positions." This principle is equally apt, on this occasion, as to the employment of women as attorneys, and their consequent admission to the bar.

Re Hall, 50 Conn. 181, 47 Am. Rep. 625; *Foltz v. Hoge*, 54 Cal. 28, 35.

Many of the premises for the arguments upon which the court in the case of *Re Bradwell*, 55 Ill. 585 (1869), founded their decision denying her application for admission to the bar are refuted in 1 History of Woman Suffrage.

It is assumed by the Supreme Court of Illinois, and this assumption is the bulwark of all the other adverse decisions on this subject, that there was no precedent at common law for the admission of women as attorneys.

Blackstone recounts that Anne, Countess of Pembroke, held the office of sheriff of Westmoreland, and exercised its duties in person. (See Co. Litt. p. 326.) The Scotch sheriff is properly a judge, and by the Statute 20 Geo. II., chap. 43, he must be a lawyer of three years' standing.

Eleanor, Queen of Henry III. of England, in the year 1253, was appointed lady-keeper of the great seal, or the supreme chancellor of

England, and sat in the *Aula Regia*, or king's court.

Queen Elizabeth held the great seal at three several times during her remarkable reign. After the death of Lord-keeper Bacon she presided for two months in the *Aula Regia*.

3 History of Woman Suffrage, p. 108.

At page 378 of the book entitled "Education in the United States," by Richard J. Boone, Prof. of Pedagogy in Indiana University, published by Appletons in 1890, being vol. 11 of the "International Educational Series," edited by Wm. T. Harris, is this single sentence in a note to the text: "It is a fact of history that one Margaret Brent, attorney-at-law, was admitted to the Maryland bar in 1648."

See also 3 History of Woman Suffrage, pp. 815, 816; W. Hand Browne's "Maryland," pp. 686, 689; Series of Am. Commonwealths, edited by Horace E. Scudder, and published by Houghton, Mifflin & Co. (1884).

The Colorado Constitution is favorable to this application.

The only section of the Constitution which could possibly stand in the way of this application is art. 7, § 6, which reads as follows: "No person except a qualified elector shall be elected or appointed to any civil or military office in this State."

In construing this section this court has decided, in *Re House Bill No. 166*, 9 Colo. 626, that a woman could not be elected or appointed a notary public, as that was a "civil office."

In *Darrow v. People*, 8 Colo. 420, it was said that the right to vote and the right to hold office must not be confused; that citizenship and the requisite sex, age, and residence constituted the individual a legal voter, but other qualifications are essential to the efficient performance of the duties connected with almost every office.

In the case of *Jeffries v. Harrington*, 11 Colo. 193, it was held that the word "office" in this section of the Constitution did not include a deputy clerkship of the county court; and that such a clerkship could be held by a woman.

An attorney is not, in the strictest sense, a public officer.

Re Robinson, 131 Mass. 376, 41 Am. Rep. 239; *White's Case*, 6 Mod. 18; *Bradley's Case*, 74 U. S. 7 Wall. 364, 378, 379, 19 L. ed. 214, 219; *Cohen v. Wright*, 22 Cal. 293.

The terms "office," and "office and public trust," as employed in the Constitution, have relation only to those persons and duties that are of a public nature.

*Admission of Women to the Bar of the Supreme Court of the United States.

Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the Supreme Court of the District of Columbia, for the space of three years, and shall have 13 L. R. A.

maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States. Act of Congress approved February 15, 1879 (20 U. S. Stat. 232).

Re Attorneys & Counselors, 20 Johns. 492; *Ex parte Yale*, 24 Cal. 244, 245; Weeks, Attorneys, p. 74; *Re Dorsey*, 7 Port. (Ala.) 293; *Leigh's Case*, 1 Munf. 468; *Re Cooper*, 22 N. Y. 84; *Byrne v. Stewart*, 3 Desaus. Eq. 466; *Ex parte Garland*, 71 U. S. 4 Wall. 878, 18 L. ed. 370; *Re Hall*, 50 Conn. 131, 47 Am. Rep. 625, 21 Am. L. Reg. 728.

The prevailing practice in other States is favorable to this application.

For cases where the applications for admission to the bar by women have been refused, see—

Re Bradwell, 55 Ill. 535, 83 U. S. 16 Wall. 180, 21 L. ed. 442, 2 History of Woman Suffrage, pp. 601-626; *Re Lockwood*, 9 Ct. Cl. 346; *Re Goodell*, 39 Wis. 232, 20 Am. Rep. 42. (The statutes were subsequently changed and Miss Goodell was then admitted. 48 Wis. 693, 694.) *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239.

The latest reported case upon the subject of the admission of women to the bar is in their favor, and is the *Application of Mary Hall*, 50 Conn. 131, 47 Am. Rep. 625, 21 Am. L. Reg. 728, note 635.

The notes to this case, as reported in the American Law Register, quotes largely from the opinions in the *Bradwell*, *Lockwood*, *Goodell* and *Robinson Cases*, and then concludes as follows: "Whatever may be the current of judicial opinion, there can be no question but that the tendency of modern legislation is strongly in favor of allowing women the privilege of admission to the bar. It is worthy of note that each one of the decisions above referred to was followed by a statute granting to women the privilege which the court had denied. See Ill. Rev. Stat. chap. 13, § 1; Act of Congress Feb. 15, 1879, 20th Stat. 292; Wis. Rev. Stat. § 2586; Mass. Stat. 1882, chap. 139.

There are a great many instances where women have been admitted as a matter of course without any question.

See 2 History of Woman Suffrage p. 606; Chicago Legal News, Feb. 5, 1870.

Miss Charlotte E. Ray was admitted on graduating from Howard University, about 1873, in the District of Columbia.

Re Goodell, 39 Wis. 238, 239; *Miss Barklow's Case*, Chicago Legal News, April 3 and April 9, 1870; Chicago Legal News, Oct. 26, 1872; Me. Rev. Stat. p. 597, § 18.

The federal district court of Illinois admitted Miss Alta Hulett.

See Chicago Legal News, May 23, 1874.

In Mrs. Lockwood's brief addressed to the Senate of the United States, March, 1878 (3 History of Woman Suffrage, p. 107), is this statement: "Illinois, Michigan, Minnesota, Missouri, North Carolina, Wyoming, Utah and the District of Columbia admit women to the bar." And writing in 1888, she says: "Most of the States in the Union have since recognized her right thereto, and notably the State of Pennsylvania, as in the case of Carrie B. Kilgore, who has recently been admitted to the supreme court of the State."

Lippincott's Mag. Feb. 1888, p. 229.

For the further literature, both *pro* and *con*, in any wise affecting women and their relation to the bar, see—

Women at the Bar, 5 N. J. L. J. 188; Women at the Bar, 2 Pump. Ct 5; 18 Ir. L. T. 306; Women and the Legal Profession, by Montgomery H. Throop, 30 Alb. L. J. 464; 19 Ir. L. T. 18; Women as Advocates, 18 Am. L. Rev. 478, 11 Ir. L. T. 340; Women as Judicial Officers, 12 Am. L. Rev. 190; Women as Law Clerks, 35 L. T. 363; Lord Brougham on Women as Law Engrsers, Bookkeepers and Printers, 35 L. T. 364; Women as Lawyers, 16 Ir. L. T. 407; Women as Lawyers, *Mrs. Goodell's Case*, 3 Cent. L. J. 186; Learned Women of Bologna, 1 Chicago Legal News, 594; Women Jurors in Wyoming, by J. H. Howe, 2 Chicago Legal News, 213, 220; Judge Greene's Charge to the Grand Jury (1884), 17 Chicago Legal News, 29; "Prudes for Proctors," 14 L. J. 746; 14 L. T. 8; Shall Women be Admitted to the Bar, 1 Chicago Legal News, 184; Female Attorneys, 16 Can. L. J. 160; Married Women as Attorneys, 22 Pittsb. L. J. 5, 10 Alb. L. J. 113; Ladies as Lawyers, 18 Ir. L. T. 264; Ladies as Lawyers in London, 3 Wash. L. Rep. 94; Married Women as Attorneys at Law, by David Stewart, 20 Cent. L. J. 365; Women as Lawyers, by Louis Frank, Chicago Law Times, Jan. 1889, American, July, 1888; Women as Lawyers, 23 Lippincott, 387, 28 Vict. Mag. 219; Women's Relations to the Professions, by E. Van De Walker, 6 Popular Science Monthly, 454; Laws for Ladies as Lawyers, R. Vashon Rogers, 21 Can. L. J. 326, 19 Ir. L. T. 621; Lady Lawyers of the Long Robe, 6 Ir. L. T. 638, 8 L. J. 9, 28; Presence of Lady Lawyers in Courts of Justice, 11 Sol. J. and Rep. 57, 187; Lady Lawyers, 13 Ir. L. T. 77, 153, 332, 605, 14 Ir. L. T. 57, 200, 208, 16 Ir. L. T. 241.

Mr. Joseph H. Maupin, Atty-Gen., amicus curiæ, filed no brief.

Helm, Ch. J., delivered the opinion of the court:

Petitioner, Mrs. Mary S. Thomas, asks to have her name placed upon the roll of attorneys practicing before this and other courts of the State. She tenders credentials attesting the prescribed professional qualifications, and a compliance with all express requirements of the Statute and rules of court regulating access to the legal profession. The question is therefore squarely presented, Are women entitled to admission to the bar of this State on equal terms with men? By ancient and universal usage, women have been denied the right to practice before the English courts. The two or three exceptions cited in petitioner's brief, such as that of Anne, Countess of Pembroke, are not well authenticated. During the early history of this country a like exclusion from the profession generally prevailed, though a few instances are recorded, as in the case of Margaret Brent, also mentioned in petitioner's brief, where they were permitted to appear specially in particular proceedings. In the District of Columbia, and in Massachusetts, Illinois, and Wisconsin, within a period comparatively recent, such applications have been rejected, the courts promulgating learned opinions in connection therewith. Fifteen years ago the Supreme Court of the United States also denied the right. The case was not reported, but the chief justice, in orally epitomizing the reasons for adverse

action, declared that the court had concluded to adhere to the uniform custom since its organization, of licensing men only, till "a change is required by statute or a more extended practice in the highest courts of the States." *Re Lockwood*, 9 Ct. Cl. 346; *Ex parte Robinson*, 131 Mass. 376, citing the above ruling of the United States Supreme Court; *Re Bradwell*, 55 Ill. 585; *Ex parte Goodell*, 39 Wis. 282.

The written opinions mentioned marshal all objections to conferring this privilege upon women, dwelling with especial force and clearness upon those existing outside of constitutional and statutory provisions. They ably discuss questions of impropriety and inexpediency based upon the laws of nature, the bearing of historical customs and usages, and the impediments growing out of woman's legal status at the common law. With all deference to those learned courts, we decline to imitate their example in the latter regard. We shall not indulge in speculation concerning the natural aptitude and physical ability of women to perform the duties of the profession, nor shall we dwell upon considerations of propriety or expediency in the premises. These are matters as to which wide differences of opinion exist; and we conceive that they have little, if any, bearing upon similar applications now presented in this State, however pertinent they may have been in the Commonwealths referred to when the above rulings were made. We shall likewise decline to give controlling weight to historic custom or usage in England, in the American colonies, and in the republic during its infancy. Reasoning, predicated upon the latter ground, possesses the inherent weakness of ignoring, to a greater or less extent, the marvelous changes throughout the country during the last fifty years in the legal status of woman. It is a significant circumstance, indicating the trend of popular sentiment on the subject, that each of the cases above referred to was speedily followed by a statute providing for the admission of women to the profession. The Supreme Court of the United States, and the courts of the District of Columbia, Massachusetts, Illinois, and Wisconsin, no longer adhere to the rule of discrimination on the ground of sex. Women are now licensed without question to practice in these courts as well as in those of several other States upon the same conditions as men, save only that the Act of Congress requires three years' membership of the bar of the highest court in some State or Territory as a condition precedent to their appearance before the Supreme Court of the United States. In this Commonwealth, women of sufficient age, married or single, may make contracts, form partnerships, inherit, acquire, and dispose of property, in all respects substantially the same as men. The policy of our legislative and judicial action has tended constantly towards conferring upon them the same property rights and business status as are enjoyed by men. They may undoubtedly pursue all vocations and enterprises of a business character. They may also become ministers, physicians, or educators, and, if any limitation

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in regard to the learned professions exists, such limitation applies solely to the bar. The privilege of practicing this profession and sharing in its emoluments is alone questioned. Hence we contend with none of the difficulties encountered by the courts above mentioned arising from the disabilities of women, especially married women, at the common law. Applications like the one before us may therefore be regarded with the judicial favor usually extended when equality of rights is involved, unless some restrictive provision be found in our Statutes or Constitution.

Turning to the Act regulating the licensing of attorneys, and defining their duties, liabilities, etc., we find nothing that, in our judgment, fairly shows a legislative intent to bestow this privilege upon men exclusively. The substantive phrases used throughout the Act, when speaking of applicants, cover both sexes. They are "no person" and "any person;" as, "no person shall be permitted to practice; . . ." "no person whose name is not subscribed; . . ." "any person producing a license from any court of record; . . ." "if any person not licensed as aforesaid shall receive any money. . . ." The pronouns employed with reference both to applicants and licensed attorneys are, it is true, masculine; but this fact, standing alone, is a matter of very little significance. The masculine pronoun is constantly used in legal and secular literature to designate both sexes; besides, it is expressly provided by law here, as in other States, that, unless the language contains something inconsistent therewith, this rule may be followed in construing statutes: "Every word importing the masculine gender only may extend to and be applied to females as well as males." Mills, Ann. Stat. § 4185. There is no language in the Act under consideration inconsistent with the application to its construction of this statutory guide. We are not unmindful of the rule that a statute is to be interpreted in the light of other statutes constituting a part of the same legislative system. But, as already suggested, the uniform and unmistakable policy of our legislation, as shown in numerous provisions, has been to extend the legal rights of women, and enlarge their sphere of occupation and usefulness. The proposition, however, is advanced, with plausibility and force, that section 6, art. 7, of the Constitution, indirectly, but clearly, forbids licensing women to practice law. This section reads: "No person except a qualified elector shall be elected or appointed to any civil or military office in the State." It is argued that attorneys are civil officers, and that since women are not electors they cannot become attorneys. Women may participate in school elections, and hold certain offices connected with the public schools, but they are not such electors as this section of the Constitution contemplates. The constitutional term "qualified elector" is here "used in its broadest sense, meaning a person qualified to vote generally." *Re House Bill No. 166*, 9 Colo. 628. The limitation declared by this provision is plain, and, if attorneys at law are civil

officers within its meaning, the objection must be sustained.

The phrase "civil office," as thus employed, is frequently used interchangeable with the term "public trust." It undoubtedly relates to public offices; that is, to those offices which involve an election or appointment by or on behalf of the general public, and the performance of duties essentially public in their nature. See *Cohen v. Wright*, 22 Cal. 293; also *Weeks, Attorneys*, § 39, citing cases from Alabama, Virginia, New York, and South Carolina. Attorneys at law are constantly spoken of as "officers of the court." The designation is not inaccurate. Their special researches and general legal knowledge enable them to aid the courts, and thus to contribute somewhat towards the due administration of justice. The office is therefore an important one, and the attorney incidentally performs a quasi public duty. But admission to the profession is purely a private matter, and is secured solely for the advancement of private interest. By virtue of such admission, attorneys are not required to perform specific public acts, nor are specified duties devolved upon them in behalf of the general public. The duties they assume and the labor they perform are usually in pursuance of personal contracts with private litigants. Admission to the bar is an essential prerequisite to the filling of certain offices, such as prosecuting attorney and judges of supreme, district, and other

courts. But these public trusts, and the functions connected therewith, devolve only upon members of the profession by virtue of an independent election or appointment. Until thus designated, they can no more enter into offices where the functions are of a public nature than can unlicensed persons wholly ignorant of the law. Our conclusion is that attorneys at law are not, *per se*, civil officers, within the meaning of the constitutional phrase under consideration. See authorities last above cited.

The major premise of the argument in support of a constitutional inhibition thus proves upon examination to be untrue, and of course the conclusion falls. That instrument, so far as we are aware, contains nothing inconsistent with the admission of women to the bar. If there were anything in the rules or usages of the court involving this inconsistency, we would feel that a modification of such rules or usages should now be made. We have no disposition to postpone falling into line with the Supreme Court of the United States and other enlightened tribunals throughout the country, that have finally, voluntarily, or in obedience to statutory injunction, discarded the criterion of sex, and opened the door of the profession to women as well as men.

The prayer of the petitioner will be granted.
It is ordered that her name be placed upon the roll of attorneys.

ALABAMA SUPREME COURT.

A. J. VEASEY, *Appt.*,
v.
Francis BRIGMAN.

(....Ala....)

A judgment by default in an action against

A. J. Veasey is supported by a return of service of summons on "Jack Veasey, the defendant."

(June 25, 1891.)

A PPEAL by defendant from a default judgment of the Circuit Court for Covington County which the court refused to set aside up-

NOTE.—*The doctrine of idem sonans.*

The law does not treat every slight and trivial variance, such as the omission of a letter, as fatal. The variance should be a substantial and material one, such as would render the instrument offered in evidence a different and distinct instrument from the one described in the petition, to authorize the court to exclude it from the jury on the ground of variance. The rule of *idem sonans*, when strictly adhered to, is considered too rigid, and has been much relaxed in modern practice. *Stevens v. Stebbins*, 4 Ill. 25.

It is claimed that mere identity of sound is a surer method of designating the names of persons than that of depending upon mere identity in the orthography. *Ahtol v. Benditto*, 2 Taunt. 401; *Myer v. Fegaly*, 89 Pa. 429.

If the sound of a name *idem sonans* be not affected by a misspelling which occurs, such error is immaterial, and any two names being alike in original derivation and used interchangeably, though different in sound, do not, by the use of either, constitute a material variance. 82 Rolle, Abr. 135; *Bacon, Abr. title Misnomer*.

The doctrine of *idem sonans* should not be too rigidly enforced. The principal question in all cases should ask as to the materiality of the variance. *Belton v. Fisher*, 44 Ill. 52.

And this is always a question of fact, to be determined by the jury.

In the case of foreign names, courts are reluctant to pronounce that a variance which in most instances is a simple misspelling, or the result of a mispronunciation shall affect vested rights honestly acquired. In an early case the Supreme Court of Illinois has held, where material variance was claimed in the names of a conveyance that Michael Allen named in a deed as grantor was, presumptively, Michael Allaine, grantee of the same property as, also, that Otoline Allaine was, presumptively, Antoine Allaine. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148.

The misspelling of a defendant's name in a summons is no excuse for non-appearance to defend, especially where it appears that the name "Butler" was written Butler. Knowing there is a suit against himself, defendant is held bound to appear. *Hermann v. Butler*, 59 Ill. 225.

The rule is, that if the distinction in the pronunciation of the names is indistinguishable in ordinary conversation, the doctrine of *idem sonans* applies. *Barnes v. People*, 18 Ill. 52.

The position contended for in the principal case is sustained by a Maine decision which holds that, although the surname of a party defendant had been spelled in seven different ways in the course of a judicial proceeding, the names were all *idem sonans* and sufficiently identified the defendant. *Millett v. Blake*, 81 Me. 581.

on defendant's claim that he was not served with process. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. John D. Gardner for appellant.

Mr. W. D. Roberts for appellee.

McClellan, J., delivered the opinion of the court:

The following is the assignment of error on this appeal: "Comes the appellant in this cause, and assigns for error (1) the judgment of the court, it not appearing that the defendant, A. J. Veasey, was served or had notice of the bringing of the suit." The record shows a complaint filed by Francis Brigman against A. J. Veasey; a writ issued by the clerk of the court on May 19, 1890, commanding the sheriff to summon A. J. Veasey to appear and answer the complaint of Francis Brigman; that this writ was received by the sheriff, May 20, 1890, and bears the following indorsement:

"Executed this 20th day of August, A. D. 1890, by leaving a copy of the within summons and complaint with Jack Veasey, the defendant.

"M. C. Gault,
"Sheriff."

We suppose the objection to this service is rested on the fact that it purports to have been made on "Jack," not A. J. Veasey. It is untenable. Had only the surname been written in the return, had the service been "by leaving a copy, etc., with Veasey," it would have been good, the presumption being that the defendant was thereby intended (*Snelgrove v. Mobile Branch Bank*, 5 Ala. 295); and surely the fact that a given name is set out, the initial letter of which is the same as one of the initials by which the defendant is designated in the summons and complaint, can have no tendency to overturn this presumption, but rather to strengthen it. But the return goes further than this. It not only asserts that service was made upon Jack Veasey, thus raising the presumption that the person served was the person sued; but it affirms that "Jack Veasey" is the defendant in the cause, and designated therein by the name of "A. J. Veasey." We have no hesitation in reaching the conclusion that service was upon A. J. Veasey, the defendant, and that upon his failure to appear judgment by default was properly entered against him.

Affirmed.

TEXAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *Appt.*,

v.

J. M. CULLERS.

(.....Tex.....)

1. It seems that an Indian may resort to state courts for redress of wrongs under a constitutional provision guaranteeing to every person the right of redress for injuries done to him in his person, property or reputation.

2. An objection to the ability of plain-

tiff to maintain suit on an assigned claim, based on the disability of the assignor to sue in person or through another, is waived unless raised by plea in abatement or by special exception.

3. An action for injury to lands without the State by an act no part of which was performed within the State cannot be maintained in a Texas court.

4. Proof of actual, peaceable and exclusive possession of personal property is sufficient prima facie evidence of ownership to sustain a suit for damages for its destruction

NOTE.—Indians may enforce their rights in a court of justice.

In the early case of *Jackson v. Reynolds*, 14 Johns. 385, an Indian was denied any status in our courts except through the attorney of his tribe; but the reasons assigned for the holding are not applicable to the present status of the Indians. *Jemmisson v. Kennedy*, 55 Hun. 47.

An early Kansas case brought for the partition of real property by an Indian decides that the court had jurisdiction of the subject, and in effect accorded to the Indian a status in the courts. *Swartzel v. Rogers*, 3 Kan. 377.

In New York it appears that since the decision of the chancellor in *Strong v. Waterman*, 11 Paige, 607, 5 L. ed. 250, the tenure of the Indians to their reservation, and their right to prosecute and maintain actions for the enforcement and protection of their rights, appears to have been settled by an Act of the Legislature. *Seneca Nation of Indians v. Tyler*, 14 How. Pr. 109.

Therefore, an action brought by said Seneca Nation of Indians, in their own name, upon a promissory note, given and made payable to them, may be sustained; and it is not necessary that they should aver their authority to sue in the state courts. *Ibid.*

It is a general rule that all persons having a just 18 L. R. A.

cause of action may bring a suit therefor, except as herein mentioned; and no personal disability will deprive one of this right. 3 Bouvier, Inst. 138; *Sinclair v. Sinclair*, 18 Mees. & W. 640; *Broom, Parties to Actions*, 84; *Barbour, Parties to Actions*, chap. 1, § 1; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 687.

Indians do not submit themselves to all the laws of a State because they seek its courts for the preservation of rights and the redress of wrongs. *The Kansas Indians, supra.*

An Indian may maintain an action in a state court to enforce his right to the enjoyment of property, real or personal. *Lobdell v. Hall*, 3 Nev. 507.

They may file a bill in equity, on behalf of themselves and the residue of the nation on the reservation, to restrain a trespass on their land. *Strong v. Waterman*, 11 Paige, 607, 5 L. ed. 250.

An Indian is liable to be sued in a state court. *Jones v. Eisler*, 3 Kan. 134; *Murch v. Tomer*, 21 Me. 535; *Rubideaux v. Vallie*, 12 Kan. 23.

If an Indian dies before the laws of a State are extended over the reservation, a state court may grant letters of administration on his estate, when they are so extended. *Brashear v. Williams*, 10 Ala. 930. But see, *contra*, *Dole v. Irish*, 2 Barb. 637; *United States v. Shanks*, 15 Minn. 339; *Desty, Fed. Const. art. 1, § 8.*

against a mere wrong-doer who shows no right to it.

5. **The fact that buildings in the possession of one person**, and because of the destruction of which he brings suit, were on the land of another, repels the presumption of ownership arising from possession, and plaintiff must affirmatively show that they were personal property and that he had the right to remove them from the soil.
6. **Exclusive and peaceable possession of hay** which had been severed from the soil is prima facie sufficient to support a recovery against a wrong-doer for its destruction, although it grew on the land belonging to the Choctaw Nation of Indians.
7. **An Indian may lawfully own personal property and assign a claim** for damages for its wrongful destruction so as to entitle the assignee to maintain a suit therefor in the Texas courts.
8. **A railroad company is not relieved from liability** for injuries caused by fire set out through its negligence by the facts that the fire had traveled over considerable space and had been revived by a strong wind after having apparently gone out before doing the damage which occurred the day after the fire started.
9. **The presumption of negligence** which arises upon proof that engines of a railroad company set out fire which destroyed property of the complaining party is rebutted by showing that the engines were provided with the best improved spark arresters, in good condition and properly operated.
10. **To recover from a railroad company the value of property** destroyed by fire alleged to have been negligently set out by the company, plaintiff must prove by a preponderance of evidence both that the company set out the fire and that it was negligent.

(June 16, 1891.)

APPEAL by defendant from a judgment of the District Court for Grayson County in favor of plaintiff in an action brought to recover the value of certain property alleged to have been destroyed by fire negligently set out by defendant. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. R. C. Foster and A. E. Wilkinson, for appellant:

There is no right to maintain suit in this State upon a local action accruing in the Indian Territory.

Rev. Stat. Tex. art. 9; *Pelham v. Murray*, 64 Tex. 477; *Rorer*, Interstate Law, p. 140, and authorities cited; Wharton, Conf. L. § 711; Story, Conf. L. §§ 548-554; 1 Chitty, Pl. 271; Cooley, Torts, 471; *McKenna v. Fisk*, 42 U. S. 1 How. 247-249, 11 L. ed. 119, 120; *Livingston v. Jefferson*, 1 Brock. 208; *Rafael v. Verelst*, 2 W. Bl. 1055; *Doulson v. Matthews*, 4 T. R. 503; *Moestyn v. Fabrigas*, Cowp. 161; 1 Smith, Lead. Cas. 4th Am. ed. 656; *Worster v. Winnipicegoe Lake County*, 25 N. H. 525.

An Indian residing in the Indian Territory has no right to sue a citizen of Texas.

Treaty with Choctaw Nation, September 27, 1830, art. 7, U. S. Stat. at L. V. 7, p. 334; Treaty with Choctaws and Chickasaws, June 23d, 1835, art. 14, Laws and Treaties of Choctaw

Nation, p. 27; Treaty with Choctaws and Chickasaws, April 28, 1886, arts. 6, 38; Rev. Stat. U. S. §§ 463, 466, 1889, 1840, 1992, 2103, 2116-2118, 2120, 2123, 2147, 2149, 2156; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643; 2 Story, Const. p. 8, 47 et seq.; *Worcester v. Georgia*, 31 U. S. 6 Pet. 515, 8 L. ed. 433, 10 Curt. Dec. 240-242; *Goodell v. Jackson*, 20 Johns. 693, 11 Am. Dec. 851; *Gardner v. Thomas*, 14 Johns. 184; Wells, Jurisdiction, § 115, p. 110.

The court erred in refusing the second instruction requested by defendant.

Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572.

Messrs. W. W. Wilkins and Brown & Bliss for appellee.

Marr, J., delivered the opinion of the court:

Appellee, J. M. Cullers, filed this suit against appellant in the District Court of Grayson County on March 4, 1887, and by amendment filed October 28, 1887, set up that on November 21, 1885, defendant negligently allowed sparks and fire to escape from its engine, which fire caught and destroyed the following property, to wit: One portable engine, valued at \$500; one hay-press, valued at \$400; one hay-press, valued at \$250; one mower, valued at \$85; one mower, valued at \$70; one derrick and hay loader, valued at \$50; six bundles hay wire, valued at \$15; one sickle grinder, valued at \$10; two dozen hay forks, valued at \$6; one rubber belt, valued at \$30; 4,500 bales of hay, valued at \$1,600; one hay shed, valued at \$200; one house and kitchen, valued at \$200; and one stable, valued at \$50; all of which property was located in the Indian Territory, and was reasonably worth, at the time and place of its destruction, in the aggregate, the sum of \$3,666. That certain portions of the hay, machinery and fixtures were owned by appellee, G. T. Black, and H. C. Lavo, individually, but that it was used in the partnership business of the firm, consisting of appellee, Black, and Lavo, which said firm was engaged at the time in the hay business; and that the hay belonged to them jointly. Appellee and Lavo were citizens of the County of Grayson, Tex. Black was a citizen and member of the tribe of the Chickasaw Indians. Black and Lavo, for valuable considerations, had transferred their interest in the claim against the appellant for the destruction of said property to appellee, and had authorized him to sue therefor in his own name. The trial before a jury on September 19, 1888, resulted in a verdict and judgment in favor of appellee for the sum of \$4,519.78, of which amount appellee remitted the sum of \$100 on November 12, 1888. From this judgment appellant has perfected its appeal to this court." Black transferred his claim to plaintiff to aid in the payment of the debts of the firm, which Cullers had partly paid and assumed the balance.

The assignments of error present several questions which require a decision thereof by this court. The first and second assignments, relating to the sufficiency of the evi-

dence in law to support the verdict of the jury, and the fourth assignment, based upon the refusal of the court to allow the second instruction requested by the defendant, and dependent for support upon the nature of the evidence, will be postponed until we have determined the other questions presented by the appellant for our consideration. Summarized, the other points contended for by appellant's counsel are: That the court erred in refusing to instruct the jury as requested by appellant, to the following effect: *First.* That Black, being a member of an Indian tribe, and an Indian himself, cannot sue, nor, by assignment of whatever right of action he might have elsewhere, authorize or confer upon plaintiff the right to sue in the courts of this State, and therefore plaintiff cannot recover as to so much of the property destroyed as originally belonged to Black. *Second.* In refusing to charge that the court below had no jurisdiction of controversies arising in the Indian Territory between Indian citizens and citizens of the United States, the defendant being a citizen of Missouri; and that a citizen of an Indian nation cannot transfer his claims for such damages to a citizen of the State of Texas, so as to enable the latter to maintain the suit thereon in the courts of this State. *Third.* In refusing to charge that, in any event, the plaintiff could not recover damages for the destruction of "the houses, stables, and other real property situated on lands of the Choctaw Indians, and belonging to a member of that tribe;" and that nothing should be allowed "by reason of the burning of the dwelling-house and stable mentioned in the petition." *Fourth.* In refusing "to instruct the jury [as requested in the fifth instruction] that plaintiff, having shown no right to cut or put up the hay for the loss of which he sues, on the lands of the Choctaw Nation, is not entitled to recover anything by reason thereof."

The plaintiff, J. M. Cullers, as well as Lavo, is a citizen of Texas and of the United States, but Black is a citizen of the Chickasaw Nation, and the property destroyed was at the time in the territory of the Choctaw Nation. It will thus be seen that the plaintiff himself is under no disability to sue in our courts, unless it be that the fact that a part of his right to recover, being derived from the Indian, Black, imparts to him a partial disability to that extent. But it seems to us that even then the question would not be one of the personal disability of the plaintiff to sue, but would depend upon the right of Black to assign his claim. If he could do this, then undoubtedly plaintiff, as his assignee, could maintain the suit on the claim, whether Black could have done so originally or not. The plaintiff is entirely free from any disability which, under the law, would deny him a standing in the courts if he possesses otherwise a right of action. There is no question of "comity" in such case. Rorer, *Interstate Law*, p. 155. If, however, it were necessary for us to decide the question, we think we would have little difficulty in holding that an Indian, like Black, is a "person" within the

meaning of our State Constitution and laws, and is thereby guaranteed the right of redress for injuries done to him "in his person, property, or reputation." If he is not a person, then what is he? Even the plea of an alien enemy has been denounced by our courts as an "odious plea," though it must be sustained if timely interposed. *Bishop v. Jones*, 28 Tex. 294. Every day alien citizens of friendly nations are allowed to sue in our courts *nemine dissente*. We should not hesitate to hold that an Indian—certainly a civilized Indian—is entitled to a redress of wrongs through our state courts. It is not a question of comity, but of right given by law, supposing the court otherwise to have jurisdiction of the controversy. *Swartzel v. Rogers*, 3 Kan. 377; *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man-a-to-wah*, Id. 111; 10 Am. & Eng. Encyclop. Law, p. 440, note 5; *Dacey, Parties*, pp. 1, 2; *Gho v. Jules*, 1 Wash. T. 325; *Cooley, Torts*, p. 35.

The federal courts, by generally deciding that an Indian is neither "an alien" nor a "citizen" until naturalized or admitted to citizenship, necessarily deprived those courts of jurisdiction over controversies between Indians and citizens of one of the States of the Union, wherever the jurisdiction is dependent upon the status of the parties. This does not apply to the state courts. But in the present case there was no plea in abatement or special exception to the disability of the plaintiff supposed to result from a supposed disability affecting Black's right to sue himself in person or through another; therefore the question is waived anyhow by the pleadings of the defendant. It may be, however, that the right of Black to assign the claim, and thus invest plaintiff with the ownership thereof, as well as the right of the plaintiff to recover damages done to such of the property as defendant contends was real estate, and, if so, was not owned by any of the parties, is sufficiently raised and presented by the pleading of the general issue which, we think, throws on the plaintiff the burden of showing at least *prima facie* his right to the property destroyed or to the damages done thereto. Before determining this branch of the case, we deem it not inappropriate to here dispose of the question raised by the defendant and argued by counsel on both sides,—that so much of the action as seeks to recover damages for the destruction of the house and kitchen and stable is purely local, and not transitory, and therefore arose out of the jurisdiction of this State, and, as a consequence, will not, like a transitory action, follow the person of the wrong-doer, so as to allow the courts of another jurisdiction to entertain jurisdiction thereof. To all intents and purposes, so far as being sued is concerned, the appellant is a resident of this State and subject to its laws, and to the jurisdiction of its courts. Its road extends into and through the country in which it was sued, and it has an agent and representative there. The court below had "jurisdiction over the subject matter," and therefore, by express provisions of law, the defendant was amenable to the process of that court, and liable to be sued in that

county. Sayles' Civil Stat. art. 1198, § 21b, and section 21. This is unquestionably correct as to so much of the cause of action as is of a transitory nature. Dicey, Parties, p. 67. But while this is true as to transitory actions, and therefore the court below undoubtedly had jurisdiction of so much of plaintiff's claim for damages as is of that nature, and would have had jurisdiction of the whole claim if it had been clearly shown that the action is transitory as to all of the items for which damages are claimed, still, upon the other hand, it must now be regarded as the settled law of this State, in harmony with the rule of the common law, that an action or remedy for injuries done to land situated beyond the territorial limits of this State, and when no part of the act resulting in the injury was committed or performed within the State, is purely local, and cannot be maintained in any court in this State, but the enforcement of the remedy in such cases must be had within the jurisdiction where the land is situate. *Morris v. Missouri Pac. R. Co.* 78 Tex. 17.

The court below therefore should have charged the jury on the subject as requested by appellant, but with a proper qualification so as to leave to the jury whether any of the property destroyed was in fact real estate or not. The necessity of such a charge, and of the jury being allowed under appropriate instructions to determine the issue whether the buildings were a part of the land or not, will hereafter be more fully discussed in the several respects in which the question is presented.

We now recur to the other questions: *first*, Could there be any recovery for the destruction of the house, kitchen, and stable? and, *secondly*, Could any part of the claim for damages be assigned by Black?

First. The appellee contends that the house and stable were chattels, not real estate. If so, it would seem that Black's right to them is as strong as to the other property held by him. It is admitted that the ownership was proved, as alleged, in all of the property; and it is alleged that the house, kitchen, and stable, were "furnished by Black" and used in the partnership. It appears, however, that these buildings were on the lands of the Choctaw Nation. If, therefore, they were a part of the realty, it is very evident that plaintiff is not entitled to recover for their destruction either in his own right or in the right of Black or Lavo, since it is not pretended that any of the parties owned or held the title to the land. It will thus be seen that the solution of this particular question does not depend upon the citizenship of the parties, since, had the house and stable been "furnished" by the plaintiff himself, instead of Black to be used by the partners, the same issue would have been presented, of the right to recover for injuries to the land, which the plaintiff admits that he did not own, nor did Black. How, then, could he recover damages for such injury? If allowed to do so, the true owner could also recover, and thereby the defendant would be subjected to a double recovery for the same act. Before proceeding further, we desire to observe that

if all of the property destroyed can be regarded as personal property, then we hold that the plaintiff established such prima facie right or title thereto as would entitle him to recover against a mere wrong-doer which showed no right to the property, if it is sufficiently proven that the defendant did destroy the property. The plaintiff proved that at the time the property was destroyed he and his partners had the actual, peaceable, and exclusive possession thereof, which, we think, was prima facie evidence of ownership or right to the property, sufficient to maintain the suit. *Pacific Exp. Co. v. Dunn* (Tex.) (Sup. Ct. present term); *Cooley, Torts*, pp. 436, 437, 445, 446; *Weymouth v. Chicago & N. W. R. Co.* 17 Wis. 550, 84 Am. Dec. 784; Angell, *Lim.* p. 385, note 4. But this does not eliminate the difficulty in his way to recover for the injuries (if any) to the land, because, as we have said, it is not claimed even that any of the parties owned the land; and as to that, therefore, the prima facie proof of ownership resulting from the possession is repelled. In arriving at their verdict and assessing the amount of damages the jury undoubtedly allowed for the loss of the house, kitchen, and stable. Can we hold that it is conclusively shown that these buildings were mere chattels, and no part of the land? If not, can we hold—would we be justified in holding—that the first paragraph of the charge of the court, allowing a recovery therefor by plaintiff, as well as its refusal to give the fourth special instruction asked by the defendant as above set forth, were harmless errors? We think not. The defendant, also, in this connection, assigns as error the first paragraph of the court's charge, and that the verdict of the jury is contrary to the law and the evidence in this particular. The court charged the jury to the effect that, under "the written transfers from Black and Lavo to the plaintiff, in connection with the undisputed evidence" in the case, he could recover for all of the property, if shown to have been destroyed by the negligence of the defendant, its servants or employés. Such was the legal effect of the charge, and it put the buildings upon the same footing as the other property destroyed. Under such circumstances, we think that the issue of ownership of those structures and the right of the plaintiff to recover therefor, as well as the right to maintain the suit in the courts of this State for an injury to the buildings, is duly raised and presented. Appellee attempts to obviate this, as we have said, by contending that the buildings were nothing more than chattels or personal property. He states all of the evidence (so far as we can discover) tending to support this contention as follows, together with the authorities cited by him, viz.: "The buildings and structures consisted of one hay shed, valued at \$200; one house and kitchen, valued at \$200; and one stable, valued at \$50; all of which was located in the Indian Territory, near Cale's switch, on appellant's line of railway. They were called the 'hay camp,' and were used in the partnership business." Authorities: Tiedeman, *Real Prop.* § 2; 1 Washb. *Real*

Prop. p. 8; *Ashmun v. Williams*, 8 Pick. 402; *Moody v. Aiken*, 50 Tex. 65; *Hutchins v. Masterson*, 46 Tex. 554. It is not alleged that these structures were personal property in the petition, nor is any right to remove them from the soil alleged or proven. It is shown that Black "furnished" the house and kitchen and the stable to be used in the partnership. But where did he acquire a right to the buildings? When and how were they erected on the ground of another? Did he own the material, and himself erect the structures, or were they already standing on the ground, and thus taken possession of by him and "furnished" or appropriated by him to the use of the partnership, of which he was a member? If he erected them, was it done in such a manner that they were still portable, and removable as on wheels, and not fixed and attached to the soil, as a house or stable generally is? We find no sufficient answer, if any, in the evidence on the subject as given in the briefs of counsel, nor have we found any in the statement of facts. The fact that the buildings are spoken of, in connection with the other property, as "the camp," does not prove that they are no part of the land. It may tend to show that the parties intended only to use them temporarily while camped there and engaged in cutting hay, but yet if Black, in fact, erected the buildings with his own material, but did so in such manner as to affix and attach them to the soil without permission of the owner, they became, as he had no interest in the realty, a part of the land, and were lost to him. We think it will not be denied that a dwelling-house and kitchen would generally be regarded as a part of the realty. In any event, whether they were movable fixtures or not, in the present instance, was a mixed question of law and fact, and the issue was not submitted to the jury at all. Authorities *supra*. Besides, as we have said, it is not shown that Black, in fact, erected these buildings, and, if he did, he put them on the land of a stranger, without license to do so. Tiedeman, in the second section of his work on Real Property (cited by appellee), says: "Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. Under the term 'land,' therefore, are included the buildings made so under the doctrine of accession. . . . The general rule of law is that a permanent annexation to the soil of a thing in itself personal makes it a part of the realty. The rule applies in some cases even where the thing annexed is the personal property of another. Thus, if a stranger erects a building upon the land of another, having no estate therein, the building becomes the property of the owner of the soil. [Certainly where he knew he did not own the land.] . . . But if such erection is in pursuance of a license granted by the owner of the soil, then the annexation will not make the building or structure a part of the realty." It seems, therefore, according to the weight of the evidence, that the structures, without further proof on the subject, would come under the operation of the general rule, and not the exception. We certainly cannot hold

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as a matter of law that there was no permanent annexation, and that the structures are movable fixtures; but, on the contrary, in the light of testimony on the subject, an opposite deduction is more reasonable. We therefore think that there was error in the first paragraph of the court's general charge, given as it was without any qualification, so as to leave to the jury the determination of this issue,—whether there had been any permanent annexation to the soil. The same may be said of the refusal to allow the fourth special instruction. In this connection we will dispose of the question as to the right of the plaintiff to recover for the hay. We think that there was no error in the court's refusal to allow the fifth instruction requested by the defendant, "that the plaintiff, having shown no right to cut or put up hay on land of the Choctaw Nation," cannot recover for its destruction. Plaintiff alleged that under the laws of that nation the members of his firm had the right to cut and put up hay on the land, and that they had complied with all the requirements of law in the premises. When destroyed, the grass had been severed from the soil, and reduced to the actual possession of the parties, ready for market. It was no longer any part of the land. Their exclusive and peaceable possession thereof was *prima facie* sufficient to support a recovery against a wrong-doer. Under such circumstances, and in the absence of proof that they did not have the right to put up the hay, a license to do so ought to be presumed. Abb. Tr. Ev. p. 623, § 4. This is different from the right to recover for an injury to the land itself, for it clearly appears that none of the parties owned the land, and the damage, therefore, in legal contemplation, could not be to them. They did not show even a possessory right to use and occupy the land itself, except temporarily, while engaged in making hay, and to the extent only that was necessary for that purpose. Had there been proof that Black had the legal authority to erect the buildings on the land, and if he did so under such circumstances as gave him the right to remove the same, then the exclusive actual possession of the buildings would likewise have been sufficient evidence of ownership, if it were necessary, under such circumstances, to rely upon that fact. 1 Civil Cas. Ct. App. §§ 517, 996; 2 Civil Cas. Ct. App. § 780. As to permanent annexations, etc., see *Cooley, Torts*, pp. 428-430, and *note 1*. But we have already sufficiently discussed the issue of fixtures *vel non* to indicate our views on that subject. At the risk of prolixity, however, we will make a few additional observations upon the matter of title in cases like the present, to prevent, if possible, a misapprehension of our views when construed in the light of some of the authorities which we have cited. Many of the decisions of most eminent courts as well as able text-writers announce the rule of law to be that in actions of trespass or trover or in kindred actions the wrong-doer cannot avail himself of a title to the property in a third party with which he is not connected. We do not doubt that the proof of such fact would not be allowed

to completely justify the wrong-doer anywhere, or prevent the plaintiff from recovering for the injury done to his possession as such, or to defeat an existent right to the possession of the property, etc.; but, upon the other hand, we are equally clear that, if it is established that the plaintiff was not the owner of the property, and had no other interest therein than the bare possession thereof, then, where the measure of damages relied upon is the value of the property injured, destroyed, or converted, in such case the defendant would not be legally liable to compensate the plaintiff for the value of property which he did not own; and ought to be permitted to prove title in a third party, not only for the purpose of disproving the plaintiff's right, or rather, claim for damages, without an injury to himself, but also to avoid being compelled to respond in double damages for the same injury to the property. *Vide Clapp v. Glidden*, 39 Me. 448. Until such outstanding title or a title in the defendant is established, however, the possessory right of the plaintiff is sufficient to justify a full recovery; hence it is correctly said that the actual possession of property is prima facie proof of the ownership thereof, but it amounted to no more than this.

We now reach the consideration of the second question propounded above, viz.: Could Black transfer his claim for damages? The appellant contends that an Indian, being under the control and protection of the government of the United States, cannot own property, nor transfer any claim for damages done thereto, and that his only redress is through the agencies provided by the general government. Without stopping to consider the inconsistency of this contention, pointed out by appellee's counsel, we hold that the entire position is untenable, and that we do not doubt that an Indian (certainly a civilized one) is entitled to own personal effects or chattels, and to be protected in their enjoyment until deprived thereof by due course of law. Any other doctrine would be monstrous, and contrary to the civilization of the age. His possessory right to keep and enjoy the property cannot, as we think, in any event be denied, upon any sound legal principle. Can he be robbed or stripped naked in our streets by lawless hands, and yet have no recourse in the courts, upon the ground that he is without title, and legally incapable of acquiring title? At the time of the destruction of the property in question it appears that Black was off his own reservation, and was not occupying strictly tribal relations with his own nation, the Chickasaws, but was engaged in business, and in a co-partnership with white men, and on his own account. We have found no law of the United States or of this State that would prevent him, or, in fact, any Indian, from acquiring personal property, and of enjoying the fruits of his labor and industry, but the laws are quite to the contrary. While it may be true that there are some restrictions upon the right of Indians to make contracts, or to dispose of either real or personal property of certain kinds, under some circum-

stances, imposed by the laws of Congress (Rev. Stat. arts. 2116, 2127 *et seq.*) still we do not believe that they apply to the transfer made by Black to the plaintiff. None of his property, as such, was in fact transferred, but only a claim for its loss. That contract does not come within the purview of section 2103, Rev. Stat. U. S., which, among other things, requires certain character of agreements made with Indians to be approved by the secretary of the interior. They are for the most part contracts to render services for an Indian or tribe of Indians in the collection of claims against the general government. This Statute was construed by the Supreme Court of Indiana, and it was held that an Indian could assign or transfer even a portion of her annuity due from the general government in payment of her debts, and authorize the creditor to receive and apply the same to the extinguishment of the debt; and that agreements or transactions of this nature between an Indian and a citizen were not prohibited nor regulated by the laws of Congress. *Godfrey v. Scott*, 70 Ind. 259. The present controversy falls within the reasoning and principle of that case. We do not think that the laws of Congress, nor the provisions of any treaty of which we are advised, were intended to confine an Indian exclusively to the interior department for a redress of grievances, or would prevent him from assigning a right of action like the present. Unless restricted by some positive law, the right to property and dominion over it, inherent in every human being, would entirely embrace the right, if not the necessity, of transferring it or of using it in such manner as seems most advantageous to the owner. The mass of personal property would be of little benefit unless it could be sold, exchanged, or transferred by the owner; and Congress certainly did not intend to deny to an Indian like Black complete dominion over and full enjoyment of such of the property as was acquired by his own industry, and not as a pensioner of the United States. The Supreme Court of Washington Territory held that an Indian sustaining tribal relations could contract, sue, and be sued the same as an alien. Among other things, the court says, in speaking of the right of an Indian to acquire property and make contracts, that "he had the same right and power to contract with appellee as the appellee had to contract with him. Money and all other personal property, which he certainly had the right to get and hold, he had also the right to use immediately, and to promise in advance in all proper ways, in pursuit of his happiness." *Gho v. Jules*, 1 Wash. T. 325, *q. v.* for a discussion of the right of an Indian to acquire and use property, to sue and be sued, and the necessity of such rights, etc. The nature of Black's claim for damages done to property being such as is ordinarily assignable, we are of the opinion that the fact that Black is an Indian does not render the assignment illegal or inoperative, and therefore the court below did not err in refusing to instruct the jury as requested by appellant on this point. Having the right both to transfer the property and to sue in

our courts, as we have seen, he could undoubtedly transfer the cause of action, when it is otherwise assignable under the law.

We return now to the first, second, and fourth assignments of error, adverted to in the outset. In regard to the fourth assignment, which relates to the refusal of the court to allow the second instruction requested by the defendant* it may be said that the first proposition thereof was applicable, and, if standing alone, should, perhaps, have been given, in order to call the attention of the jury pointedly to the issue; but it was mixed up and connected with other improper directions that should not have been allowed. It was not "wholly immaterial" whether the fire which had been raging on the previous day was "communicated by the engines of the defendant," and destroyed the hay camp, for there was some evidence to that effect. If that fire arose from the negligence of the defendant, and in fact destroyed plaintiff's property, we do not see why the defendant should not be held responsible for the consequences of that fire. Defendant offered proof tending to show that the fire which destroyed the camp was a prairie fire, not kindled by its engines. This was permissible, but the court had already charged the jury that, if the fire that destroyed the property was not caused by fire escaping from the defendant's engines, but resulted from some other cause, they would find for the defendant. The court was not, therefore, bound to reform and rectify the requested instruction into a presentable shape.

The first and second assignments present more serious questions, viz.: Does the evidence sustain the verdict finding that the engines of the defendant communicated the fire which destroyed the property, and that this was due to the negligence of the defendant? The only facts proved by the plaintiff to show the origin of the fire, or negligence upon the part of the defendant in this respect, are the following: A short time before the fire was discovered two freight trains belonging to the defendant, one following the other after a short interval, passed over the road, and near to the point where appellee claims the fire was started, and might, therefore, have set out the fire. Between three and four hours after the fire was first discovered, a witness (Lavo) for the plaintiff went over the recently burned district, and traced the course of the fire to where he says it "started." The place located by this witness and relied on by the plaintiff as the beginning point of the fire was at the foot of the railway embankment, and within 15 feet of the track, and south of the bayou. Here the witness testifies that he found "grass and brush still burning." On the next day another witness for plaintiff observed ashes at the same point. It was proved that the

country was very dry, and that at and during the time of the fire a furious wind was blowing, which swept the flames and shocks of burning grass before it with rushing rapidity, and to great distances, defying every effort of the witness to protect the hay camp, which, though situated at some considerable distance from the railway, was quickly reached and consumed by the fire. The defendant introduced a great deal of testimony to disprove the facts relied on by the plaintiff, and at least completely repelled the presumption of negligence that would be indulged from the fact that its engines communicated the fire, even if it be conceded that the fire was thus caused. The defendant proved by a number of witnesses that these engines were provided with the best improved fire-arresters, in good condition, and properly operated. Nay, more than this, that its road track was down grade at this point, and that these trains (as was the habit) passed along by their own momentum, without the use of steam, or the working of the engines, and that in such case it is "impossible" for an engine to emit sparks and cinders, etc. These facts the plaintiff did not even attempt to disprove. There was also proof of the prevalence of "the prairie fire" which we have already mentioned. But it may be said, as it is argued by appellee's counsel, that there is a conflict of evidence as to the origin of the fire, and that the jury had the right to conclude that it was set out by the act of the defendant. If we concede this, still, where is the proof that the fire was kindled through the culpable negligence of the defendant? Both of these facts must be shown by a preponderance of the evidence, at least in the court *a quo*. Appellee answers that the defendant permitted combustible material to accumulate on its right of way. If so, that would be negligence, if that caused the fire. But the only proof of this is that "some grass and brush" (how much it is not shown) were found burning at the beginning point of the fire, as fixed by appellee, several hours after the fire. If in fact dry and combustible, how is it that the grass and brush burned so long and continued to burn at the same place in the face of so strong a wind as was then prevailing? Would not such material have been swept away as fast as it burned, or been extinguished in a short while? The process of incineration was entirely of too great duration to be compatible with the hypothesis that the material was dry and combustible, under the circumstances. It seems to us that this brush and grass must have been green and difficult to burn, or else the fire did not, in all probability, originate at this point. If it did not, then there is no proof of negligence. The evidence, in our opinion, fails to show an accumulation of dry and combustible material at this point or anywhere on the right of way. One wit-

*That instruction was as follows: "If you believe that the property in question was set on fire by the prairie fires which had been burning on the preceding day and night, and that this fire, after having apparently gone out, was revived by a strong wind on the day in question, and carried to the property, and caused its destruction instead, you should find for defendant. There is no compe-

tent evidence that such fire was communicated by defendant's engines, nor is it material for the jury to consider whether or not it was so caused under the circumstances. If this fire, and not one freshly set out by the engines which approached Cale switch just before the destruction of the hay, caused the damage, plaintiff is not entitled to recover." [Rep.]

ness testifies that the fire started at a point north of the bayou, but this does not appear to have been on the right of way; and, besides, on that side of the bayou the defendant had recently cleared and burned off its right of way. The law did not require nor permit the defendant to destroy or remove grass or other inflammable material not on its right of way. In view of the evidence as presented in the record, we are constrained, though not without some reluctance, to hold that it does not support the verdict of the jury to the extent required by law in such cases, particularly as to the issue of negligence.

Vide, Missouri Pac. R. Co. v. Bartlett, 69 Tex. 79; *Gulf, C. & S. F. R. Co. v. Witte*, 68 Tex. 295; *Fort Worth & N. O. R. Co. v. Wallace*, 74 Tex. 585; *International & G. N. R. Co.*

v. Timmermann, 61 Tex. 663; *Texas P. R. Co. v. Levi*, 59 Tex. 677.

Upon another trial additional evidence may be adduced, or at least fuller explanations of the circumstances relied upon may be made, on behalf of the plaintiff, and we forbear therefore from saying that the verdict is entirely without any evidence for its support. We have endeavored to dispose of all of the numerous questions presented because it is apparent that they will arise again upon another trial, and this has unavoidably protracted the opinion to an extent much beyond our desire.

For the errors indicated we think that *the judgment should be reversed*, and the cause remanded.

Adopted by Supreme Court, June 16, 1891.

FLORIDA SUPREME COURT.

D. S. FORBES, *Appt.*,

v.

ESCAMBIA COUNTY BOARD OF HEALTH.

(..... Fla.)

*1. **The Act of 1885, chap. 3603, providing for the creation of county boards of health**, and constituting them corporations, must be construed in connection with the Acts of 1879, chap. 3162; 1881, chap. 3812, and 1883, chap. 3443, Laws Fla.,— as being *in part materia*, and having in view one object.

2. **Under the Act of 1879, chap. 3162**, as amended by the Act of 1883, chap. 3443, county boards of health have no authority to demand and collect from vessels coming into the jurisdiction of said boards fees for fumigation or disinfection, unless said vessels are subject to and have been put in quarantine.

3. **Under the Act of 1885, chap. 3603**, and the acts *in part materia* prior thereto, county boards of health have no authority, without an examination or inspection, to require vessels upon entering ports within the jurisdiction of said boards to deviate from their course six miles and go to a quarantine station for inspection and examination.

4. **County boards of health are corporate bodies**, invested by statute with functions of a public nature, to be exercised for the public benefit, and, in the absence of such remedy conferred by statute, are not liable in an action for tort for damages in the performance of an official duty.

(August 15, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Escambia County sustaining a demurrer to the complaint in an action brought to recover damages for defendant's alleged illegal interference with plaintiff's vessel in compelling it to go into quarantine and pay the charges thereof. *Affirmed.*

The facts are fully stated in the opinion. *Messrs. R. L. Campbell and J. Emmet Wolfe* for appellant.

Mr. John C. Avery, for appellee:

If the Board of Health made an error in their construction of the law in so far as it authorized them to thoroughly protect the public health of the county, they were acting within the general scope of their jurisdiction and cannot be held responsible for an error in their comprehension of the limits of their power.

4 Wait, Act. & Def. 632, par. 2; 1 Dillon, Mun. Corp. par. 39, 304; 2 Dillon, Mun. Corp. par. 753; 2 Thompson, Encyclop. Law, 429; *Bryant v. St. Paul*, 33 Minn. 289; *Ex parte O'Donovan*, 24 Fla. 281; *Ferrari v. Escambia County Board of Health*, 24 Fla. 390.

Mabry, J., delivered the opinion of the court:

In September, 1888, appellant, D. S. Forbes, commenced a suit against appellee in the Circuit Court of the First Judicial Circuit of Florida for Escambia County. A demurrer was sustained on the 22d day of October, 1888, to the original declaration filed by plaintiff below, and leave given to amend the declaration. On the 5th day of November, 1888, plaintiff below filed the following amended declaration: "D. S. Forbes, by his attorney, R. L. Campbell, sues the Board of Health of Escambia County, a corporation existing under the laws of the State of Florida, for that, on the 27th day of August, A. D. 1888, the British bark Tiber, whereof said plaintiff was and is master, did enter the Port of Pensacola, in said county and State, the Port of Cape Town being the last port from which said bark Tiber sailed on the voyage which ended at the Port of Pensacola on the day and year above mentioned; and plaintiff avers that, although no quarantine had, before the entry of said bark into the said Port of Pensacola, nor during the stay of said bark in said port, been declared by said defendant against said Port of Cape Town, and although no contagious, infectious, or pestilential disease existed upon said bark at the time of or after her coming into the said Port of Pensacola as aforesaid, and although no such disease had occurred or existed upon said bark during her voyage from said Port of Cape Town to said Port of

Pensacola, nor within thirty days before her arrival at said Port of Pensacola, said defendant did compel said bark, immediately upon her entering the Bay of Pensacola, in which said Port of Pensacola is situated, to proceed directly to the quarantine station of said defendant, which said quarantine station is situated upon an arm of said Bay of Pensacola, and distant southeasterly six miles from the said Port of Pensacola, where vessels load and unload, thereby compelling said bark to deviate six miles from the course of vessels not subject to quarantine, proceeding to the usual place of loading and unloading cargo in said Port of Pensacola, and did compel said bark to make said deviation and proceed to said quarantine station as aforesaid, without any inspection or examination of said bark, her crew, or cargo, by any health inspector or city physician of said port, and without any report of such inspector or physician, or order of said defendant in respect to the sanitary condition of said bark, her crew or cargo, but solely and exclusively under the provisions of section 1 of a proclamation of said defendant made on the 23d day of April, A. D. 1888, which is as follows: 'That from and after the 15th day of May, A. D. 1888, and until the 15th day of November, A. D. 1888, no vessel which may have been, between those dates, at ports or places where yellow fever or other malignant disease had actually appeared, shall be permitted to discharge ballast or cargo or load cargo in said Bay of Pensacola; and that all other vessels arriving in said bay between said dates shall, immediately upon crossing the bar, proceed to the quarantine station hereinafter designated, to be inspected, and, if deemed necessary by the quarantine physician, discharge ballast, and be submitted to a cleansing and disinfecting process:—and not under any other proclamation or order or requirement of said defendant, or law of the State of Florida; and did, for a long space of time, to wit, twelve days, detain said bark, the reasonable damages for which detention is \$78.94 per day, rating the same at the usual rate of demurrage per day for a vessel such as the said bark, which is 8 cents per day per registered ton, said bark being of the burden of 924 registered tons; and did also compel said bark to undergo fumigation, for which said defendant charged the plaintiff the sum of \$46.20 for said fumigation and the materials used in effecting the same; and also did compel said bark, with her own crew and appliances, to discharge her ballast at said quarantine station, and did charge and compel the payment by said bark at the rate of thirty-five cents per ton for every ton of ballast so discharged, which amounted to 820 tons, making the aggregate charge for the discharging of said ballast of \$112. And plaintiff further avers that he was compelled to pay said ballast and fumigation charges under pain of attachment and seizure of his vessel for the refusal of plaintiff to pay the same, and also of plaintiff being prevented from taking said bark from the said quarantine station to the loading ground for vessels in said Port of Pensacola, for the purpose of fulfilling the charter of said bark, for the fulfillment of which said bark came lawfully into the Port of Pensacola, 13 L. R. A.

as aforesaid. Wherefore plaintiff says that he is damaged in the sum of \$2,000, and therefore he brings this suit," etc.

Defendant below demurred to the amended declaration on the ground that "the same is bad in substance, in this: that it fails to set forth any cause of action against defendant." This demurrer was sustained, and, plaintiff below declining to further amend, a final judgment was rendered against him on the 12th day of December, 1888, from which decision an appeal is prosecuted to this court.

The errors assigned here are: (1) in sustaining the appellee's demurrer to appellant's amended declaration; (2) in rendering final judgment against appellant upon said demurrer.

The sole question for us to deal with now is the sufficiency of the allegations of appellant's declaration to state a cause of action against appellee. The Board of Health of Escambia County is a creature of statutory law, and all its duties and powers are derived from this source. Before analyzing the declaration to see if its allegations are sufficient to constitute a cause of action, let us refer to the statutory provisions on the subject of county boards of health. The first enactment on this subject to which reference need be made is the Act of 1879 (chap. 8162, Laws Fla.) This Act constitutes the mayor, aldermen, and city physician, if there be one, of every incorporated city or town a board of health for said city or town; and when there is no incorporated city or town the board of county commissioners shall constitute a board of health for such county. The boards of health thus created are invested with power to declare quarantines on water or land, within their jurisdictions, against boats or vessels upon which any contagious, infectious, or pestilential disease existed or had existed during the voyage to said city, town, or district, or within thirty days next preceding the arrival of said boat or vessel within the jurisdiction of said boards, and against any country or locality infected with plague or other malignant or contagious disease. Said boards are authorized to make such rules for the regulation of quarantines as may be deemed necessary, not inconsistent with said act, and to prescribe penalties for their violation. They are also authorized to appoint one or more port inspectors, whose duty it shall be to board every boat or vessel approaching such city or town, and ascertain if the same is subject to perform quarantine; and, if such boat or vessel is subject to quarantine, the inspector visiting her shall order her thrown into quarantine at the place designated for such purpose, and immediately notify the board that such boat or vessel has been ordered into quarantine. This Act gave to the boards of health power to deal with infected persons, goods, vessels, or localities, and as to such matters they could only act by putting in operation a quarantine. The boards created by this Act have no power to act in regard to matters pertaining to public health otherwise than by establishing quarantines. To carry out this object such boards are authorized to establish quarantine grounds, appoint port inspectors and quarantine physicians, and to make rules regulating quarantines when declared. After a quarantine has

been established by the board of health as provided by this Act, and due notice thereof given, all persons are bound to observe the regulations thereof. This Act (sec. 17) provides for the payment of the expenses of the quarantine boards and the officers and employes in and about quarantine, and also for the payment of certain fees by vessels undergoing inspection and in quarantine. This section has been amended by the Act of 1888 (chap. 8448, Laws Fla.). In 1881 the Legislature, by chapter 8312, Laws Fla., provided that the governor shall appoint for every incorporated city and town in this State containing 800 or more registered voters a board of health. Section 4 of this Act confers upon boards of health created by it power to act in regard to all matters pertaining to the public health and vital statistics, and to make such rules and regulations as they may deem necessary for its government and the protection of the public health. The 5th section gives to said boards in matters of quarantine the same powers as are conferred upon boards of health by the Act of 1879 (chap. 8162, Laws Fla.). This Act also provides that section 1 of chapter 8162, so far as it relates to cities and towns of less than 800 registered voters, is not repealed. The Act of 1885, chap. 8608, provides that the governor shall appoint for every county in the State a board of health, which shall be a corporation, with power to sue and be sued, contract and be contracted with, and to acquire and dispose of property, both real and personal. The sixth section of this Act provides that the county commissioners of each county are empowered to assess and levy a tax not to exceed in any year two mills on the dollar, to defray the expenses of said boards of health. The county boards of health created under this Act shall have full power to act in all matters pertaining to quarantine, public health, vital statistics, and the abatement of nuisances, to appoint and suitably compensate a port inspector and such other officers or agents as they may find necessary; and any person who shall interfere with, hinder, or oppose any such officer or agent of the Board in his or their discharge of duty shall be fined not exceeding \$1,000. The 9th section of this Act provides that such boards of health may at any time establish such quarantines as in their judgment are expedient for the public welfare, and to provide rules and regulations for the same; and, after the same are established against any port or place, any person violating the same shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment. The tenth section enacts that every such board may adopt such rules and regulations as they may deem needful in the exercise of the powers and discharge of the duties created and imposed by this Act.

In *Ex parte O'Donovan*, 24 Fla. 281, it was held that "the Statute of 1885 (chap. 8608), providing for the appointment of county boards of health, and defining their powers, does not repeal the Act of 1879 (chap. 8162), providing a uniform system of quarantine in this State. These statutes are *in pari materia*, and to be construed together." It was also held in the case of *Ferrari v. Escambia County Board of Health*, 24 Fla. 390, that these Acts

are on the same subject, and have in view one object, and should be construed together as one system.

The question arises under these Acts, Under what conditions can the County Board of Health of Escambia County detain vessels coming into the Port of Pensacola, and impose upon them the payment of fees for inspection, fumigation, and discharge of ballast? All the powers which this Board can exercise in this respect must be derived from the Statute. This board is a corporate body, the creature of statute, and is incapable of exercising any other powers than those conferred by the Act of Incorporation, or in any other manner than it authorizes. The Act of 1885, however, authorizes county boards of health to declare quarantines and to act in all matters pertaining to quarantines, and this must be taken to confer on such boards all the powers given by statute in reference to such matters. In *Ex parte O'Donovan*, *supra*, it was held that the authority to declare quarantine conferred by the Act of 1885, means quarantines as authorized by the Act of 1879. The latter Act (sec. 8) provides in reference to vessels that "any board of health may at any time during each year establish a quarantine, forbidding the approach to the city, town, or district over which said board of health has jurisdiction of any vessel or boat upon which any contagious, infectious, or pestilential disease has occurred or existed during the voyage to said city, town, or district, or within thirty days next preceding the arrival of said vessel or boat at said city, town, or district, and forbidding the landing of any persons or goods from such boat or vessel until such boat or vessel has performed quarantine in accordance with the provisions of this Act and with the rules and regulations of the board of health." Section 4 provides that "any board of health may at any time, upon information that any country or locality is infected with plague or other malignant, contagious, or infectious disease, establish quarantine against such country or locality, forbidding the approach to the town, city, or district over which the said board may have jurisdiction of any vessel or boat or persons from such infected country or locality, and forbidding the landing of such boats or vessels, or of any persons or goods therefrom, until such boat or vessel, person, and goods shall have performed quarantine in accordance with the provisions of this Act and with the rules and regulations of the board of health." The sixth section provides that the boards of health "may appoint one or more port inspectors, whose duty it shall be to board every boat or vessel approaching such city or town, and to ascertain if the said boat or vessel is subject to perform quarantine under the third or fourth sections of this Act; and, if such boat or vessel is subject to perform quarantine as aforesaid, the inspector so boarding said boat or vessel shall order the same, together with all persons and goods, thrown into quarantine at the place designated by the board of health. The said inspector shall immediately notify the board of health that the said boat or vessel has been ordered into quarantine." The quarantines mentioned in this Act are not self-existing. They are to be estab-

lished by the boards of health when conditions give rise to them. The object of the Statute in providing for quarantines was to protect the people of the State from infectious, contagious, or malignant disease, and the boards of health, in order to accomplish this object, were authorized to establish and maintain quarantines against infected vessels, or vessels from infected places and infected localities. Before any vessel can be put in quarantine one must be established, and the vessel ascertained, by inspection, to be subject to perform quarantine. If the vessel is ascertained by inspection not to be subject to quarantine, she cannot be detained by the board of health, under the Act of 1879, for any purpose. If a vessel is not subject to quarantine,—that is, if she has not been found subject to perform quarantine on account of having on board, or existing within thirty days next preceding the arrival of said vessel at some town or city, “contagious, infectious, or pestilential disease,” or on account of her coming from some infected country or locality,—there is no authority to impose upon her any other charge than that for inspection. It is clear that all the authority the board of health has to collect fees from such vessels must be found in the Statute. The 17th section of the Act of 1879, as amended by the Act of 1888 (chap. 8443), provides that “all the officers and employes in and about quarantine shall be paid, and the expenses of quarantine board, by the city or town establishing such quarantine. Every vessel undergoing inspection by the port inspector, and every vessel in quarantine, which, in the opinion of the port physician, shall require and receive fumigation or other disinfection, shall pay therefor to the board of health such fee or fees as may be prescribed by said board of health, and if the master of any ship, boat, or vessel shall refuse to pay such fees, the board of health may detain said vessel in quarantine until the same are paid, or may sue for and recover the same from the owner of such ship or vessel.” The port inspector, as provided in the sixth section of the Act of 1879, is required to board the vessel as she approaches the city or town, and, if found subject to perform quarantine, she is thrown into quarantine. The Statute provides that every vessel undergoing inspection shall pay such fees therefor as may be prescribed by the board of health; and this, of course, becomes a charge, whether said vessel is ordered into quarantine or not. As will be seen, it further provides that every vessel in quarantine, which, in the opinion of the port inspector, shall require and receive fumigation or other disinfection, shall pay the fees therefor which the board shall prescribe. If the vessel is not subject to and has not been put in quarantine, there is no authority under this Act to make her pay for fumigation or disinfection fees. Counsel for appellee contends, however, that the defendant has power not only to establish quarantines, but to act in all matters pertaining to the public health, vital statistics, and the abatement of nuisances, and to make rules and regulations to govern such matters; that, under the power given to make rules to protect the public health, defendant had the right to require vessels entering the Port of Pensacola to go to a point called a

“quarantine station” for inspection, and if in ballast, and deemed expedient, to discharge ballast, and undergo fumigation. It is true that county boards of health, in addition to the power to declare quarantines, have authority to act in all matters pertaining to public health, vital statistics, and the abatement of nuisances, and there is an express grant of power to such boards to adopt such rules and regulations as they may deem needful in the exercise of the powers conferred to protect the public health; but the power to act in matters pertaining to public health, and to make rules and regulations in reference thereto, does not include the authority to demand and collect fees or other money exactions from those who are made to undergo quarantine. Such a power as this must be expressly conferred in order to its rightful exercise. The Board of Health of Escambia County had a right to make such rules in reference to the deposit of ballast near the City of Pensacola as were deemed necessary to preserve the health of the inhabitants of that city. It would be competent, when deemed essential to preserve the public health, for such board to direct that all vessels coming into the Port of Pensacola and in ballast shall discharge the same a reasonable distance from the wharves and inhabitants of the city, and to enforce such rules by adequate penalties. When, however, fees, charges, or money exactions are attempted to be imposed on vessels coming into port, the authority to demand and collect the same must be pointed out in the Statute.

We are satisfied from a careful examination of the statutory provisions on the subject in force at the time the cause of action is alleged to have accrued in this case that no fees other than for inspection can be imposed on vessels coming into the jurisdiction of county boards of health, unless such vessels have been ascertained, by inspection, to be subject to quarantine, and have been put in quarantine.

Let us now turn our attention to the allegations of the declaration, and see if sufficient has been averred to make a case against defendant. It is alleged that defendant promulgated on the 23d day of May, 1888, the following order, viz.: “That from and after the 15th day of May, A. D. 1888, and until the 15th day of November, 1888, no vessel which may have been between those dates at ports or places where yellow fever or other malignant disease has actually appeared shall be permitted to discharge ballast or cargo or load cargo in said Bay of Pensacola; and that all other vessels arriving in said bay between said dates shall immediately upon crossing the bar proceed to the quarantine station hereinafter designated, to be inspected, and, if deemed necessary by the quarantine physician, discharge ballast, and be submitted to a cleansing and disinfecting process.” That on the 27th day of August, 1888, the bark Tiber entered the Port of Pensacola, in Escambia County, Fla., the Port of Cape Town being the last port from which said bark sailed on her voyage to the Port of Pensacola, and that no quarantine had been established against Cape Town by defendant before said bark entered the Port of Pensacola, or during her stay in said port, and that no contagious, infectious or pestilential disease existed upon said bark during her said

voyage from Cape Town, nor within thirty days before her arrival at the Port of Pensacola, nor at the time of or after her coming into said port. Further, that upon entering said Bay of Pensacola said bark, without any inspection or examination of said vessel, her crew, or cargo by any health inspector or physician of said port, was compelled to proceed directly to the quarantine station of defendant, and thereby to deviate six miles from the course of vessels not subject to quarantine. That defendant proceeded against said bark solely and exclusively under the said proclamation dated 23d day of May, 1888, and did retain said bark twelve days, to her damage \$78.94 per day; and did also compel said bark to undergo fumigation at a cost of \$46.20, and with her own crew and appliances to discharge her ballast at said quarantine station, and pay the sum of \$112 therefor, rating the same at thirty-five cents per ton for ballast discharged; and that plaintiff was compelled to pay said ballast and fumigation charges under pain of seizure of his vessel, and also of being prevented from taking said bark from said station to the loading grounds in the Port of Pensacola. All the allegations of the declaration that are well pleaded are admitted by the demurrer.

Admitting the allegations of this declaration to be true, the defendant had no authority to impose any fees on the Tiber for fumigation or unloading ballast. She was not subject to quarantine, as provided by statute; and the authority given defendant to act in matters of public health, and to make rules and regulations in reference thereto, did not extend to the right to collect such fees. When a quarantine has been established, and a vessel entering port is ascertained, by inspection, to be subject to perform quarantine, she may, in the opinion of the port physician, be required to undergo fumigation or disinfection, and in this event shall pay therefor such fees as may be prescribed by the board of health. The statute authorizes fees for inspection; and when a vessel is subject to quarantine, and in quarantine, she may be taxed by the board of health with the fees for fumigation or disinfection, and beyond these charges the county boards of health have no power to go in exacting money from vessels. In the case of *Ferrari v. Escambia County Board of Health*, *supra*, a regulation of said board, providing that "vessels in quarantine may be discharged at the crib therein by paying fifty cents per ton for so discharging," was sustained by a majority of the court. Judge Maxwell, in speaking for the majority of the court, said, in reference to this regulation: "That is legitimate, if such discharge is for the purpose of disinfecting the vessel; but not otherwise." He was speaking of a vessel subject to quarantine and in quarantine. The Statute authorizes fees only for inspection, fumigation, or disinfection, and if in disinfecting a vessel in quarantine the board of health would have to discharge her ballast in order to accomplish this object, the cost of the same might be included in the disinfecting fees; but we see no authority in the statute authorizing county boards of health to establish a place where vessels with their own crew and appliances shall discharge ballast, and impose

charges on such vessels for so doing. The regulation under which appellant avers his vessel was detained and forced to pay fees requires vessels crossing the bar of Pensacola to proceed to the quarantine station to be inspected, and, if deemed necessary by the quarantine physician, to discharge ballast, and be submitted to a cleansing and disinfecting process. No fees or charges are mentioned in this regulation to be paid, nor is the location of the quarantine grounds, where vessels shall go on entering the bar for inspection, fixed. The declaration avers that defendant did compel the Tiber without an inspection to go six miles deviation out of her course to a quarantine station, and did compel her to pay for fumigation, and to pay for discharging her ballast with her own crew and appliances at said station. In *Ex parte O'Donovan*, *supra*, a regulation of the board of health that a vessel shall be detained until not only the inspection has been made, but also until the report and release of the vessel, was held unauthorized by the Statute. The Statute provides (Act 1879, chap. 8162, § 6) that the port inspector shall "board every boat or vessel approaching such city or town, and to ascertain if the said boat or vessel is subject to perform quarantine; . . . and, if such boat or vessel is subject to perform quarantine as aforesaid, the inspector so boarding said boat or vessel shall order the same, together with all persons and goods, thrown into quarantine at the place designated by the board." The declaration avers that plaintiff's vessel, without an inspection or examination, immediately upon entering the Port of Pensacola, was forced by defendant to go six miles out of her course to the quarantine station. Conceding this to be true, it was unauthorized by the Statute or any rules or regulations which defendant had authority to make. Our conclusion is that the detention of the Tiber, and the exaction from her of fees for fumigation and the discharge of her ballast by defendant in the manner and under the conditions alleged in the declaration, were without legal authority. This conclusion is based upon the statutory provisions in force on the subject at the time of the alleged cause of action.

Counsel for appellee further contends that, should the court find that the declaration presents a case in which the acts complained of were not authorized by the terms of the law, yet the board only committed an error of judgment, for which it cannot be held responsible in damages in an action in tort. It will be discovered upon an examination of the declaration that appellant's suit is not to recover back money illegally exacted, but the action is in tort, for illegally detaining the vessel, and compelling her to pay certain charges. Can the defendant, as a county board of health, be sued for damages in respect to the matters alleged in the declaration? The answer to this question, we admit, is not free from difficulty. The defendant is a body corporate, made so by statute, capable of suing and being sued, contracting and being contracted with and of acquiring and disposing of property, real and personal. A careful examination of the various statutory provisions in reference to the creation, duties, and powers of these corporate boards leaves no room to doubt that the functions con-

ferred upon them are a part of the police power of the State, to be exercised exclusively for public purposes. The sole purpose of the Legislature in creating these corporate boards was to protect the inhabitants of the State from contagious or infectious disease, and to preserve the public health. Such powers and duties are of a public nature, and of the highest importance and value. *Cooley, Torts, 382; Bryant v. St. Paul, 33 Minn. 239; Spring v. Hyde Park, 187 Mass. 554; Harrison v. Baltimore, 1 Gill, 264; Raymond v. Fish, 51 Conn. 80.*

In determining the liability of public corporations a distinction has been drawn between the functions exercised by them as agencies of the State as a part of its governmental machinery for the public benefit and those denominated strictly corporate powers, conferred for the benefit and profit of the corporation. In the sphere of the former powers they are exempt from liability upon the theory that the corporation, to that extent, is performing a part of the functions of the state government, and the officers are public officers; but in the latter sphere they are held liable as private corporations for the acts of their agents. This distinction is recognized generally by the authorities, although its application in many of the adjudicated cases has not been free from confusion. Its application has been made most frequently in suits against municipal corporations. In the case of *Hill v. Boston, 122 Mass. 844*, which was a suit for damages for injuries received by a child at school by reason of a defective house, required by law to be furnished by the city, Judge Gray reviews the authorities on this subject. The conclusion reached in this well-considered case is "that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the benefit of the corporation, pecuniary or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by general law applicable to all cities and towns in the Commonwealth, is a duty owing to the public alone; and a breach thereof by a city is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby." See also *Hafford v. New Bedford, 16 Gray, 297; Walcott v. Swampscott, 1 Allen, 101; Buttrick v. Lowell, Id. 172; Richmond v. Long, 17 Gratt. 875; Hill v. Board of Aldermen, 72 N. C. 55; Bartholomew County Comrs. v. Wright, 22 Ind. 187; Hayes v. Oshkosh, 33 Wis. 314; Dargan v. Mobile, 31 Ala. 469; Murtaugh v. St. Louis, 44 Mo. 479; Condict v. Jersey City, 46 N. J. L. 157; Marmilian v. New York, 62 N. Y. 160; Dillon, Mun. Corp. § 778 et seq.*

A public corporation, invested with powers for public purposes, may also have conferred upon it powers for private advantage and emolument. This has been held in many cases against municipal corporations. In *Bailey v. New York, 3 Hill, 531*, it is said in reference to these two powers blending in a public corporation: "But this distinction is quite clear and well-settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred as to the object and purpose of the Legislature in conferring them. If granted for public pur-

poses exclusively, they belong to the corporate body in its public, political character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

The case of *Jones v. New Haven, 34 Conn. 1*, illustrates this distinction. The fact that these boards are created corporations with power to sue and be sued does not of itself authorize a suit against them for everything, but this must be taken to mean that such artificial bodies may be sued, like an individual, for all those matters and things for which they are legally liable. To determine the liability we must look to the principles of law applicable in such matters. *Sussex County Board of Chosen Freeholders v. Strader, 18 N. J. L. 108; Finch v. Toledo Board of Education, 80 Ohio St. 37.*

In the case of *Ogg v. Lansing, 35 Iowa, 495*, suit for damages was instituted against the city for the negligence of its officers or agents in executing sanitary regulations adopted to prevent the spread of small-pox. A statute of Iowa provided that the city council shall have power to establish a board of health, and to invest it with powers and duties necessary to secure the people of the city against contagious and malignant diseases. It was alleged in this case that the agents and employes of defendant requested and directed plaintiff to assist in taking a coffin, in which the corpse of a person who had died of small-pox was deposited, without giving him information of this fact, and without having cleansed the house in which the coffin was; and that plaintiff went to his home and soon thereafter had small-pox, and from him two of his children contracted the disease and died. On demurrer it was held that defendant was not liable.

In *White v. Marshfield, 48 Vt. 20*, suit was brought against the town for neglect and refusal of the selectmen to take care of and provide for plaintiff, as the Statute required, while he was infected with small-pox, by reason whereof the disease was communicated to the family of plaintiff, and three of his children died. The Statute provided that the selectmen of the town should perform certain duties to protect the inhabitants against infectious disease. On demurrer it was held that the action would not lie. In *Richmond v. Long, 17 Gratt. 875*, suit was instituted against the City of Richmond for the value of a slave, who, it was alleged, lost his life through the carelessness of the agents of the city. The declaration alleged that the slave was admitted into the hospital of the city to be cared for and treated for small-pox, in pursuance of the ordinance of the city, and that the city carelessly and negligently permitted him to escape from the hospital and go off at night whereby he lost his life. The ordinance of the city establishing the city hospital was adopted in pursuance of legislative authority for towns and counties in the State to provide against contagious disease. The liability of the city was denied in this case, and the judge who wrote the opinion said that if a recovery could be sustained he did not perceive why, by parity of reason, the

State should not be held liable, through its public functionaries in civil actions at the suits of individuals, for losses or torts occurring in the management of its departments under its immediate control and supervision. In Maine a statute provided that the selectmen of any seaport town, when deemed necessary to protect the safety of the inhabitants thereof, may cause any vessel arriving there from any port or place to perform quarantine at such place and under such regulations as they may judge expedient; that said towns may select a health committee, or health officers, who may perform the duties and exercise the authority which selectmen may perform. Under the Statute the health authorities had no power to impress vessels coming into port, but could compel them to perform quarantine. One Mitchell sued the City of Rockland for damages sustained by him for the partial destruction of his vessel and her cargo by fire occasioned by the health officers of said city. This case was three times before the supreme court of that State, reported in 41 Me. 868, 45 Me. 496, and 52 Me. 118. In this case plaintiff's vessel came into port with a case of small-pox on board, and the health officers of the city took possession of the vessel, and it was claimed through their illegal and negligent acts the vessel caught on fire. It was decided finally in this case that neither a town nor its officers have any right to appropriate or interfere with private property except so far as that right is conferred by statute, and that health officers of the City of Rockland had no authority to take possession of plaintiff's vessel; also that neither the relation of master and servant nor principal and agent existed between a town and its health or police officers, nor is the town liable for their unlawful or negligent acts. *Mitchell v. Rockland*, 52 Me. 118.

The same doctrine was reaffirmed in that State in the case of *Lynde v. Rockland*, 66 Me. 309. Here the plaintiff alleged that his hotel in the city was taken possession of by the health officers of the city against his consent, and converted into a small-pox hospital for thirty days, thereby endangering the lives and health of plaintiff and his family, and destroyed the business, reputation, and character of the hotel for all time to come. It was decided in this case that no action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a house and using it for a small-pox hospital without the consent of the owner, and without legal authority. The action in this case was in tort. See also the case of *Barbour v. Ellsworth*, 67 Me. 294, sustaining the same doctrine. A case similar in its features is *Spring v. Hyde Park*, 137 Mass. 554. In this case the action was in assumpsit on contract, and it was held that under the Statute of Massachusetts, which provided how property could be impressed for use as a hospital, a board of health of a town, without pursuing the course pointed out by the Statute, has no authority to take possession of a dwelling house without the consent of the owner, and use the same as a hospital for a person found therein sick with a contagious disease, and the owner cannot maintain an action of contract against the city for the use

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and occupation of the house during the time it was so held by the board of health.

In the case of *Aaron v. Broiles*, 64 Tex. 816, it was held that the city council had the right, under legislative authority, to enact an ordinance providing for the removal from the city of persons afflicted with contagious disease, and that there was nothing judicial in the act removing persons under such an ordinance; but in doing so those to whom such a duty is given by the city must make every reasonable provision for the safety of the persons removed. The suit in this case, however, was not against the city or the board of health of the city, but the individuals who composed the Board of Health,—the mayor and marshal of the city. The plaintiff's case against the defendants was that they, acting under the ordinance of the city, took by force his child, four years old, sick at the time with small-pox, and its mother, and conveyed them to the country, in the rain and cold, at night, and failed to provide them any suitable place to stay, which caused the death of both of them. Held, that plaintiff was entitled to recover damages.

In the case of *Southampton Bridge Co. v. Southampton Board of Health*, 8 El. & Bl. 801, an action for damages was sustained against the defendant as a corporate body under allegations that "defendant, acting as such board of health, conducted itself so wrongfully, improperly, and negligently, and with want of due care in the construction, management, and direction of a certain sewer, that by means of the wrongful, improper, and negligent conduct of defendant as such board of health great quantities of filth and sewage matter were poured in and upon certain canals of which plaintiffs were proprietors." The Act incorporating the defendant as a local board of health authorized it to construct sewers. It was contended in this case that defendant could not, as a board of health, be held liable in an action for damages. Lord Campbell said that defendant's liability must be determined by a true interpretation of the Statute by which it was created. The decision against the defendant was placed upon the construction of the Statute. The Act creating the board of health provided that no action shall be maintained against the board unless previous notice thereof be given for one month, and that the defendant may tender amends, and plead such tender to the action. This language was held to give a right of action for damages against defendant.

Independent of the provision making county boards of health bodies corporate, with power to sue and be sued, there is nothing in the statutory provisions in reference to them giving the right of action in tort for damages, or indicating a purpose on the part of the Legislature to subject them to such suits. As we have already seen, the right alone to sue and be sued cannot be construed to give such remedy. These boards are created for public purposes in the exercise of the police power of the State, and they have no corporate interest in the execution of the powers given them. They cannot levy taxes, and under the Statute must invoke the taxing power of the county authorities for the means to defray their expenses. It is true, they can fix and collect fees for inspection, and,

when vessels are subject to quarantine and in quarantine, can collect fees for fumigation when deemed necessary; but it is evident that such exactions were intended to meet the reasonable expenses in such matters.

In the case of *Finch v. Toledo Board of Education*, 30 Ohio St. 37, the liability of defendant in tort as a corporate body arose. The board of education of Toledo was a corporation, with power to sue and be sued, and derived its means of support from taxation by the City of Toledo and a portion of the public school fund. The suit was for damages for negligently digging wells or openings near school buildings, into one of which a child at school fell and was hurt. Judge Ashburn said, in delivering the opinion: "We have wholly failed to find any provision of the School Law, general or special, creating or implying the liability of defendant in this class of cases. No possible means appears in the School Laws by which defendant, if liable for a tort, could provide a fund out of which to satisfy a judgment against it." It was held in this case that, while defendant was a corporation with power to sue and be sued, yet it was a corporation for public purposes, and the nature, duties, and powers conferred upon it was a sufficient reason why it was not liable to be sued in tort. See also *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Benton v. Boston City Hospital Trustees*, 140 Mass. 18; *Summers v. Daviess County Comrs.* 108 Ind. 262, 1 West. Rep. 217; *Sherbourne v. Yuba County*, 21 Cal. 118; *Shearm. & Redf. Neg.* § 266.

There are cases of recovery in actions of tort against municipal corporations, but they proceed upon the ground that where the corporation acts in the exercise of powers or performance of duties not discretionary, governmental, or public in their nature, but ministerial, and for some corporate benefit, it incurs the common-law liability for its acts as an individual. *Bailey v. New York, supra*; *Gibbs v. Liverpool Dock Trustees*, 8 Hurlst. & N. 164; *Jones v. New Haven, supra*.

In the case before us the plaintiff avers that solely and exclusively under the proclamation of the board of health, and which is set out in the declaration, plaintiff's vessel was compelled to go to quarantine station, and discharge ballast, and pay fees. It is not charged that defendant acted maliciously or willfully, or otherwise, for aught that appears in the declaration, than in the discharge of a supposed public duty. An examination of the authorities and the principles governing such cases leads us to the conclusion that defendant was invested with public functions, and the duties it owed were to the public, and as such it comes within the sphere of public functionaries, exempt from liability in tort, unless such remedy has been provided by statute. As we have seen, no such remedy has been provided by statute, and the declaration shows that plaintiff is pursuing this course.

The judgment of the court below sustaining the demurrer is affirmed.

MICHIGAN SUPREME COURT.

Michael SULLIVAN

v.

Edmund HALL, *Appt.*

(.....Mich.....)

1. Absence of evidence to support a

NOTE.—*Venue and jurat should appear in the affidavit.*

The venue is an essential part of every affidavit. It is prima facie evidence of the place where it was taken. *Belden v. Devoe*, 12 Wend. 225, note; *Manufacturers & M. Bank v. Cowden*, 3 Hill, 461; *Lane v. Morse*, 6 How. Pr. 394.

A venue is essential to an affidavit but it may be supplied by amendment. *Clement v. Ferenback*, 1 City Ct. Rep. 57.

Omission of venue in landlord's affidavit in summary proceedings is fatal. *People v. De Camp*, 12 Hun, 378.

When the landlord's affidavit omitted the venue, and it did not appear where it was sworn to nor where the justice of the peace who appears to have taken it resides, it was held a fatal error. *Cook v. Staats*, 18 Barb. 407; *Lane v. Morse, supra*.

Jurisdiction frequently depended on the affidavit, and if it is lacking in an essential requisite all subsequent proceedings founded upon it are void unless the defect is waived. Where there is no appearance before the justice there can be no waiver of defects. *People v. De Camp, supra*.

The jurat, when the deposition is taken by a notary, acting out of his home county, should have attached to it the name of the county for which the notary was appointed and in which he resides, and 13 L. R. A.

justice's judgment cannot be presumed

where no attempt to return the evidence was made but the return states that the judgment was rendered after listening to the testimony and after due deliberation.

2. The appearance as attorney in proceedings to enforce a logger's lien, on

also a statement that his certificate is filed in the county in which the venue is laid and the act performed, though an omission to make such designation will not render the verification void. *Produce Bank v. Baldwin*, 49 How. Pr. 277; *Estate of King*, 2 Civ. Proc. Rep. 71; *Snyder's Notaries' Manual*, p. 57.

The jurat should be in proper form and be subscribed by the officer before whom it is made. If the jurat be all right in the original it is immaterial as to the copy served. *Barker v. Cook*, 40 Barb. 254; *Livingston v. Cheetham*, 2 Johns. 479; *Union Furnace Co. v. Shepherd*, 2 Hill, 414.

The case of *Graham v. McCoun*, 5 How. Pr. 353, seems to hold the contrary. *Wait, Pr.* p. 580.

Under the former practice before the adoption of the Code the New York court of errors held in *Livingston v. Cheetham, supra*, that the omission of the jurat and signature of the party to a copy of an affidavit on which a motion was made formed no objection to the service. The rule has been followed in similar cases since. *Graham v. McCoun, supra*.

A clerical omission on the part of the prothonotary to put his signature to the jurat, after swearing the defendant, does not vitiate the affidavit, the defendant appearing personally in court and declaring his willingness to be sworn again. *Maples v. Hicks*, Brighly, 56; *Endlich, Affidavits of Defense*, § 340.

behalf of the claimant, of the notary public who administered the oath in support of the lien is not unlawful.

3. The omission of venue from a notary public's jurat does not render it invalid where he is a state officer the record of whose appointment is required to be kept in the office of the secretary of state.

(May 8, 1891.)

ERROR to the Circuit Court for Clare County to review a judgment in favor of plaintiff in an action brought to enforce a logger's lien. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Perry and Henry A. Chasney, for appellant:

The statement of lien in this case is a nullity; the law requires it to be sworn to (Act 1887, No. 229, § 2), and this involves an affidavit.

An affidavit is an oath in writing, sworn before, and attested by, him who has authority to administer the same.

1 Bacon, Abr. 64.

The jurat of affidavits should state when, where, and before whom they are sworn.

1 Tidd, Pr. 494.

The authority to administer the oath, and the fact that the oath was taken before the officer having such authority, are indispensable to a good affidavit. It is not enough that these conditions exist in fact, but they must appear affirmatively, though whether they appear from the venue, the body of the affidavit, the jurat, or the signature thereto, is immaterial.

Smart v. Lowe, 8 Mich. 590; *Cross v. People*, 10 Mich. 24; *Re Teachout*, 15 Mich. 346; *Griffin v. Forrest*, 49 Mich. 811.

The party for whose information the lien is filed, and whose rights are put in jeopardy by it, ought surely to be able to see, by an inspection of the paper, where to look for the authority by which it was certified. Admitting that Wickham, as a notary for any county in Michigan, could act in any other, it would be intolerable that he whose interests are imperiled should have to search the records for every county in the State to settle the question of his authority.

A notary, in Michigan, is an inferior officer deriving all the power he has from positive statute.

How. Stat. (Mich.) § 631.

The jurisdiction of such an officer should appear affirmatively.

Id. § 632.

The mere signing of one's name cannot be the official signature contemplated. The authority to sign must be disclosed. The entry of a justice's judgment must be signed officially.

Howard v. People, 3 Mich. 207; *Hollister v. Giddings*, 24 Mich. 501.

So must the transcript of it.

Bigelow v. Booth, 39 Mich. 622.

Where an affidavit is made for an appeal from before a justice if taken before anyone but the justice himself, an official signature to the jurat is necessary.

People v. Simondson, 25 Mich. 118.

The certificate of acknowledgment to any sort of deed must be signed (*Ryerson v. Eldred*, 18 Mich. 12; *Marston v. Bradshaw*, 18 Mich. 81) and signed officially.

Final v. Backus, 18 Mich. 218; *Wright v.* 18 L. R. A.

Wilson, 17 Mich. 192. See also *People v. Murphy*, 56 Mich. 546; *First Nat. Bank v. St. Joseph*, 46 Mich. 526.

It is no idle form or mere technicality for which we contend, but such a general rule as will give certainty to official papers and reasonable security to all whose rights may be involved therein.

To say nothing of the affidavit's having no venue (*Persinger v. Jubb*, 52 Mich. 304); it is not even entitled.

Graham v. Elmore, Harr. Ch. 265; *Whipple v. Williams*, 11 Mich. 115; *Arnold v. Nye*, 11 Mich. 456.

And, what is also fatal, it is sworn to before a person who had no right to administer the oath.

Greenoault v. Farmers & M. Bank, 2 Dougl. (Mich.) 498.

Because, as the record shows, he was the claimant's attorney; and an attorney cannot swear his own client.

How. Stat. (Mich.) § 687; *McCaslin v. Camp*, 26 Mich. 890; *Snyder v. Hemmingway*, 47 Mich. 549; *Bradley v. Andrews*, 51 Mich. 100; *Re Hogan*, 8 Atk. 818; *Re v. Wallace*, 3 T. R. 408; *Hopkinson v. Buckley*, 8 Taunt. 74; *Jenkins v. Mason*, 8 Moore. 325; *Chicago Rubber Clothing Co. v. Branch*, Feb. 13, 1891.

Mr. W. A. Burritt for appellee.

Long, J., delivered the opinion of the court:

This action was brought by attachment in Justice Court under Act No. 229, Laws 1887, to enforce a lien upon certain logs of the defendant. On the trial plaintiff had judgment for \$16 and costs of suit, and for a lien upon the logs. The cause was removed by certiorari to the Circuit Court for Clare County, where the judgment was affirmed. The cause comes to this court by writ of error. The errors complained of are set forth in the affidavit for the writ of certiorari to the justice, and are: "(1) that the notice of the lien was not properly sworn to as required by the Act; (2) because no testimony was given on the trial tending to prove any agreement with defendant or any authorized agent of his, or any contractor under defendant, with plaintiff that he should do any work on said logs, and no proof that defendant or any agent of his or contractor under him knew that plaintiff was doing work on said logs; (3) because no testimony was offered of any contract with defendant or his agent for any specific wages, and no proof of how much his labor was worth; (4) because said justice gave judgment in said cause for an attorney fee of five dollars; (5) because the person who claimed to be the attorney for plaintiff, and was so recognized by said justice, undertook to administer the oath to plaintiff of the notice claiming lien against the property attached; (6) because the evidence given at the hearing of said cause did not warrant any of the findings or judgment of the court; (7) because no evidence was given tending to prove the property mentioned in said writ of attachment and in plaintiff's declaration are the same." There is no force in the objections made that there was no evidence tend-

ing to show the plaintiff's claim. The evidence was not reduced to writing, and is not returned. The justice, in his return, states that the plaintiff was sworn in his own behalf, and, after listening to the testimony, and after due deliberation, he gave judgment for the plaintiff. Under these circumstances we cannot presume that there was no evidence tending to support the judgment. The writ of attachment contains a description of the property attached, and the declaration contained the same description, and there is therefore no force in the seventh assignment of error. It is not shown that the notary public who administered the oath to the plaintiff on the statement of claim of lien was the attorney for the plaintiff at that time. The lien was sworn to and filed in the office of the county clerk, as provided by statute. The notary public who administered the oath thereto afterwards appeared in justice court as attorney for the plaintiff. This is not in violation of section 637, How. Stat., and does not fall within the ruling of cases cited by defendant's counsel. The fourth assignment of error is not noticed in the brief of counsel, and will be treated as abandoned. The only remaining assignment of error is the first, which relates to the notice of lien. No objection is made to the statement except that the same does not show in what county the oath was administered. The claim of the lien is in the following form: "The statement of lien made under oath of Michael Sullivan in manufacturing, cutting, skidding, the following described property, to wit: One million feet of white pine, Norway pine, and hemlock saw-logs, marked as follows: [C] That the last day's work of said labor [C] was done on the 8th day of February, 1889, and said labor was performed in the County of Clare; and that said described property, or a portion of the same, is now situated in the County of Clare, State of Michigan; and that there is now due claimant for said work and labor over and above all legal set-offs the sum of \$16, as near as may be, for which said sum a lien is claimed upon said described property. Michael Sullivan. Subscribed and sworn to before me this 9th day of February, 1889. Henry K. Wickham, Notary Public."

The statement of lien has no caption showing the county or State in which it was made. It follows the form laid down in the Statute, but, inasmuch as the notary public does not state in the jurat the county in which he acts as such officer, it is contended that no valid lien was filed authorizing the bringing the writ of attachment under this Statute. Section 632, How. Stat., provides that his certificate, when under his hand and seal, shall be presumptive evidence of the facts contained in it, except in certain specified cases. His right to that office comes from an appointment by the governor of this State, and his compliance with the requirements of the Statute in filing oath of office, bond, etc. Act No. 117, Pub. Acts 1887. By this same Statute the county clerk of the county in which the oath of office and bond is filed is required to transmit the name of such person to the state treasurer and secretary of state. 18 L. R. A.

Thus it is that the fact whether one is a notary public may always be ascertained in the office of the state treasurer and secretary of state, as well as in the office of the county clerk in the county for which the appointment is made. Therefore the objection that the statement of lien contains no venue, and the party whose property is thus incumbered has no means of ascertaining whether the person who acts as notary public is such in fact, has no force. It is not true, as claimed, that the party who desires to ascertain the fact must go from one county clerk's office to another to get the desired information. An inquiry at the office of the secretary of state would at once show the fact, as it is a matter of record there. A notary public is in no sense a county officer. "The governor, by and with the advice and consent of the senate, may appoint one or more persons notaries public in each county, who shall hold their office," etc. Act No. 117, Pub. Acts 1887. While it is very proper that a notary public should sign himself as a notary public in and for the county from which he is appointed, yet his certificate would not be fatally defective if the designation of the county is omitted. He may act in any part of the State, and his official acts are not confined to the county where he resides. It is true that under the Amendatory Act of 1889 (Act 74, Pub. Acts 1889) no person is eligible to the office of notary public unless the person is a resident of the county of which he or she desires to be appointed, yet their official acts are not necessarily confined to that county. The office would undoubtedly become vacant by removal from that county, but it does not follow that for this reason the party is a county officer. The appointment has always been regarded as one of state matter, rather than that of county. It is a state appointment, and the omission of the venue would not be a fatal defect in the jurat. It cannot matter to the party to be affected by such certificate from what particular county the notary public was appointed. In legal phraseology "venue" means the county where a cause is to be tried, and originally a venue was employed to indicate the county from which the jury was to come. The necessity of stating a venue at all is reluctantly confessed by the authorities. *Bean v. Ayers*, 67 Me. 487; *Briggs v. Nantucket Bank*, 5 Mass. 95. In process or pleading, the objection under the strict rules of the common law, and perhaps under our Statute, to the want of venue might be taken advantage of by demurrer. It may also be true that a certificate made by a justice of the peace would be void if it omitted the venue, were no venue stated at all in the instrument. But the question here involved is not to be governed by the reasons which would be applicable in such cases. Claim is also made by appellant in his brief that the Act under which the lien is claimed is unconstitutional and void. That question was settled by this court in *Cradock v. Dwight* (filed at the present term of this court), and the cases there cited.

Judgment affirmed, with costs.

The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Neil McNEIL

v.

BOSTON CHAMBER OF COMMERCE.

(....Mass.....)

1. **The rights of persons submitting bids for the erection of a building** cannot be determined by the printed "notice to bidders" where it appears that the terms of the contract were orally fixed at a conference between the bidders and the persons requesting the bids, that the terms so fixed were not incorporated into the printed notice, and that both parties rested upon what was said and done at the conference.
2. **A majority of a committee** appointed by a corporation to contract for the erection of a building may, in the absence of the other members, lawfully act in letting the contract.
3. **Silent acquiescence by directors of a corporation in acts of its building committee** in procuring bids and letting the contract for the building with full knowledge of such acts will make the contract binding on the corporation, although the committee had in fact no authority to make it.
4. **That acts of a committee were known and assented to** by those who appointed it may be inferred from circumstances.

(September 2, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County (Holmes, J.) for the opinion of the full court of an action brought to recover damages for the breach by defendant of an alleged agreement to award the contract for erecting defendant's building to plaintiff in which a verdict had been directed in favor of defendant. *Judgment for plaintiff.*

The following questions were submitted to the jury:

First. "Did the committee on building purport to make a contract on behalf of the defendants by which they agreed to accept the lowest bid in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case?"

Answer. "Yes."

Second. "If such contract was made was it approved by the directors?"

Answer. "Yes."

Third. "If such contract was made, was it within the ostensible authority of the committee?"

Answer. "Yes."

Fourth. "Was the building as finally contracted for, a building substantially in accordance with the said plans and specifications?"

Answer. "Yes."

Fifth. "If the plaintiff is entitled to recover, what are his damages?"

Answer. "\$14,500."

The further facts appear in the opinion.

Messrs. Robert M. Morse, Jr., and Charles E. Hellier, for plaintiff:

Even if the plaintiff had incorporated the notice to bidders into the written offer made

and signed by him, it would have been competent for the plaintiff to show a subsequent parol agreement modifying and controlling it.

Cummings v. Arnold, 8 Met. 486; *Hastings v. Lovejoy*, 1 New Eng. Rep. 218, 140 Mass. 261; *Bartlett v. Stanchfield*, 2 L. R. A. 625, 148 Mass. 394; *Goss v. Nugent*, 5 Barn. & Ad. 65.

Silence of a principal, with knowledge of the acts of his agent, amounts to approval and ratification of such acts.

Brigham v. Peters, 1 Gray, 189; *Sherman v. Fitch*, 98 Mass. 59; *Poster v. Rockwell*, 104 Mass. 167; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *Matthews v. Fuller*, 128 Mass. 446; *Harrod v. McDaniel*, 126 Mass. 418; *Murray v. Nelson Lumber Co.* 8 New Eng. Rep. 419, 148 Mass. 250; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 181 U. S. 871, 33 L. ed. 157; *Saveland v. Green*, 40 Wis. 431; *Pickard v. Sears*, 6 Ad. & El. 469.

Defendants actually held forth the committee as having "full powers and authority to procure plans and specifications for a building, and make the contracts for the erection and completion of the same," and the qualification upon their authority "subject to the approval of the directors," may fairly be understood as meaning "subject to the control of the directors."

See *Winchester v. Glazier*, 9 L. R. A. 424, 153 Mass. 816.

A corporation, like an individual, is bound by the acts of its agents within the scope of their apparent authority, or of that authority which it is customary and usual for such agents to have.

Fay v. Noble, 12 Cush. 1; *Lester v. Webb*, 1 Allen, 84; *Reed v. Ashburnham R. Co.* 120 Mass. 48; *Ayer v. R. W. Bell Mfg. Co.* 6 New Eng. Rep. 329, 147 Mass. 46; *Craft v. South Boston R. Co.* 5 L. R. A. 641, 150 Mass. 207; *Bartlett v. Mystic River Corp.* 151 Mass. 483; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 299, 3 L. ed. 851; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 658; *Mahonoy Min. Co. v. Anglo-Californian Bank*, 104 U. S. 92, 26 L. ed. 707; *Haight v. Sahler*, 30 Barb. 218; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Georgia Military Academy v. Estill*, 77 Ga. 409.

Mr. Richard Stone, for defendant:

Plaintiff merely promised that he would submit a bid. That was not an acceptance of the offer. An offer to give a contract to the lowest bidder is not accepted by promising to submit a bid. An offer can only be accepted in the terms in which it is made. An acceptance, therefore, which modifies the offer in any particular, will go for nothing.

Langdell, Cont. p. 22; Fry, Spec. Perf. 8d ed. § 271.

A party incurs no responsibility by a mere proposition that is not accepted.

Waterman, Spec. Perf. § 138; *Potts v. Whitehead*, 23 N. J. Eq. 514. See also Benjamin, Sales, 4th ed. § 89, note c; *Gowing v. Knowles*, 118 Mass. 282.

It was clearly the intention of both parties that the whole of the contract should be in writing.

NOTE.—See note to Fones Bros. Hardware Co. v. Erb, ante, 383.

18 L. R. A.

The circumstance that the parties intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to an agreement.

Pollock, Cont. 5th ed. p. 43, citing *Ridgway v. Wharton*, 6 H. L. Cas. 238, 284, 268, 305. See also *Lord Blackburn*, in *Richardson v. Gray*, L. R. 3 App. Cas. 1151; *Lewis v. Brass*, L. R. 3 Q. B. Div. 667.

The contract which the plaintiff alleges was made by the building committees was never approved by the directors as required by the vote of the stockholders under which the committee were appointed, and from which they derived their authority.

The approval required by the vote is the approval of the directors as a board.

This has been said to mean that it should be the vote of a majority of a quorum at a regular and legal meeting of the board.

1 Morse, Banks & Banking, 3d ed. § 124.

The assent of a majority of the directors, expressed by them individually, and not at a regular meeting of the board, is not sufficient to confer upon the cashier authority to do any act which he would not have authority to do unless it was conferred upon him by the directors.

Elliot v. Abbot, 12 N. H. 549. See also *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 207; *Edgerly v. Emerson*, 23 N. H. 559; *Ft. Scott First Nat. Bank v. Drake*, 35 Kan. 564; *Tenney v. East Warren Lumber Co.* 43 N. H. 343; *Corbett v. Woodward*, 5 Sawy. 408; *Baldwin v. Canfield*, 26 Minn. 43; *Ang. & A. Corp.* § 504; *Junction R. Co. v. Reeve*, 15 Ind. 237; *Barcus v. Hannibal R. & P. Pl. Road Co.* 26 Mo. 102; *D'Arcy v. Tamar, K. & C. R. Co.* 4 Hurlst. & C. 468; *Wood's Field, Corp.* § 209, and cases cited.

When authority is conferred upon two or more agents to represent their principal in transaction of business of a private nature, the rule is that such agency will be presumed to be joint, and can be executed only by all of them jointly.

Mechem, Ag. § 77, and cases cited. See also *Kuifer v. Augusta South Parish*, 12 Mass. 185, 189, note; *Sutton First Parish v. Cole*, 20 Mass. 232, 243; *Copeland v. Mercantile Ins. Co.* 6 Pick. 197, 201; *Story*, Ag. § 42; *Story*, Cont. § 208, and cases cited; *Wharton*, Ag. § 140, and cases cited.

C. Allen, J., delivered the opinion of the court:

There was sufficient evidence to warrant the finding that the members of the committee on building, who were present at the conference of March 15, purported to make a contract on behalf of the defendants, by which they agreed to accept the lowest bid, in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case. The presiding justice, in his charge to the jury, called attention to the distinct difference in the testimony introduced on the one side and on the other. Five different buildings had been selected by the architects and the building committee of the defendants, to whom written notices had been sent, requesting bids for the defendant's proposed new building. To each

of these a copy of the specifications was afterwards delivered, to which was attached a "notice to bidders," containing the terms of the bidding. After an examination of these documents, four of the selected builders declined to submit bids. A conference was thereupon invited and had, between the builders and the building committee, at which there was a full discussion, and certain changes from the terms of the "notice to bidders," and from the specifications, were agreed upon; and the builders agreed to submit bids. In respect to one particular, which has become material, the testimony is somewhat at variance as to what was the result of this conference. The "notice to bidders" contained the two following provisions: "The work to be let to the lowest and best bidder upon his executing to the Boston Chamber of Commerce a good and sufficient bond," etc. "The building committee of the Chamber of Commerce reserves the right to reject any and all bids." These provisions were the subject of discussion at the conference. All the witnesses agree that the words "and best" were to be struck out of the first clause. The plaintiff contends that the last clause was modified by an agreement that in case the building should be erected substantially in accordance with the plans and specifications then submitted, the contract should be given to the lowest bidder among the five selected builders. The defendant contends that the committee only agreed to give the contract to the lowest bidder among the builders, if any of their bids under the competition should be accepted; but that they did not surrender the right to reject all of the bids and open a new competition. The plaintiff offered testimony tending to support his view, which was met by testimony offered by the defendant tending to support the contrary view. This testimony was all submitted to the jury, under instructions to which no exception was taken; and their verdict sustained the view contended for by the plaintiff.

There can be no doubt that it was competent in law for the parties by an oral agreement to vary the terms of the "notice to bidders." This would be so even if that notice had expressed the terms of a concluded contract. *Burtlett v. Stanchfield*, 143 Mass. 894, 2 L. R. A. 625. But it was only a proposal which was never accepted as it originally stood; and it is not contended that there was anything in the nature of it to make it legally impossible for the final contract between the parties to be expressed and represented partly by the writing and partly by additions or changes orally agreed to.

The defendant, however, contends that an examination of the evidence shows clearly that both parties to the conference understood that the terms on which bids should be invited were to be expressed in writing, and that they were then and there undertaking to do no more than to settle the terms in which a future invitation should be expressed; so that the notice to bidders, subsequently sent, must be taken to embody all the terms upon which the bids were to be made. This proposition is controverted by the plaintiff, and it does not seem to us that it can be said to be clearly established. No witness testified that there was to be a new written or printed notice embodying the new terms, which had been settled upon. No one of the

builders testified that he accepted the new notice as having the effect contended for by the defendant. On the other hand, the plaintiff testified that he did not think he read it, but did not remember. The specifications attracted his chief attention. Mr. Woodbury testified that he did not remember whether there was any change in the notice to bidders. The several bidders apparently proceeded with their estimates without waiting for any new statement of terms, and when it came, no one of them appears to have treated it as embodying all the terms of a new proposal for bids. Indeed it plainly did not do so. One of the terms upon which there was no dispute was that the bids should be opened in the presence of all the bidders. There was a reason for insisting on this stipulation. The original notice to bidders provided for a delivery of the bids signed and sealed to the architects; but there was a distrust of the fairness of the architects. Mr. Lothrop, in his letter of March 12, declining to submit a bid under that notice, mentioned as one objection that the proposals should be opened in the presence of the bidders. At the conference this letter was read, and this stipulation, according to the testimony of the plaintiff, and of Mr. Lothrop, was expressly agreed to, and no witness said anything to the contrary. All agreed that the letter was read and its objections commented on, one by one. Nor does it appear that the terms of the new notice were fixed by the committee. The plaintiff asserts that it was prepared by one of the architects, who was not present at the conference. So far as it appears, the jury might properly find that both the committee and the builders rested upon what had been said and done at the conference.

The defendant further contends that the building committee were joint agents of the defendant, and that the four members who were present at the conference of March 15 could not execute the power which was delegated to the whole committee consisting of five members, jointly. It does not clearly appear that this was taken at the trial and it is not noticed in the charge of the presiding judge; but we have considered it. Where special agents are appointed to act jointly in the execution of a particular power, it has often been held that the action of all is necessary, in order to execute the power properly. This rule, however, is subject to many qualifications or exceptions. It is well understood that public agents may usually act by a majority. So also it has been settled that a majority of the directors of a corporation constitute a quorum, and a majority of the quorum may act. *Sargent v. Webster*, 13 Met. 497, 504; *Edgerly v. Emerson*, 23 N. H. 555; *Wells v. Railway White Rubber Co.* 19 N. J. Eq. 402. Generally speaking, a committee of a corporation is subject to the same rules as the directors. *State v. Jersey City*, 27 N. J. L. 493; *Junkins v. Doughty Falls U. School Dist.* 39 Me. 220. It would be very inconvenient in practice if a committee of this character, whose duties involve many acts in carrying out the general purpose of their appointment, could do nothing if a single member should be absent. There is sufficient precedent for holding that a majority may act, and such is the better rule. *Kupfer v. Augusta South Parish*, 13 18 L. R. A.

Mass. 185; *Damon v. Granby*, 2 Pick. 345; *Hayward v. Pilgrim Soc.* 21 Pick. 275, 277; *Haven v. Lowell*, 5 Met. 35, 42; *Weymouth & B. Fire Dist. v. Norfolk County Comrs.* 108 Mass. 142.

Moreover, there was evidence from which the jury might infer the assent of Mr. Speare, the absent member of the committee, to what was done by his associates. He went away temporarily, to New Orleans, leaving the business in their hands. But on his return it expressly appears that he had a conference with them, or with some of them, and that they undertook to tell him what had been done. He denies, to be sure, that what they told him was in accordance with what the plaintiff contends and what the jury have found to be the fact. The significant fact, however, that they undertook to tell him the result of the conference in respect to the right of the committee to reject any and all bids is testified to by Mr. Speare. He says: "They told me they had expressly reserved that" if, in point of fact, the reservation of this right was accomplished with the qualification that they would accept the lowest bid in case they should build substantially in accordance with the plans and specifications submitted, the jury might think it a natural inference that at that time, before any controversy had arisen as to accepting the plaintiff's bid, Mr. Speare's associates told him all that had been agreed to on this head, though Mr. Speare had forgotten a part of it at the time of testifying. Mr. Lothrop's testimony tends to support such an inference. He said: "Before the meeting I stated to Mr. Blaney and Mr. Speare that in my opinion the right to reject any and all bids passed (ceased?) after they had selected five from the many mechanics who had been recommended; and I was assured by them that if any one of these parties whom they had selected, and whom they supposed to be responsible, should be the lowest bidder, his bid would be accepted, and it was on that condition that I estimated, and I should not have figured on any other." He further testified that in a private conversation, perhaps a different one before that meeting, Mr. Speare said he would not consent to give up the right to reject all bids. It is further to be observed that the chief reason assigned by the members of the committee who were present at the conference, why they did not wish to give up the right to reject any and all bids, was that they were not willing to be bound absolutely; that the cost of the building might be too much for their means, so that a substantial change of plan might be necessary, or possibly the erection of the building given up entirely; that the lowest bid might be entirely above the views of the committee, so that they were unwilling to accept it unconditionally. Mr. Speare himself testified that he gave to Mr. Lothrop two reasons why the committee would not give up the right to reject all bids. The first was, that the lowest bid might be a sum which the directors would not think advisable to spend to erect a building. The second was, that it was the directors who would be the final arbitrators whether the committee should award the contract, and therefore the committee would have no right to give up the right to reject any and all bids. Mr. Lothrop,

on the other hand, testified very explicitly and in detail, that while Mr. Speare in conversation had mentioned the names of the committee to him, he (Mr. Lothrop), did not know then, nor at the time of testifying, whether the action of the committee must be approved by any other board or body. Looking at all the testimony, if the objection now urged had been distinctly presented as a question of fact at the trial, it must have been left to the jury to determine whether Mr. Speare assented to the terms of the contract, by which (as found by the jury) his four associates purported to agree to accept the lowest bidder, in case the building should be built substantially in accordance with the plans and specifications submitted. Their finding that the contract was approved by the directors must have involved the finding that it was approved by Mr. Speare. And this finding might well be reached without implying any intentional misstatement on his part.

The remaining questions are, whether there was sufficient evidence to warrant the second and third findings, or either of them, that such contract, if made by the committee, was approved by the directors, and was within the ostensible authority of the committee. If either of these was supported by the evidence, it is enough for the plaintiff's purposes, and most, if not all, of the evidence relating to the second finding bears also upon the third. The plaintiff contends that it was within the ostensible authority of the committee to fix the terms upon which it would receive bids, and to make the agreement which is embodied in the first finding of the jury, without any reference to an approval by the directors. He urges that this was within the ordinary province of a building committee; and that, in this instance, the directors knew that there was to be a competition for bids, that this competition was to be limited to five selected builders, and that the committee would fix the terms of it; that the directors were well aware that the committee were going on to attend to all these matters, that a vote had already been passed by the directors authorizing the committee to make leases in the new building, that they also knew that the architects had been selected, that the plans were hanging up in the office, that the erection of the new building was the most important subject which the board of directors or the Chamber of Commerce had under consideration during this period; that it was a subject of constant talk; that no director ever objected to the committee's undertaking to fix the terms of the competition among the builders, or questioned its powers to do so, till after a letter from the plaintiff's attorney threatening an action at law. There was testimony in support of these various propositions. So far as appears, no one of the bidders doubted the power of the committee to act in the matter. The committee assumed to make changes in the terms of the competition at its own will. There is nothing to show any suggestion to any of the bidders in respect to the need of consulting the directors, except in Mr. Speare's testimony already referred to, of his conversation with Mr. Lothrop. The notice to bidders held out the building commit-

tee as having the power to act in the premises. No mention of the directors was made in it. The board of directors had regular monthly meetings. Mr. Speare was president of the board, and was upon the building committee. He testified: "It was known to the directors, in a general way, that specifications, notice to bidders, and other details preliminary to obtaining bids and making the contract were being attended to by the committee and the architects." "Was it not the understanding of the directors that there was to be a competition? Yes, sir. How was that known to them? Simply in a general way; I presume at a meeting of the directors I told them." He added, later, that the board of directors knew that the committee was trying to get bids and that no effort was made to inform bidders that they could not safely deal with the committee. According to the strict letter of the original vote, the committee could not even procure plans and specifications, except subject to the approval of the directors. It was allowed, however, not only to procure plans and specifications, but to employ the architects, without formally consulting the directors.

Without dwelling further upon the details of evidence, the jury might properly find that the committee itself believed that it was authorized to go on as it did without consulting the directors as to the details, and that the directors were aware in a general way of what the committee was doing. It seems to us that the jury, as a result of the whole testimony, might properly come to the conclusion that the contract was within the ostensible authority of the committee, and that the bidders had a right to assume that the defendant would be bound by the contract of the committee as to the terms of the bidding.

The doctrine as to the ostensible authority is thus stated in *Bronson v. Chappell*, 79 U. S. 12 Wall. 681, 683, 20 L. ed. 436: "Where one without objection suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner." Circumstances may warrant an inference that acts of a committee openly done and extending over a considerable period of time were known and assented to by those who appointed the committee. The directors represented the corporation, and if the directors knew, and by silence acquiesced in the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors. This was clearly left to the jury by the presiding judge in terms to which the defendant did not except, and which appear to be unexceptionable. The decisions cited by the plaintiff afford various illustrations of the application of the rule of law as to

apparent authority in an agent. The rule itself is not open to doubt. *Fay v. Noble*, 12 Cush. 1, 17, 18; *Lester v. Webb*, 1 Allen, 84; *Ayer v. R. W. Bell Mfg. Co.* 147 Mass. 46, 6 New Eng. Rep. 329; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26

L. ed. 707. See also *Case v. Citizens Bank of Louisiana*, 100 U. S. 446, 454, 25 L. ed. 695, 698. The defendant does not now insist that the evidence did not warrant the fourth finding of the jury.

The result is, that there should be—
Judgment for the plaintiff on the finding.

DELAWARE CHANCERY COURT.

William G. BRYAN *et al.*

v.

Rebecca P. MILBY.

(6 Del. Ch.)

No obligatory trust is created by a will giving all of testator's estate to his wife with a request that if she does not require the whole of it as a support, she will, at her death, will the remainder to certain other persons named.

BILL filed in Kent County by the children of Charles A. Bryan to establish a trust in certain money alleged to have been loaned to defendant by Mary R. Bryan, deceased, and to recover such money for the benefit of com-

plainants, the alleged *cestuis que trustent*. *Bill dismissed.*

The case sufficiently appears in the opinion. *Mr. J. Alexander Fulton*, for complainants:

Precatory words in a will create a trust. But the objects of the bounty must be sufficiently described, and the property sufficiently defined.

2 Bouv. L. Dict. 364.

Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out, with sufficient certainty and clearness, both the subject matter and the object or objects of the intended trust.

NOTE.—Will—Precatory words, effect of.

Where a testator devises property absolutely and recommends devisee at his death to leave it in trust to certain of his descendants, and if there be none such then living then to a certain college, no trust is created in favor of the college. *Re Whitcomb's Estate*, 86 Cal. 265.

Where property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence. *Colton v. Colton*, 127 U. S. 314, 32 L. ed. 144; *Hess v. Singler*, 114 Mass. 59.

A clause in a will declaring that testator "desires" that a certain disposition should be made of all that remains on his wife's death of the real and personal property given her by previous clauses of the will is merely precatory, and will not prevent her from taking the fee-simple title of the land and the absolute property in the subject of the bequest. *Bills v. Bills*, 8 L. R. A. 896, 80 Iowa, 299.

Precatory words expressive of desire, recommendation, and confidence are not sufficient to convert a devise or bequest into a trust. *Hopkins v. Glunt*, 2 Cent. Rep. 64, 111 Pa. 287.

After an unqualified devise by a testator of his property, no precatory words addressed to his devisee can defeat the estate previously granted. *Ibid.*

Where a testator devised real estate to his widow in fee simple, the words: "I only make this request of her, and only as a request, . . . viz., that in the event she should marry again she will see that the interests of our children in said property are protected,"—the widow takes an absolute estate in the land, and does not hold it in trust for herself and children. *Sale v. Thornberry*, 86 Ky. 266.

Provision giving the whole estate to certain persons, "assuming that they will not fail to do for another son as their fraternal regard may require," does not create a trust and is not an incumbrance on real estate. *Rose v. Porter*, 1 New Eng. Rep. 750, 141 Mass. 309.

18 L. R. A.

When create a trust.

Precatory words are frequently sufficient to create a trust by implication. *Jones v. Jones*, 13 West. Rep. 527, 124 Ill. 254.

They will be held to import a trust when they are so used as to exclude all option or discretion in the party who is to act, when the subject is uncertain. *Maught v. Getzendanner*, 3 Cent. Rep. 866, 65 Md. 527.

Words of recommendation, request, entreaty, wish or expectation will impose a binding duty upon the devisee, by way of trust, provided the testator has pointed out with clearness and certainty both the subject matter and the object of the trust. *Noe v. Kern*, 12 West. Rep. 234, 93 Mo. 367.

The words "wish" and "desire" used as expressing a desire for an act to be done by some person named, may be held to be precatory; but when used to express the intention of the testator, they are mandatory. *Taylor v. Martin* (Pa.) 8 Cent. Rep. 139.

Where the donee of property is "desired" or "requested" by the testator to dispose of that property in favor of others, those words are imperative and their use will create a trust. *Riker v. Leo*, 115 N. Y. 99. See 1 Wms. Exrs. 88; *Vandyck v. Van Beuren*, 1 Cal. 84.

In a will devising a farm to testator's son for his support, thereby indicating that a life estate is intended, and then declaring that if the son should have family the testator desires the estate to go to the use of his children, the word "desire" is mandatory. *Oyster v. Knull*, 187 Pa. 448.

If a testator should desire his wife, at or before her death, to give certain personal estate among such of his relatives as she should think most deserving and approve of, such request would be held to be a legacy among such relatives. *Wheeler v. Lester*, 1 Bradf. 238; *McLachlan v. McLachlan*, 9 Paige, 534, 4 L. ed. 805.

Precatory words in will. See notes to *Slattery v. Wason* (Mass.) 7 L. R. A. 398; *Knox's App.* (Pa.) 6 L. R. A. 353.

Trust created by. *Ibid.*

1 Jarman, Wills, 2d Am. ed. 1849, p. 332; Little & Brown's ed. 1881, p. 335. See also 2 Story, Eq. 2d ed. § 108.

It is plain from the will that the intent of the testator was to provide for the support of his widow during life, and that whatever remained at her death should go to the children of his brother Charles.

In the construction of wills the intention of the testator is the first object of inquiry, and when found it must be fully carried out, and control the disposition of the estate.

Precatory words, when used in a will, are imperative, and must be so regarded.

Where the object and the subject can be discovered from the will itself, or the will and surrounding circumstances, or where the court, by the exercise of its usual powers and functions, can ascertain the subject of the gift and the persons to be benefited, the trust shall not fail because of uncertainty.

1 Jarman, Wills, 2d Am. ed. 1849, p. 332; 2 Story, Eq. § 1068; *Malim v. Keighley*, 2 Ves. Jr. 338; *Wilson v. Major*, 11 Ves. Jr. 205; *Wright v. Atkyns*, 17 Ves. Jr. 255; *Parsons v. Baker*, 18 Ves. Jr. 476; *Briggs v. Penny*, 8 Eng. L. & Eq. 281; *Coates' App.* 2 Pa. 129; *McKonkey's App.* 13 Pa. 253; *Pennock's Estate*, 20 Pa. 268; *Ingram v. Fraley*, 29 Ga. 553; *Henderson v. Blackburn*, 104 Ill. 227; *Bull v. Bull*, 8 Conn. 48; *Hall v. Otis*, 71 Me. 326.

This is a Virginia case. The testator was domiciled there at the time of his death. The will was proved there. The estate was there. The rule in such cases is that the law of the testator's domicile shall direct the court of distribution.

Wms. Exrs. 366.

The rule above contended for is the one adopted and acted upon in Virginia.

Harrison v. Harrison, 2 Gratt. 1.

That the gift over was subject to accretion or diminution is immaterial.

Pierson v. Garnet, 2 Bro. Ch. 38; *Horwood v. West*, 1 Sim. & Stu. 387; *Knight v. Knight*, 3 Beav. 148.

Mr. Nathaniel B. Smithers, Sr., for defendant:

Wherever a bequest is made in terms importing an absolute gift, precatory words will never be construed as creating a trust, if either they ought not upon the whole will to be considered as imperative, or if the subject matter of the request be uncertain, or if the objects intended to be benefited be not clearly ascertained. If in any gift there is manifest an intention to give to the devisee a right or power to dispose of the property so given, and by using such right to leave more or less or nothing upon which such trust would operate, then such precatory words will never be construed as imperative.

This principle is found in Lewin on Trusts, 184; and *Harding v. Glynn*, 1 Atk. 469, 2 Lead. Cas. Eq. 4th Am. ed. 1079-1082, 1086, 1087, and it is sustained by the adjudicated cases.

Wynne v. Hawkins, 1 Bro. Ch. 179; *Pierson v. Garnet*, 2 Bro. Ch. 328; *Sprange v. Barnard*, 2 Bro. Ch. 585; *Malim v. Keighley*, 2 Ves. Jr. 338; *Pushman v. Filliter*, 8 Ves. Jr. 7; *Heneage v. Andover*, 10 Price, 230; *Horwood v. West*, 1 Sim. & Stu. 387; *Knight v. Knight*, 3

Beav. 171; *Cowman v. Harrison*, 10 Hare, 284; *Parnall v. Parnall*, L. R. 9 Ch. Div. 96; *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321.

In the decisions of the chancery judges of England for more than a century there is an unbroken assent to the proposition that, when in a will there has been an absolute gift and a subsequent bequest over of an unused residue, it is void, and where the disposition over has been attempted to be made by the agency of a precatory trust it is equally void, and that this always occurs when the terms of the first bequest show that the person to whom it was given had the right to spend the property out of which the gift over, whether direct or precatory, was to arise.

The only change which has been made in England is the modification of the doctrine of the earlier cases in regard to the presumption with which the judges approached the subject of construction. It was at first held that words of desire and confidence had at least a quasi technical meaning and force and prima facie imported a trust unless controlled by other expressions. This was unsatisfactory to many of the ablest judges.

See *Wright v. Atkyns*, 1 Ves. & B. 313; *Salé v. Moore*, 1 Sim. 534; *Heneage v. Andover*, 10 Price, 230.

As the result of this extensive and increasing dissatisfaction the current of judicial sentiment has changed and in modern decisions the leaning of the court has been distinctly against the establishment of precatory trusts.

See *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321.

Such being the doctrine of the English courts, it will be found that the American decisions are in harmony with them.

See *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1069; *Coates' App.* 2 Pa. 129; *McKonkey's App.* 13 Pa. 253; *Pennock's Estate*, 20 Pa. 268.

The *cestuis que trust* could not have filed a bill alleging that the widow was extravagantly wasting the fund and asking that it be impounded and an allowance made to her.

Wynne v. Hawkins, 1 Bro. Ch. 179; *Pushman v. Filliter*, 8 Ves. Jr. 7; *Sprange v. Barnard*, 2 Bro. Ch. 585; *Mussoorie Bank v. Raynor*, *supra*.

Even under the ancient stringent rule which made the use of precatory words presumptive evidence of the intention to create a trust, the will of William A. Bryan imposed upon his widow no obligatory trust as to the bequest to her,—and much more, under the modern canon of interpretation, by which words of desire, request, or expectation are deprived of their former technical signification and are construed according to their ordinary meaning, such bequest will be held to have been an absolute gift.

With this conclusion the law of Virginia, the domicile of the testator, is in harmony.

May v. Joyner, 20 Gratt. 692; *Carr v. Eftenger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251.

Saulsbury, Ch., delivered the following opinion:

An agreement between the solicitors for the plaintiffs and defendant respectively was filed in this cause before the argument thereof began, which is in the following words: "It is agreed by the solicitors for the complainants

and defendants respectively, in order to save costs and expenses consequent upon taking testimony, that as if upon demurrer to so much of the complainant's bill as alleges that by the bill of William A. Bryan, the gift to his widow, Mary R. Bryan, was upon an obligatory trust in favor of the complainants, it shall be first argued whether any such trust was by the said will created; and if it shall be finally determined that such trust was thereby created, then the parties shall be at liberty further to proceed in the cause and take testimony in support of their respective allegations of facts and go on to hearing."

The only question for me to decide, therefore, is, Was the gift to his widow, Mary R. Bryan, by William A. Bryan upon an obligatory trust in favor of the complainants?

That gift was as follows: "I give and devise to my wife, Mary R. Bryan, all of my estate both real and personal. And I do hereby authorize and direct my executrix hereinafter named, to sell my real estate as soon as it can be sold to advantage and to invest the money in good stocks and bonds. And I do request my wife if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother, Charles A. Bryan, of Cecil County, Maryland. I do hereby constitute and appoint my wife, Mary R. Bryan, sole executrix to this my last will and testament, with the request to the court in which she may qualify that no security may be required of her and no appraisal be made of my estate."

This is the first case, so far as I know, in respect to what is called precatory trusts, which has come before the courts of Delaware for decision. I am not therefore embarrassed by authority here upon the subject.

The tendency of modern decisions, however, is, not to extend the rule or practice, which from words of doubtful meaning deduces or implies a trust.

In the case of *Musoorie Bank v. Raynor*, L. R. 7 App. Cas. 321, a man gave his widow the whole of his real and personal property, feeling confident "that she will act justly to our children, in dividing the same when no longer

required by her. The privy council, in deciding in favor of the widow, expressed the opinion that "the current of decisions now prevalent for many years in the court of chancery shows that the doctrine of precatory trusts is not to be extended."

Lindley, L. J., in a subsequent case, after quoting from the judgment in the case of *Musoorie Bank v. Raynor*, *supra*, remarked: "I am very glad to say that the current has changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." But I am not going to enter into any extended argument in respect to the principles involved in the case.

The principles have been fully and ably discussed by the solicitors representing the parties plaintiff and defendant. Their arguments were marked by extraordinary research and ability.

I content myself therefore by simply saying that there is no precatory trust in the will of William A. Bryan in favor of the plaintiffs.

The subject of the gift claimed as precatory was not certain. The testator, William A. Bryan, gave and devised to his wife, Mary R. Bryan, all of his estate, both real and personal, after the payment of his debts, and only requested his wife if she should not require the whole of his estate, that she should will at her death, not the property devised to her, but the remainder, to the children of his brother, Charles A. Bryan of Cecil County, Maryland.

There might be, or there might not be, any remainder of his estate which could be enjoyed after his wife's death by any person whomsoever. A necessary ingredient or characteristic, therefore, in a precatory devise or gift is wanting in this case. There was nothing that this court could have ordered impounded if application for that purpose had been made to it.

I must therefore decide, and I do so decide, that the gift to Mrs. Bryan was absolute and unconditional, and not upon an obligatory trust in favor of the complainants.

The bill of the complainants is therefore dismissed with costs.

NEBRASKA SUPREME COURT.

George W. HEPLER, *Piff. in Err.*,

Henry H. DAVIS.

(.....Neb.....)

* A judgment was recovered against A in the State of Illinois, in the year 1879, and

*Head note by MAXWELL, J.

A soon afterwards removed to this State, and has resided herein continually ever since. In 1888, the judgment was revived in Illinois, without personal service upon A in that State, or an appearance by him in the action, and suit was thereupon brought on the revived judgment in Nebraska. *Held*, that the alleged revivor of the judgment in Illinois did not affect the running of the Statute of Limitations in this State, as the court had no jurisdiction over the defendant

NOTE.—The doctrine of the principal case illustrated.

The doctrine of the principal case has been sustained and recognized from a very early period. In the case of *Bank of the United States v. Donnelly*, 33 U. S. 8 Pet. 372, 8 L. ed. 978, the court held that "remedies are to be governed by the laws of the country where the suit is brought." The nature, validity, etc., of the contract may be ad-

mitted to be the same in both States; but the mode by which the remedy is to be pursued, and the time within which to be brought, may essentially differ. The laws of the State where the action is brought must govern the limitation of the suit.

The same principle is established by the court in *Pearsall v. Dwight*, 2 Mass. 84, and *Byrne v. Crowninshield*, 17 Mass. 55, where it is shown that the encroachment upon the *lex fortis* is inconsistent

and could make no order to affect him personally.

(July 2, 1891.)

ERROR to the District Court for Fillmore County to review a judgment in favor of defendants in an action brought to compel payment of a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Billings & Billings, for plaintiff in error:

By the common law of our county the Statute of Limitations commences to run at the time of the judgment of revivor.

Littleton, § 805.

Lord Coke observes in commenting upon this passage in Littleton, 290, b: "So by the writ it appeareth that the defendant is to be warned to plead any matter in bar of execution and therefore albeit it be a judicial writ."

Every writ whereunto the defendant may plead, be it original or judicial, is in law an action.

Pulleney v. Townson, 2 W. Bl. 1226; *Kirkland v. Krebs*, 84 Md. 98.

It is hardly to be supposed that the law intended to allow the plaintiff to revive his judgment by *scire facias* and not permit it to be used as evidence of indebtedness in an action of debt upon it in any other State. If a judgment is good for anything it is certainly good as an evidence of indebtedness.

See U. S. Const. art. 4; *Packer v. Thompson*, 25 Neb. 688.

In an action based on a judgment of revivor from another State the Statute of Limitations begins to run from the date of such revivor and not from the date of the original judgment.

Fagan v. Bently, 32 Ga. 534.

A court that has authority to render a judgment in the first instance certainly retains the power where no appeal has been taken to keep such judgment alive until it is satisfied.

Dennis v. Omaha Nat. Bank, 19 Neb. 677; *Mitchell & R. Furniture Co. v. Sampson*, 40 Fed. Rep. 805; *Wegman v. Childs*, 41 N. Y. 159; *Uthaffer v. Stewart*, 71 Pa. 170; *Woodward v. Baker*, 10 Or. 491.

This can do the defendant no injustice because he was charged with the knowledge that the court which rendered the original judgment would have power to keep it alive until paid because such was the law at that time.

Elaesser v. Haines, 52 N. J. L. 10.

Mr. F. B. Donisthorpe, for defendant in error:

A judgment rendered in the State of Illinois becoming dormant may be revived by service by publication, whereby it will become of

full force and effect against the defendant in that State; but not in this State, unless personal service of notice of the proceedings had to revive said judgment be had upon said defendant.

Tessier v. Englehardt, 18 Neb. 177.

The judgment, as revived, is simply a continuation of the vitality of the original judgment with all its incidents from the time of its rendition. And not, as plaintiff in error would have it, a new judgment.

Eaton v. Hasty, 6 Neb. 424.

The defendant having resided in this State for eight years after the original judgment against him was rendered, and before the commencement of this action on said judgment revived, our Statute of Limitations prevents such action from being maintained in this State.

Neb. Code Civ. Proc. § 10; *Marr v. Kilpatrick*, 25 Neb. 107.

Maxwell, J., delivered the opinion of the court:

In January, 1879, the plaintiff recovered a judgment against the defendant in the State of Illinois, the defendant being personally served with summons. Soon after the recovery of the judgment the defendant removed to this State, and has continued to reside here to the present time. On the 12th of October, 1888, the judgment in Illinois was revived in that State without jurisdiction of the person of the defendant. In December following this action was brought in the District Court of Fillmore County, upon the judgment so alleged to have been revived. On the trial of the cause the court found as follows: "That on the 7th day of January, 1879, plaintiff recovered judgment against the defendant in the Circuit Court of Livingston County, Ill., on personal service, said court being a court of general jurisdiction, for the sum of \$180.65, and \$49.25 costs of suit, together with interest at six per cent per annum, in an action then pending in said court between said parties. That on the 12th day of November, 1888, said plaintiff obtained a judgment of revivor in said court as by the law of said State provided, which said law is as follows, viz.: Sec. 27. *Scire Facias*. It shall not be necessary to file a declaration in any *scire facias* to revive a judgment, or foreclose a mortgage, in any court of record in this State; and in any such case of *scire facias* to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of court, out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the State, or is concealed within the State, so that process cannot be served on him, and stating the place of residence of such de-

with the necessity and convenience of every State in controlling remedies in its own courts.

Though the Statute of Limitations of the State where the parties resided, and where the debt was contracted, had barred the remedy, yet, when resort was made to the courts of another State, the statutes of the latter must govern that remedy. *M'Elmoyle v. Cohen*, 38 U. S. 13 Pet. 312, 10 L. ed. 177.

It has been held by the Supreme Court of Arkansas that the Statute of Limitations is not a bar to the revival of a judgment by writ of *scire facias*. 13 L. R. A.

Montgomery v. Brittin, 23 Ark. 322; *Brearly v. Peay*, Id. 172.

Code doctrine regarding the revival of judgments.

A judgment in a civil action may be revived by filing a petition in the action alleging the time the judgment was rendered, that it remains unsatisfied in whole or in part, stating the amount it is claimed the judgment should be revived for; which petition shall be verified, as complaints are required to be by the Act. Colo. Code, § 241; N.Y. Code Civ. Proc. 428.

defendant, if known, or that on due inquiry his place of residence cannot be ascertained, then, in such case, notice to the defendant may be given by publication and mail in the same manner as is provided by statute for notice in like cases in chancery." Chap. 110, Rev. Stat. Ill. 1888. "Sec. 25. Revival of Judgment by *Scire Facias*. Judgments in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after date of such judgment, and not after." Chap. 88, Id. "Notice by Publication, etc. Sec. 12. Whenever any complainant or his attorney shall file in the office of the clerk of the court in which his suit is pending an affidavit showing that any defendant resides or hath gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and stating the place or residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper printed in his county, and, if there be no newspaper published in his county, then in the nearest newspaper published in this State, containing notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section shall be evidence." Chap. 22, Id. "That no personal service of notice was had of said proceedings upon said defendant who then and now and for eight years last past

has continually been a resident of Fillmore County, Neb., and he had no notice or knowledge in any manner of said proceedings. It is therefore considered by the court that said cause of action did not accrue within five years next before the commencement of this action, and is therefore barred by the Statute of Limitations, and that the plaintiff's cause of action be and the same is hereby dismissed."

In *Packer v. Thompson*, 25 Neb. 688, the plaintiff in error had removed from Iowa to this State after a judgment had been recovered against him in that State. Eight years afterwards he returned to Iowa on a visit, when he was personally served with a conditional order of revivor, and the action afterwards revived. An action was thereupon brought on the revived judgment in this State, and the action was sustained. That case, however, differs materially from this. The judgment rendered in Illinois had no extraterritorial force. If it was sought to collect it in this State by due course of law, an action must be brought thereon, and service had upon the defendant, and a defense such as payment, release, the Statute of Limitations, etc., is available. An action upon a foreign judgment must be brought within five years, or it will be barred; and the judgment of a sister State is, within the meaning of the Statute of Limitations, a foreign judgment. Neither did the alleged revivor, there being neither an appearance by nor service on the defendant, remove the bar of the Statute, as the writ could have no effect beyond the limits of the State where issued. The bar of the Statute of Limitations, therefore, was not removed by the attempted revivor, and the action is barred.

The judgment is right, and is affirmed.

The other Judges concur.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

Philip A. SCHLEY

v.

Charles H. P. COLLIS *et al.*

(....Fed. Rep.....)

1. The assent of executors to a specific legacy is presumed where the legatees are in possession under it.

2. He who accepts a benefit under a will must adopt the whole contents of the in-

strument renouncing every right inconsistent with it.

3. An execution under a judgment against executors as such cannot be levied on land of which a life tenant under the will had taken possession with the executors' assent before the judgment was rendered.

(June, 1891.)

SUIT to enjoin the sale of certain property under an execution. *Injunction granted.*

NOTE.—The doctrine of elections as applied to wills.

It is a familiar principle of equity jurisprudence that one who is the recipient of a beneficial interest under a will is assumed to have ratified the other recitals of the instrument and the courts will not allow him to set up a cause of action of his own, however well founded, which has a tendency to defeat or in any way impair the full operation of the will. *Collins v. Woods*, 68 Ill. 285; *Morrison v. Bowman*, 29 Cal. 387; *Thellusson v. Woodford*, 13 Ves. Jr. 209; *Hyde v. Baldwin*, 17 Pick. 308; *Brown v. Ricketts*, 3 Johns. Ch. 553, 1 L. ed. 714; *Cox v. Rogers*, 77 Pa. 180; *Churchman v. Ireland*, 1 Russ. & M. 250; *Wise v. Rhodes*, 84 Pa. 402. 13 L. R. A.

It is an exceedingly stubborn principle that no one shall be permitted to claim under, and adverse to, a will. If the testator assumes to dispose of property belonging to a devisee or legatee, the latter, accepting the benefit, must also make good the testator's attempted disposition." *White v. Brokaw*, 14 Ohio St. 380. See also *Havens v. Sackett*, 15 N. Y. 365; *Ditch v. Sennott*, 5 West. Rep. 162, 117 Ill. 362.

In 1 *Jarman, Wills*, 386, the doctrine of election is stated thus: "That he who accepts a benefit under deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it." See also *Havens v. Sackett*, *supra*.

The facts are stated in the opinion.

Mr. W. W. Montgomery for plaintiff.

Messrs. Charlton & Mackall for defendants.

Speer, J., delivered the following opinion:

This case depends upon the following statement of facts: One Anderson was the assignee, under the laws of New York, of the estate of DeLeon, and committed a devastavit thereon. William Schley, late of this district, was the surety upon the assignee's bond, and after the death of Schley, who died testate, Collis, who had been substituted as assignee of this New York estate, brought suit there on the bond of the defaulting assignee and obtained judgment for the sum of \$7,000. The record of the proceedings there was brought to this district, and suit instituted in the circuit court, at common law, against the executors of William Schley, to wit: Thomas M. Norwood and J. W. Schley on their testator's obligation as surety for Anderson, assignee, and a verdict and judgment was rendered against them, as executors. The execution was issued upon that judgment, and levied upon a certain estate known as "Richmond Hill," near Augusta, claimed by the complainant in the bill now before the court, which was duly advertised for sale. This complainant is Philip A. Schley. He was the brother of William Schley and he claims an estate for life in Richmond Hill by virtue of the following item of the will of William Schley:

"Item 5th.—I direct that my old home known as Richmond Hill in Richmond County, Georgia, shall be held by my executors as trustees for, and during the lives of my sister Mary Ann Haines, and my brother Phillip A. Schley, and during the life of the survivors of them. My purpose being to give them a home as long as they live."

He insists that the estate cannot be lawfully sold for the debts of William Schley, sued to judgment, after the specific legacy made by the clause of the will above quoted was assented to by the executors, and after the property had long been in his possession. He had been in possession of this property long anterior to the death of William Schley; and continuously since then. It is in dispute whether he was there by the express assent of the executors, or as a tenant by sufferance, but in the view the court has of the law that fact is not important to be settled at this time. The rule as announced by the Supreme Court of Georgia in *Parker v. Chambers*, 24 Ga. 527, may be deduced from the following extract from that decision:

"The objection that no evidence was submitted to the jury to prove the assent of the executor to the legacy to Chloe Parker and her children cannot be sustained. The executor allowed the property to remain in the possession of the tenant for life, and that was an assent to the entire legacy. It was in her possession at the death of the testator, and remained there, with the assent of the executor of course.

In *Jordan v. Thornton*, 7 Ga. 520, the court observes: "It was further claimed before the court below that there was no assent to the legacy by the executor proven, and therefore the plaintiff had no right of action. The court held that assent might be implied from possession; and as there was some evidence of possession, both in the tenant for life and in the plaintiffs after her death, he left that question to the jury. And this view of the case we affirm. Assent to a legacy is necessary to enable a legatee to sue at law for his legacy. It is not necessary to show an express assent; it may be implied from facts and circumstances. The assent, it is true, must be clear and unambiguous. The possession of the property willed does make out a clear case of assent by implication, — citing 2 Wms. Executors, p. 986; Mathews, Presumptions, 267; 3 Preston, Abstr. 2d ed. 145; *Richardson v. Gifford*, 1 Ad. & El. 52, and other authorities.

For the purposes of this investigation therefore the court concludes that the assent to this specific legacy was made by the executors.

And moreover these executors may not be heard to deny this. It is in evidence that one of the executors took a benefit under the will. He thereby received certain property and mortgaged it for his purposes. That mortgage is in evidence, and it concludes the executor, because it contains recitals which show that the executor relied for his title to the mortgaged property upon the will itself; and the authorities seem to be plain and conclusive, that he who accepts a benefit under a will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. *Hainer v. Legion of Honor*, 78 Iowa, 245; *Eichelberger's Estate*, 135 Pa. 160; *Scholl's App.* (Pa.) 17 Atl. Rep. 206; *Vanzant v. Bigham*, 76 Ga. 759; *Talisferro v. Day*, 82 Va. 79.

All these decisions are comparatively recent, and quite a number of others might be cited in support of that proposition. Indeed the statute law of this State seems to recognize the doctrine without qualification. Ga. Code, pars. 2456-2462.

This rule would seem especially applicable

When a person accepts a legacy, it is an election to stand by the provisions of the will. *Fulton v. Moore*, 25 Pa. 468; *Pennsylvania L. Ins. Co. v. Stokes*, 61 Pa. 136.

Courts of equity adopt the rational exposition of the will, that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. *Story*, Eq. § 1077.

In *Wilbanks v. Wilbanks*, 18 Ill. 19, where a testator devised property belonging to his son to a third person, and in the same will made a devise to the son, it was held that the son must either relinquish his claim to his own property or to the leg-

acy,—that the son might elect which he would take, but he would be concluded by his election. This decision was based on the rule established by the authorities, that a devisee could not at the same time take under a will and contrary to it. The doctrine of election again arose in *Brown v. Pitney*, 39 Ill. 468, and after referring to the authorities bearing upon the question, it was held "that the beneficiary under a will cannot insist that the provisions in his favor shall be executed and those to his prejudice annulled,—he must accept the instrument in its entirety or not at all."

where the legatee is also an executor, who qualifies solemnly as such, to execute the will, and therefore the entire will.

It is clear, therefore, that there was an assent to this specific legacy, and it is equally clear that the assent was distinctly and definitely made with all of its legal effectiveness before the date of judgment, upon which the plaintiff at common law, and defendant here, relies for the enforcement of his rights, and that J. W. Schley, the executor, taking a benefit under the will, may not be heard to deny this. It will follow, therefore, that if the plaintiff in the execution seeks to subject this specific legacy, assented to, as we have seen by the executor, to the payment of his debt, he must adopt a proceeding other than that to which he has resorted. The case of *Baker County v. Moreland*, 20 Ga. 146, is we think sufficient authority for this proposition. The court, *Justice McDonald* delivering the opinion, in that case, makes this announcement: "This is a proceeding at law to subject to the payment of a judgment against the administrator obtained in 1854, a negro man who had been distributed in 1848 to the claimant who was one of the heirs-at-law of defendant's estate. If the legal lien of the judgment upon the property had not attached before the distribution it is not subject thereto, unless there was fraud in the distribution. If the suit on which the judgment was rendered, was pending at the time of the distribution, the question whether the distribution was made to delay and hinder the creditor in the collection of his debt ought to have been submitted to the jury. But the record discloses no such fact.

There is no legal reason why the legal title of the claimant to the property which had passed to him without fraud nearly six years before should be disturbed by the judgment. This property is unquestionably liable, ratably, to pay the plaintiff's judgment, if the administrator has not assets or is not solvent; but it must be subjected by a different kind of proceeding before a tribunal that can bring all the heirs of the estate before it, and compel those who are solvent to contribute, ratably to the payment. If some are solvent, those who are able to pay may be compelled to contribute to the extent of the assets, if necessary, received by them."

It follows, therefore, we think conclusively, that the plaintiff here has no right to single out this specific legacy and fasten his entire debt upon that. The judgment should have been under the pleading "*de bonis testatoris*." Wms. Exrs. 1888, 1889; Ga. Code, 3578.

Specific legacies are favorites of the law. When no specific provision is made for the pay-

ment of the testator's debts in the will, the personal estate is primarily liable. If that is insufficient a lapsed devise may be applied thereto, and if debts still remain specific devises must contribute *pro rata*. *Morse v. Hayden*, 82 Me. 227; *Ruston v. Ruston*, 2 U. S. 2 Dall. 245, 1 L. ed. 366.

It appears that this property was returned for taxes by the plaintiff for seventeen or eighteen years, and it appears that the executors were absolutely silent about it, although they were obliged to make an inventory of the real property lying outside of the County of Chatham, in which their executorship was located. We have the testimony of the ordinary of Chatham County that they made no return whatever to this property, and these facts are all material. On the final trial of this case an interesting question will arise also, upon the proposition of plaintiffs that this creditor could not now subject a specific legacy to the payment of his debt because of an alleged collusion on his part with the executors. He is seeking to enforce the judgment, not against the executors, and there is some evidence which seems to indicate it was understood that the executors would be relieved from the lien of this judgment. We are not prepared to say how important the question is at this time, but if it be true that the executors have been relieved from liability upon this judgment, it may become quite important to the rights of the plaintiff in execution, who is the defendant in this bill. The judgment was taken against the executors as such, and that is conclusive of assets. This is so held in *Demere v. Seranton*, 8 Ga. 47.

The general estate, as we have seen, would be first liable to pay the debts, and if the executors have permitted a devastavit as to the general estate of William Schley, which would be in the first instance liable for this debt, it would be perhaps quite important to determine whether their individual estate would not be liable rather than a specific legacy which they had assented to.

There are several other questions which have been presented in argument, but the court has indicated enough to justify in its opinion the conclusion that this is a case which should be inquired into more carefully upon sworn testimony, taken in the usual manner in equity and upon fuller consideration. It is not one of those cases which should be disposed of on a preliminary hearing.

We think, therefore, that *the injunction restraining the sale under execution should be made permanent*, and the case proceed as usual in equity.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Helena SCHULTZ *et al.*, *Plffs. in Err.*,

v.

John S. BYERS.

(....N. J. L....)

***Excavation by an owner on his own**

*Head note by SCUDDER, J.

land adjoining another's building, causing damage, without his knowledge, or previous notice to him, is evidence of want of care in doing the work.

(*Magie, J., dissents.*)

(August 10, 1891.)

NOTE.—Duty of owner in making excavations.

One cannot, by erecting a building near the extremity of his own land, deprive the adjoining owner of the right of digging in his own soil for a 13 L. R. A.

legitimate purpose, even though the house be thereby ruined. *Radoliff v. Brooklyn*, 4 N. Y. 201; *Quincy v. Jones*, 78 Ill. 237; *Roath v. Driscoll*, 20 Conn. 583. See *Callender v. Marsh*, 1 Pick. 434;

ERROR to the Circuit Court for Hudson County to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiffs' building, which were alleged to have resulted from defendant's negligence in making excavations on his adjoining property. *Reversed.*

Statement by **Scudder, J.:**

The plaintiffs, Helena Schultz and Valentine Schultz, were the owners of a lot of land in Bayonne, Hudson County, upon which there was a building erected on brick piers set from three feet to three feet and a half in the ground. The defendant, who owned the adjoining land, excavated to the depth of seven feet, within three or four inches of the plaintiffs' building, and erected a house thereon. The excavation by the defendant, within the line of his own land, caused the building of the plaintiffs to sink, and it was weakened, cracked, and injured. There was judgment of nonsuit, and exceptions, on which errors are assigned.

Mr. W. W. Anderson for plaintiffs in error.

Mr. De Witt Van Buskirk for defendant in error.

Scudder, J., delivered the opinion of the court:

The declaration is framed on the idea that the plaintiffs' land, dwelling-house, and build-

ing were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived, and the cause was tried on a plea of the general issue and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as it was there tried and decided. It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this State by the case of *McGuire v. Grant*, 25 N. J. L. 356 (1856). As to land in its natural condition, there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of

Wyatt v. Harrison, 3 Barn. & Ad. 871; *Greenleaf v. Francis*, 18 Pick. 117.

A landowner has no right to require the adjacent owner to desist or refrain from improving his own, for his benefit or security. *Bellows v. Sackett*, 15 Barb. 101. See *Partridge v. Scott*, 3 Mees. & W. 220; *Acton v. Blundell*, 12 Mees. & W. 353.

For an excavation causing an injury to the soil in its natural state an action would lie; but without proof of a right, by grant or prescription, in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon. *Gilmore v. Driscoll*, 122 Mass. 207. See *Hay v. Cohoes Co.* 2 N. Y. 162; *Richart v. Scott*, 7 Watts, 460; *Richardson v. Vermont Cent. R. Co.* 26 Vt. 465; *Beard v. Murphy*, 37 Vt. 99; *Shrieve v. Stokes*, 8 B. Mon. 453; *Charles v. Rankin*, 22 Mo. 593; *McGuire v. Grant*, 25 N. J. L. 356; *Massey v. Goyder*, 4 Car. & P. 161; *Humphries v. Brogden*, 12 Q. B. 739; *Gayford v. Nicholls*, 9 Exch. 702.

The opinion of a witness whether ordinary care or diligence is used in digging or excavating an adjoining lot is not proper testimony. *Rogers v. Rhoadback*, 5 N. Y. Legal Obs. 335.

All which can be claimed is that the adjacent owner shall not so dig upon his land as that that of his neighbor shall fall into his pit. If the weight of buildings of late erected by his neighbor on the land cause it to slide, when of its own weight it would not, there is no claim for redress. *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 554.

A land proprietor has a right to assume that the soil of which he is the owner shall be allowed to stand in its natural state; and any interference with that right constitutes an actionable wrong without reference to the question of negligence. *Richardson v. Vermont Cent. R. Co.* *supra*; *Wild v. Ministerley*, 2 Rolle. Abr. 565; *Foley v. Wyeth*, 2 Allen, 131, *Humphries v. Brogden*, *Hay v. Cohoes Co.*, and *McGuire v. Grant*, *supra*.

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Where the complainant has himself erected weighty structures upon his own property, and an abutting owner in attempting to do likewise causes damage and loss, the complaint is remediless as he has directly contributed to the cause of the injury. To recover he must aver and prove negligence and want of skill on the part of the adjoining owner. *Washb. Easem.* § 444; *Charles v. Rankin*, 22 Mo. 593; *Lasala v. Holbrook*, 4 Paige, 169, 3 L. ed. 390; *Elliot v. Northeastern R. Co.* 10 H. L. Cas. 338; *Panton v. Holland*, 17 Johns. 92; *Beard v. Murphy*, 37 Vt. 99.

A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line of his neighbor. *Thurston v. Hancock*, 12 Mass. 229.

The injury usually consists in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit-owner would justify the transfer of a portion of another man's land to his own. *Hay v. Cohoes Co.* 2 N. Y. 162.

The right of lateral support extends only to the soil in its natural condition. *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

It must be regarded as an incident to the land, naturally attached to the soil. *Farrand v. Marshall*, 19 Barb. 383.

Such right does not extend where the owner, by building or otherwise, has increased the lateral pressure upon the adjoining soil. *People v. Canal Board*, 3 Thomp. & C. 277.

The topics of "The Reciprocal Easement of Lateral Support," and "Title in Party-wall and Right to Strengthen and Elevate," are the subjects of extended treatment in *Ray on Negligence of Imposed Duties*, 190.

the work. This is the law as established by the cases prior to that decision. It has remained the unquestioned law in this State since that time, and it has been confirmed by many cases since in other courts. Some of the most recent are very valuable for reference, notably *Gilmore v. Driscoll*, 122 Mass. 199; *Dutton v. Angus*, L. R. 6 App. Cas. 740, L. R. 8 Q. B. Div. 85, where a most thorough examination of the subject will be found. Although this law seems to give the owner of a building put upon his own land, in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining land, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other. Our Statute relating to party walls (Revision, 809), shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining landowners. This Statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep; but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinage of property. The maxim, *sic utere tuo ut alienum non ledas*, is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is that, if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so, not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiff's house was caused to settle, and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiff's house. The special ground of complaint is that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work, is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is *Lasala v. Holbrook*, 4 Paige, 169-173, 8 L. ed. 390-392 (1833). In this case Chancellor Walworth, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building supported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable im-

provement on his own land is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites *Peyton v. London*, 9 Barn. & C. 725, 4 Man. & R. 625; *Walters v. Pfeil*, 1 Mood. & M. 362; *Massey v. Goyder*, 4 Car. & P. 161. In *Peyton v. London* it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord Tenterden says, because of the failure to allege want of notice, the action cannot be maintained upon the want of such notice; supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In *Massey v. Goyder*, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held that he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury. In *Chadwick v. Trouer*, 6 Bing. N. C. 1, 8 Scott, 1 (1839), it was decided in the exchequer chamber that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in *Trouer v. Chadwick*, 3 Bing. N. C. 834, and cited in *Smith v. Tanner*, 2 Scott, N. R. 77, and *Chadwick v. Trouer*, 5 Scott, N. R. 119. In the argument, when it was urged that, if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the neighbor to take steps for his own security, Parke, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be a duty affecting property rights, and the breach causes damage, it would seem that the law must afford a remedy. In *Brown v. Windsor*, 1 Crompt. & J. 20, Garrow, B., said: "There may be cases where a man, altering his own premises, cannot support his neighbor's, and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution."

There are no later cases that I have found in the English courts which change the rule given in *Chadwick v. Trouer*, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings. There are very few cases in our country which bear directly on this point. *Shafer v. Wilson*, 44 Md. 268, is most frequently referred to, after *Lasala v. Holbrook*, above cited. It is there said that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be

attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is *Beard v. Murphy*, 37 Vt. 101. *Chancellor Kent* (3 Com. 437) has quoted the case of *Lasala v. Holbrook*, and this has been referred to in *Shafer v. Wilson* and elsewhere. Washb. Easem. 434, 435; Shearm. & Redf. Neg. 497; 1 Thomp. Neg. 276; and other text-books,—cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country. None of these cases are of binding authority in this court, and, in a case of doubt like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house may enable the receiver of notice to shore or prop his wall to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him.

In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs; and the judgment will be reversed.

Magie, J., dissenting:

The question in this case is whether the owner of an urban lot, who, in excavating its soil for a lawful purpose and in a manner not in itself negligent, has caused to settle a building erected on the adjoining lot, and deriving support from such soil without having acquired any right to such support, is liable to an action for the injury, merely because he had given no previous notice to the owner of the building of the intended excavation. The solution of the question is of great importance, and, as I have the misfortune to differ from the majority of the court, I deem it my duty to give my reasons for my dissent. From a very early period judicial consideration has been given to the right of support to soil in its natural state, and to artificial structures erected thereon, by the soil of adjacent or subjacent lands. A complete review of the course of decisions in England can be found in the opinions of *Baron Pollock* in *Dalton v. Angus*, L. R. 6 App. Cas. 740, and of *Chief Justice Gray* in *Gilmore v. Driscoll*, 122 Mass. 199. It is thereby thoroughly settled as the law of Great Britain that the undisturbed maintenance by an owner of a building erected

on the confines of his land, and supported by the soil of adjacent lands, for a period requisite to make title by adverse possession, will establish in such owner a right to that support. While there are conflicting views as to the legal source and character of the right (*Dalton v. Angus*, *supra*), all agree that, once acquired, the right cannot be invaded by removal of the supporting soil, without liability for the resulting damage. Whether this doctrine is obligatory upon us, or has been adopted in this country, may, perhaps, be open to question. The analogous doctrine respecting the acquisition of rights by "ancient lights" has been doubted and denied. *Hayden v. Dutcher*, 31 N. J. Eq. 217.

But it is unnecessary to express any opinion on the subject, for in the case in hand plaintiffs had not, by length of maintenance of their house, acquired any right of lateral support, if they could have done so. But it is settled by the general concurrence of courts administering the common law that, when a building on the land of its owner derives actual support from the soil of adjacent land of another owner, but has acquired no right to such support, the latter owner may, for any lawful purpose, excavate and remove his supporting soil without any liability for injury occasioned thereby to the building, provided he does not act wantonly, or without the exercise of due care and prudence. In the case before us, the excavation was for a lawful purpose, and liability for the injury occasioned will only attach to the owner if his act in excavating was, in the eye of the law, negligent. Negligence is the want of that care which, under the circumstances, is due. As the only negligent act charged is the lack of notice, the question before us resolves itself into this, viz., whether it was defendant's duty to give notice of his excavation to plaintiffs. If so, a breach of that duty would constitute negligence. No such duty has been attempted to be imposed by statute. The "Act to regulate party-walls" is not applicable.

The contention is that the duty arose out of the juxtaposition of the lands, and the application of the maxim *sic utere tuo ut alienum non ledas*. But it must be remembered that the conflicting interests of the parties arose, not from the mere juxtaposition of their lands, but from the erection of a building by one owner, supported by the soil of the other owner, without having acquired a right to such support. In making such erection, the owner of the building must be deemed to have full knowledge that the supporting soil can be lawfully removed. Can his act restrict the right of the other owner to remove the soil, and impose on the latter the duty of giving notice of what it is admitted he may lawfully do? If the act is an actionable wrong, or if the maintenance of the building will, by lapse of time, ripen into an indefeasible right, it seems to border on the absurd to say that the owner of the land injured, or threatened with injury, may not interrupt the running of the claim by removing the support improperly claimed, without the necessity of giving previous notice to him who is attempting to burden the land by such an easement or right. But if the act is neither actionable nor capable, by continuance, of creating an easement of support, or right of that

nature, yet as to the adjoining owner it is without authority, and it is unreasonable, in my judgment, to permit such an act, knowingly done, to impose on the adjoining owner positive obligations restrictive of his rights. He who knowingly burdens the soil of another with the support of his building, without right, must in reason be deemed to take the risk of the owner removing the supporting soil, and to be prepared to protect his interest by his own vigilance. He cannot, by such act, impose on his neighbor the duty of being vigilant for him. The maxim, *sic utere tuo*, forbids the exercise of one's rights so as to injure the rights of others. But the removal of supporting soil, under the supposed circumstances, injured no right, for none had been acquired. The maxim no doubt forbids the negligent use of one's rights to the injury of the rights of others. This negative obligation is in my judgment the bound of the duty imposed in the case before us. The owner, in excavating, as he has a right to do, is under a duty to do the work with care and prudence, so as to do no unnecessary injury to the right of the owner of the building in its support on his own land. A failure to perform this duty will be negligence, but negligence cannot be predicated of a failure to give notice, for such a duty is not laid upon him. The argument in behalf of plaintiff seems to me to confound the rules of neighborly courtesy with the rules of law. Politeness to a neighbor might dictate the giving of notice to him in many instances where the law would not require any. What we settle in this case is a rule of law to govern an owner of land in the use of his undoubted rights therein.

But it is said that the doctrine contended for is established by authority. Among the many litigated cases on the subject of lateral support, which engaged the English courts before the separation of this country, none has been discovered in which this doctrine has been even hinted at. In 1838, *Chancellor Walworth*, in dealing with a case not involving this question, made this statement, viz.: "From the recent English decisions, it appears that the party who is about to endanger the building of a neighbor by a reasonable improvement on his own land is bound to give the owner of the adjacent lot proper notice of the intended improvement." *Lasala v. Holbrook*, 4 Paige, 169, 3 L. ed. 890. To support this statement he cites *Peyton v. London*, 9 Barn. & C. 725; *Walters v. Pfeil*, 1 Mood. & M. 362, and *Massey v. Goyder*, 4 Car. & P. 161. All these cases were decided in 1829. I think it can be shown that this statement of *Chancellor Walworth* is the sole basis of the claim that the doctrine contended for is established by authority. The independent opinion of that eminent jurist would go far to establish the doctrine, but, as has been seen, no opinion was called for, and none was expressed by him. Moreover, the cases referred to do not support his statement. In *Peyton v. London*, *Lord Teunterden*, after adverting to the fact that the declaration did not charge a want of notice of taking down the house whereby the alleged injury was caused, added: "Therefore, in our opinion, the action cannot be maintained upon the want of such notice, supposing that, as

matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not in this case called upon to give any opinion." In *Walters v. Pfeil*, the question of the obligation to give notice was not raised or mentioned. *Massey v. Goyder* is the report of a trial before *Chief Justice Tindal*. By one count, defendant was charged with excavating on his own land to the injury of plaintiff's building, without giving previous notice; by another count he was charged with negligently excavating. The question of notice was left to the jury, who found notice had been given, but upon a general finding judgment was entered on the last count. It is plain that none of the cases justified the statement in *Lasala v. Holbrook*. The precise question was afterwards raised. One of the counts of a declaration for injury done to a building by removal of its support on adjacent land was founded on a lack of notice. *Tindal, Ch. J.*, in dealing with the case on demurrer, said: "As to the allegation that it was the duty of defendant to give notice to plaintiff of his intention to pull down his wall, . . . it is objected, and we think with considerable weight, that no such obligation results as an inference of law from the mere circumstance of the juxtaposition of the walls of defendant and plaintiff." *Trower v. Chadwick*, 3 Bing. N. C. 834. That cause was thereafter tried before the same chief justice. One of the issues was on the above-mentioned count. Damages were awarded generally. On writ of error, the exchequer chamber reversed the judgment. *Baron Parke*, delivering the unanimous judgment of the court, quoted the language of *Chief Justice Tindal*, above set out, and added: "We also think it impossible to say that, under such circumstances, the law imposes upon a party any duty to give his neighbor notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantial ground for damage; and the probability is that the main damage did result from the want of notice, for it is obvious that, if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think that the judgment must be arrested, and a *venire de novo* awarded." *Chadwick v. Trower*, 6 Bing. N. C. 1 (1839). Notwithstanding this unmistakable deliverance, the statement of *Chancellor Walworth* commenced and has continued to be cited as expressing the conclusions of English courts on this subject. In the edition of the third volume of *Kent's Commentaries*, which was published in 1840, it is stated that "if the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives due notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he remove his own with reasonable and ordinary care." This statement was not made in the first edition of that volume, which was published in 1828. From that fact, and from the note to the passage above quoted, it is plain that it was based upon *Lasala v. Holbrook* and the English cases of 1829. The case of

Chadwick v. Trower was not alluded to. After the decision of *Trower v. Chadwick*, Gale & Whately, in their treatise on Easements, discussed the question of the duty to give notice, now contended for, and declared their opinion that, if the observations of *Chief Justice Tindal* in that case were well founded, no such duty was imposed by law. Those observations were, as we have seen, adopted and approved by the exchequer chamber. Subsequent authors in this country have expressed views in respect to the duty to give notice, such as have been contended for, but they refer for English authority only to the cases of 1829, on which the statement in *Lasala v. Holbrook* had been based. The case of *Chadwick v. Trower* is not mentioned. They also refer to American cases as authority for the doctrine. I have not been able to find among them a single case justifying the statement. The cases generally cited are *Shrieve v. Stokes*, 8 B. Mon. 458; *Winn v. Abeles*, 35 Kan. 85, and *Shafer v. Wilson*, 44 Md. 268. In *Shrieve v. Stokes* the question of the obligation to give notice was not raised by the pleadings or the evidence. What was said by the court on the subject was incidental, and based on the supposed authority of the English cases of 1829. In *Winn v. Abeles*, the question of duty to give notice was not involved. In *Shafer v. Wilson* the question of liability for want of notice was raised. The court below instructed the jury that notice was a duty. In reviewing this instruction, the court above only says that such notice would seem to be a reasonable precaution, and basis this statement on *Lasala v. Holbrook*.

This review in my judgment justifies the assertion that the doctrine contended for has not the sanction of authority. In the only adjudicated case not based on mistaken cita-

tions the determination was against the doctrine; and although the decision does not bind us, it must have great weight as a declaration of the obligations imposed by the common law on adjoining property owners, by a court of eminent ability. Having found no support for the contention of plaintiffs, either in principle or authority, I am unwilling to join in imposing this burden on property owners. I have devoted much consideration to this case, from the sincere conviction that the rule to be promulgated will disastrously affect urban property, and without producing any practical good. A judicial determination that notice is necessary in cases such as that before us cannot prescribe the form of notice, or fix the time, or provide for constructive notice. Our determination will simply require reasonable notice, and whether in any case such notice has been given must be matter for the jury. An owner hereafter proposing to improve property so situate must give notice. Must the notice be in writing, or will verbal notice or knowledge suffice? How shall notice be given to the owner of the building if he be an infant, or *non compos mentis*, or non-resident? Such and other similar questions the owner, when confronted by the rule to-day promulgated, must determine according to his own view of what is reasonable, but conscious that a jury may disagree with his view and hold him liable. If the owner of the building be infant, idiot, or beyond seas, it would seem to be impossible to give the required notice. To add to the difficulties and risks which have before attended the putting down a suitable foundation for building in such cases, the difficulty of giving notice, and the risk of its being ineffective, will retard the improvement of such property and diminish its value. I shall vote to affirm the judgment below.

CALIFORNIA SUPREME COURT.

Ex Parte D. M. VANCE, Petitioner.

(....Cal....)

The time of absence from jail of one who, having been committed under an alternative judgment that he pay a fine or be imprisoned a certain number of days, secures his release through the unauthorized act of the sheriff, can-

not be considered as having been spent in jail in satisfaction of the judgment.

(July 15, 1891.)

APPPLICATION for a writ of habeas corpus to procure the release from jail of one who had been committed for contempt of court,

NOTE.—*Absence from jail not considered in satisfaction of the sentence.*

A convict is not serving out his sentence while away from prison on parole where commutation of time is given by statute for obedience to prison discipline. *Woodward v. Murdock*, 124 Ind. 439.

The time during which a convict is at large on parole by the governor is to be computed as part of the term of his imprisonment, so as to extend the period of his sentence. *Ibid.*

One who escapes from prison before the expiration of his sentence becomes a fugitive, and upon his return no previous examination before a magistrate is required before an information is filed for another offense with which he is charged. *People v. Kuhn*, 11 West. Rep. 533, 67 Mich. 589.

The English courts have found no obstacle in the way of executing a prisoner where he has escaped after sentence, and remained at large beyond the 13 L. R. A.

time fixed for execution. In 1716, Charles Ratcliffe, after conviction and sentence to death for treason, escaped from prison and went to France. About thirty years afterwards he was brought before the king's bench, where his identity was established and he was afterwards beheaded. *Rex v. Ratcliffe*, 18 How. St. Tr. 429, 1 Wils. 150; *Rex v. Harris*, 1 Ld. Raym. 482.

Lord Hale says: "If a prisoner for felony be in jail and escape and the jailor pursue after him, he may take him seven years after, though he were out of view." Again: "If a felon escape out of the jail by negligence, though the jailor be fined for it, he may retake the felon at any time after, for the felon shall not take advantage of his own wrong or the jailor's punishment." 1 Hale, P. C. 602; 1 Russ. Crimes, 421.

In *Cleek v. Com.*, 21 Gratt. 777, the defendant was sentenced to imprisonment for ten months, com-

but who alleged that the term of imprisonment had expired. *Petitioner remanded.*

The facts sufficiently appear in the opinion. *Mr. A. H. Carpenter* for petitioner.

Messrs. C. S. Denson and Wilson & Wilson, contra.

De Haven, J., delivered the opinion of the court:

The return to the writ of habeas corpus issued herein shows that the petitioner, D. M. Vance, was on October 18, 1889, adjudged by the Superior Court of Sacramento County to be guilty of contempt, and to pay a fine therefor of \$800, and to be imprisoned in the county jail of Sacramento County until such fine was paid, in the proportion of one day for every dollar of the fine. The petitioner was on that day committed to jail under said judgment, and there remained until October 22, 1889, when he was released by the sheriff, and remained at liberty, free and without confinement, until June 10, 1891, at which date he was re-arrested under an order of the superior court made June 9, 1891, directing that its former judgment be enforced. The release of petitioner by the sheriff was not by any order of the court, but upon an undertaking given by petitioner on appeal to the supreme court from said judgment of contempt, and it may be assumed that both the sheriff and the petitioner acted upon the belief that the execution of said judgment was stayed by said appeal and undertaking. The petitioner now claims his release upon various grounds which assail the validity of the original judgment for contempt, and also because "the term of such imprisonment has long expired, and there having been no legal or authorized suspension of said judgment." In regard to the first claim of petitioner it will be sufficient to say that the affidavits charging him with contempt were such as to authorize the order which directed him to show cause why he should not be punished for the contempt therein alleged, and the subsequent proceedings ending in the judgment for contempt were regular, and the judgment itself valid. The remaining ground upon which the petitioner claims his release presents the single question whether his release from jail under the circumstances here stated, and thereafter remaining at large with free and perfect liberty, for a length of time sufficient to have satisfied said judgment if he had re-

mained in jail, operate as a complete execution of the judgment; and it would seem from the mere statement of the proposition that the contention of petitioner on this point cannot be sustained. The sentence of the court was that he pay a fine, and that part of the judgment relating to imprisonment was merely incidental to the judgment of fine, and in the nature of an award of execution directing the particular way in which that judgment should be enforced, in the event of the non-payment of the fine imposed, and it seems clear to us that such judgment can only be satisfied by a compliance with its terms. In this case it is admitted that the judgment of fine has not been paid, and that the defendant has not suffered the alternative of actual imprisonment. The judgment therefore remains in full force. The act of the sheriff in releasing the petitioner was unauthorized, and petitioner's departure from the jail to which he had been lawfully committed, without having been discharged by due course of law, was equally so, and was in effect a technical escape, from which he can derive no advantage. The time of petitioner's absence from jail, in violation of law, cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment.

This question, although presented here for the first time, is not a new one. *Re Edwards*, 43 N. J. L. 555, the petitioner had been committed to state's prison for the term of ten years at hard labor. He made his escape, and remained at large for seven years, and he claimed that, notwithstanding such fact, he was entitled to his discharge at the end of the term of ten years. but the supreme court, in an elaborate opinion, held otherwise. The same question came before the Supreme Court of Kansas in the well-considered case of *Hollon v. Hopkins*, 21 Kan. 638, and was disposed of adversely to the contention of the petitioner here. In that case the petitioner had been sentenced to the state prison for three years "from the 19th day of September, A. D. 1874." On the next day after sentence he made his escape, and was not recaptured until 1878, and he insisted that the judgment had expired by its own limitation, but the court held that the essential part of the judgment was that petitioner be imprisoned for three years, and that the time fixed by the court for its commencement was not such a material part thereof as to per-

mening July 13, 1870. He escaped September 21, 1870, and was not apprehended until January 14, 1871. He sued out a writ of habeas corpus, but the court refused to discharge him, holding that he must bear the full measure of imprisonment imposed.

Workhouse commissioners are without authority to establish rules by which a subsequent sentence against one imprisoned shall date from his incarceration, or by which deduction shall be made from sentences for good behavior. *Vanvabry v. Staton*, 38 Tenn. 334.

A prisoner who has served out the full extent of any valid sentence under the general laws will be discharged, although he was sentenced to a longer term, whether the judgment was altogether erroneous or only void as excessive. *Re Franklin*, 77 Mich. 615.

Under the New Hampshire statute, a convict who has been incarcerated, but subsequently com-

mitted to an insane asylum, cannot, upon discharge from the asylum, be remanded to prison, if at the time of the discharge the term for which he was sentenced to imprisonment has expired. *Re McQuinn*, 65 N. H. 84.

Gross v. Rice, 71 Me. 241, is not in conflict with the cases which have been cited. There, a statute providing that a prisoner should not be discharged from state's prison until he has remained the full term for which he was sentenced, excluding the time he was kept in solitary confinement for violating the prison rules, was held to be unconstitutional, on the ground that it deprived him of liberty without due process of law.

The defendant, in *Ex parte Clifford*, 29 Ind. 106, was sentenced, September 13, 1862, to three years in state's prison. January 9, 1863, he escaped, and remained at large until April 4, 1867, at which time he was recaptured. Being brought up on habeas corpus, his discharge was refused.

mit an evasion of the judgment by the wrongful act of the prisoner. The court there said: "The only way of satisfying a judgment judicially is by fulfilling its requirements. Of course, if Hollon had died, or been pardoned, the sentence would be at an end. But, as those things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements, or of exhausting its force, except service by Hallon of the time required in the penitentiary.

In *State v. Cockerhusm*, 24 N. C. 204, the defendant had been sentenced to be imprisoned for two months "on and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence should be immediately executed, and it was held that the order was proper, and that the essential part of the judgment was not the time when it should be executed, but the extent of the punishment fixed. So also in *Dolan's Case*, 101 Mass. 219, the same conclusion was reached, the court holding that "expiration of time without imprisonment is in no sense an execution of the sentence. Other cases might be cited to the same effect, and, indeed, our attention has not been called to the decision of any appellate court holding to the contrary. We are satisfied with the law as thus declared.

Petitioner remanded.

We concur: **Harrison, J., Sharpstein, J.; McFarland, J.**

Alpheus BULL, *Appt.*,

v.

Watson A. BRAY *et al.*, *Repts.*

(89 Cal. 286.)

The fact of fraudulent intent must be found to support a judgment setting aside a voluntary conveyance as in fraud of creditors, at least unless the facts found absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, under statutes making every transfer of property with intent to defraud or delay a creditor void, and providing that the question of fraudulent intent is one of fact and not of law, and that no transfer shall be adjudged to be fraudulent solely on the ground that it was not made for a valuable consideration; findings that the transfer was voluntary, that the grantor was insolvent, and that the transfer actually defrauded creditors are not sufficient.

(May 23, 1891.)

A PPEAL by plaintiff from an order of the Superior Court for Alameda County setting aside a judgment in his favor and granting a new trial in an action brought to set aside certain conveyances as fraudulent. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. F. Wendell, W. B. Sharp, S. C. Denson and William H. Sharp for appellant.

Messrs. J. P. Phelan and Garber & Bishop, with **Messrs. Chickering & Thomas**, for respondents.

18 L. R. A.

Garoutte, J., delivered the opinion of the court:

This is an appeal from an order granting defendants a new trial. The action was brought by plaintiff, a judgment creditor, to set aside two certain deeds of gift made by defendant Watson A. Bray, the judgment debtor, to Julia A. Bray, his wife, May 20, 1880, and August 3, 1881, respectively, of lands in Contra Costa County, as being void against prior creditors. Plaintiff's debt had been reduced to judgment; execution was issued thereon, and returned wholly unsatisfied. In the lower court, plaintiff had judgment, as prayed for, declaring said deeds null and void as against his judgment, and that he be entitled to enforce his execution against the property in said deeds described. Defendants moved for a new trial, and their motion was granted upon the ground that the findings as filed omitted to find upon the issue of intent raised by the pleadings in the case; that is to say, there is no finding on the issue made by the pleadings, whether the conveyances from Bray to his wife, referred to in the pleadings, were made or accepted with intent to hinder, delay, or defraud the plaintiff or other creditors of said Bray. The question presented by this appeal is, therefore, whether, in view of the facts found by the court, it was necessary to make a further finding as to the fraudulent intent; for, if the facts found by the court necessarily establish the fraudulent intent, that satisfies the law. If probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient. *Osborne v. Clark*, 60 Cal. 623; *Biddel v. Brizzolara*, 56 Cal. 381; *People v. Haggar*, 52 Cal. 189; *Coveny v. Hale*, 40 Cal. 555.

The only findings of the court necessary to consider in the investigation of this most important question are as follows:

(1) That said deeds were entirely voluntary, and there was no valuable consideration whatever for the making and delivery of the same, and said deeds were deeds of gift.

(2) That at the times of the making of said deeds the defendant Watson A. Bray was insolvent, and has ever since remained insolvent.

(3) That defendant Bray, at the time he made and delivered said deeds, was not fully aware, and did not know his actual financial condition, and his inability to pay and discharge in full his then outstanding debts and liabilities.

(4) That by the making and delivery of said deeds Watson A. Bray did hinder, delay, and defraud this plaintiff in the collection of his debt.

This action rests upon section 3439 of the Civil Code: "Every transfer of property . . . made . . . with intent to delay or defraud any creditor . . . is void." "Every transfer of personal property . . . is conclusively presumed if made by a person having . . . the possession or control, . . . and not accompanied by an immediate delivery . . . to be fraudulent and therefore void against those who are his creditors, while he remains in possession." Civil Code, § 3440.

Then, to exclude all possibility of misconception arising out of the conflicting decisions of other States as to whether the question of intent is a matter of law or of fact, section 3442 provides that in all cases arising under section 3439 "the question of fraudulent intent is one of fact, and not of law." It further provides that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. It also expressly excepts transfers of personal property arising under section 3440, for that section makes the question one of law by providing that transfers made in a certain way shall create a conclusive presumption of fraud. The general contention of appellants in this case is fairly illustrated by the doctrine laid down by Bump, in his work on Fraudulent Conveyances, 3d ed. 271, 273: "If the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with fraudulent intent. The intent is to be assumed from the act. The circumstances of the act, or rather the act itself, is conclusive evidence of fraud, for no man is permitted to say that he does not intend the necessary consequences of his own voluntary act. The law will not speculate about what is actually passing in the donor's mind, for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. . . . He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it, and yet, if the transfer is voluntary, and hinders, delays, or defrauds his creditors, it is fraudulent. . . . The presumption in such a case is conclusive, and against it all other evidence is unavailing. The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act. It is upon these principles that the law relating to voluntary conveyances rests. In the construction of the Statute, they are deemed within its operation, when they necessarily tend to defeat the just rights of creditors, even though they are made bona fide and with the intention of conferring a gratuitous benefit upon some meritorious object. The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such case the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is, that persons must be just before they are generous, and that debts must be paid before gifts can be made." This doctrine, ever since the celebrated cases of *Reade v. Livingston*, 3 Johns. Ch. 500, 1 L. ed. 686, decided by Chancellor Kent, has been recognized and accepted by many judges in many States of the Union.

Respondents insist that "the question of intent is a question of fact, and that the intent or purpose of the grantor in making the transfer in all cases is a question for the jury, and that it is material to the issue to determine whether the act done is a bona fide transaction, or whether it is a trick or contrivance

to defeat creditors." "That the question of solvency or insolvency of the grantor at the time of the making of the deeds is a matter of evidence to be given its due weight in determining the ultimate fact as to the fraudulent intent of the grantor; that a rich man may make a fraudulent deed as well as one who is insolvent; and that while a voluntary conveyance by an insolvent may be prima facie fraudulent, it cannot be conclusively fraudulent, for that would make the question of intent a question of law, and thus be in violation of that provision of the Code which says it shall be a question of fact." These views, to a great extent, are supported by the exhaustive case of *Seward v. Jackson*, 8 Cow. 450, and by other authority, both English and American. The cases in this country passing either directly or indirectly upon the questions involved in this litigation are practically numberless, and, as we have already seen, are greatly at variance. But, as has been said by Bigelow on Fraud (Preface, iv. and v., ed. 1877): "The law here to be applied is statutory law, and, as to the statutory law concerning fraud on creditors and purchasers, each State of the Union, with few exceptions, has a Code of its own, interpreted by independent tribunals, and enforced by distinct and diverse penalties and procedure. With deference to the views of others who have attempted to present a harmonious view of the statutes of the different States, the author is satisfied that such efforts are both unsatisfactory and dangerous. The decisions of the courts of New York concerning the interpretation of an ambiguous statute of that State,—that is, concerning the intention of the Legislature of that State in the passage of the Act,—cannot be safe authority in another State, even upon a question of the meaning of a statute framed in the very same words. The Legislature of New York meant one thing by the language used, and the Legislature of another State may have meant something else, and so the courts of each State may have declared, and rightly. To say, therefore, that the decisions are in conflict is incorrect, and to attempt to deduce the true rule of law as applicable to both States is vicious." Without attempting to deduce the true rule from the many authorities of many States, we will discuss this case by the authority of our statutes and Codes, and in the light of the decisions of our own judicial tribunals.

Having found the fact that the conveyances were voluntary conveyances, that the defendant Watson A. Bray was insolvent at the time he made the conveyances, and that these conveyances delayed and defrauded the plaintiff in the collection of his debt, was it still necessary for the court to find the further fact that the intent of the grantor in making the conveyances was to delay and defraud creditors, and was the court justified in granting a new trial by reason of its failure to make such finding? Appellant contends that the absence of a finding of intent is immaterial, because the conveyance being voluntary, the grantor being insolvent, and the conveyance having defrauded the creditor, the intent to delay and defraud follows

as an absolute and conclusive presumption, and the intent, being the ultimate fact, necessarily results from such probative facts. In order to support this contention the ultimate fact must follow necessarily—that is, as a matter of law—from the other facts.

In *Coveny v. Hale*, 49 Cal. 556, the court said: "Of course, it is only when the conclusion follows as a matter of law that such finding will be held sufficient."

"The only inferences which we can draw from the findings," said the court in *De Celis v. Porter*, 65 Cal. 10, "are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court would infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that the same rule applies to findings of fact." To the same effect are the cases of *Chandler v. People's Sav. Bank*, 65 Cal. 499; *Salisbury v. Shirley*, 66 Cal. 228; *Hibberd v. Smith*, 67 Cal. 556.

It may be conceded that it would have been perfectly proper for the trial court to have drawn an inference of fact as to the fraudulent intent of the grantor from the other facts found; that this court might be justified in setting aside a finding to the contrary as not being supported by the evidence (*Judson v. Lafford*, 84 Cal. 505), but that does not dispense with the necessity of an actual and express finding as to the ultimate fact, as a fact, by the lower court, nor authorize this court to exercise what would be original jurisdiction by supplying a finding upon this most vital and essential matter. As section 8442 of the Civil Code declares that the question of fraudulent intent is "one of fact and not of law," it is not entirely plain that this court can under any state of facts, however plain they might be, hold that the ultimate fact might flow from the probative facts as a matter of law. But, assuming that the ultimate fact of "intent to defraud" may flow as "matter of law" from the probative facts, yet to obviate a finding of this ultimate fact the facts found must necessarily and conclusively indicate that the grantor was possessed of the intent to defraud at the time the conveyances were made. If the facts found do not absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, then the want of the finding of such intent cannot be dispensed with in this court. Thus, in the case of *Emmal v. Webb*, 36 Cal. 204, the court, in considering whether it could infer a fact from other facts, said: "To warrant us in so doing, the fact to be inferred must follow inevitably from the facts found, or in other words, the non-existence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found." And to the same effect are *Coveny v. Hale*, 49 Cal. 556; *Younger v. Pagles*, 60 Cal. 520; *Walker v. Buffandeau*, 63 Cal. 312; *Ogden v. Beard*, 65 Cal. 63; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 601.

We then proceed to consider whether there

is any possible state of facts consistent with the findings of the court heretofore quoted, and also consistent with the absence of fraudulent intent in the mind of the grantor at the time of the making of the deeds sought to be set aside in this action. The finding of the court "that the defendant Bray by the making of these deeds did hinder, delay, and defraud the plaintiff in the collection of his debt" throws no special light upon the solution of the question as to the actual intent of the grantor; while important as evidence of the intent, by reason of the presumption that every man intends the usual and ordinary consequences of his voluntary acts, yet our Statute requires that a conveyance shall not only delay and defraud creditors, but that it was made with the intent to delay and defraud, and the Statute appears to recognize the intent as the prevailing and controlling element in measuring the bona fides of the transactions. Bray did actually defraud Bull in the making of the deeds, by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives.

Appellant insists that the existence of the facts, to wit, "that the grantor was insolvent at the time of the transfer, and that the conveyances were deeds of gift, render the inference of fraudulent intent absolute and conclusive, and a conveyance under such circumstances, therefore, would be void under any and all conceivable states of facts; and this is the important and determinative question in this case." Very many of the authorities from other States relied upon by appellant to support this contention rest in whole or in part upon the presumptions "that every man intends the usual and natural consequences of his voluntary act," and that "every man is presumed to know the condition of his own business;" and, applying those presumptions, it is said that the natural consequence of an insolvent giving away his property is to defraud his creditor, and that, therefore, the insolvent must have intended to defraud; and, again, "a man is presumed to know the condition of his own business affairs, and therefore if, as a matter of fact, he is insolvent, he must know of such insolvency."

Best, in his work on Evidence, section 807, speaking of the changes which this subject of presumptions has undergone in our legal history, says: "Certain presumptions which in earlier times were deemed absolute and irrebuttable have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *presumptiones juris tantum*, or considered as presumptions of fact, to be made at the discretion of the jury. On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be

justified by the clearest expediency and soundest policy, and some presumptions of this class ought never to have found their way into it."

According to the provisions of the Code of Civil Procedure (§§ 1961-1968), the foregoing presumptions are disputable presumptions, and may be controverted by other evidence; and, indeed, the presumption that every man knows the condition of his own business affairs has no standing in this case, for the trial court has found as a matter of fact that "the defendant Bray did not know that he was insolvent." And, not knowing his insolvency, how can it be presumed from the existence of his insolvency that he intended to defraud? For no man can be presumed to intend a consequence which he does not know, of which he is ignorant, and which, therefore, he cannot contemplate. It may be conceded that one who acts recklessly and regardless of consequences is not to be exonerated. The fraud in this case rests upon the insolvency of the grantor; for, while there is no allegation, proof, or finding as to the value of the property conveyed, still, if he was solvent, a gift of this character, in the absence of an actual fraudulent intent, would be upheld. If defendant Bray did not know that he was insolvent, then he did not know that this property was required to pay his debts, and the finding of the court that he was ignorant of his insolvency is absolutely inconsistent with the presumption that he intended the consequences of an act, which consequences depended upon insolvency. Appellant's counsel insist that a voluntary conveyance by an insolvent is void under all circumstances, and that the intent to defraud is conclusively presumed. If that be so, it must be by reason of some presumption of law; but, if it be said that fraud can be conclusively presumed in any case, except as provided by section 3440, Civil Code, then fraud is again made a question of law, and this would amount to an abrogation of section 3442, Id., which provides that "fraudulent intent is a question of fact," and would be creating a class of conclusive presumptions not recognized or justified by either section 3440, Id., or section 1962, Code Civil Proc.

As has been remarked at the inception of this opinion, the great number of cases from the courts of other States, cited by appellant's counsel to support this contention, will not be reviewed. Some of them directly sustain such position; others merely affirm the decisions of *nisi prius* courts, that a gift by an insolvent is sufficient evidence to justify the setting aside of a conveyance by a creditor; others hold the insolvent guilty of a fraudulent intent as a matter of law; and many others are based upon the two presumptions heretofore referred to, and holding that such presumptions were conclusive presumptions, and that therefore the fraudulent intent necessarily resulted therefrom; and this was the reasoning adopted by this court in the case of *Swartz v. Hazlett*, 8 Cal. 118. The court held in that case that "every man must be held to know the law and the facts regarding his own business." In other words,

if the debtor is insolvent, he is conclusively presumed to know that fact; and, the necessary consequences of a transfer of his property being to delay and defraud his creditors, the fraudulent intent follows in all cases. The important distinction between that case and the one at bar is that in this case the lower court not only recognized the presumption that "every man is presumed to know the condition of his own affairs," as being rebuttable, but absolutely rebutted it by finding as a fact that "the defendant Bray did not know the condition of his own affairs, and did not know that he was insolvent."

In 1 Wharton, Cont., § 877, subd. 4, is used this language: "As a condition of fraudulent intention, insolvency known to the grantor must be shown. A party who believes himself to have the pecuniary ability to make a gift can make such gift without the risk of its being subsequently impeached, supposing his belief is not negligently adopted."

In the case of *Swartz v. Hazlett*, *supra*, this court really held that a transfer of property by a grantor who knew of his insolvency was conclusively fraudulent; and, while we are not inclined to even adopt that view of the law under our statutes, yet, from the reasoning of the court in that case, if there had been a finding as to the grantor's ignorance of his insolvency, it does not appear that the case could have been reversed, and judgment ordered for the plaintiff. As we have already seen (*Emmal v. Webb*, *supra*), if, upon any conceivable theory, the inference of fraudulent intent would be inconsistent with the fact of insolvency, then this court cannot find the intent as matter of law. Now, it appears from the record in this case, in addition to the findings already discussed, that the liabilities and assets of the defendant Bray approximated three quarters of a million dollars, respectively; that he continued in business for years after these deeds were made, and before he made an assignment for the benefit of his creditors; and, in addition to these facts, we will suppose that he honestly believed at all times that he had ample property remaining to pay his debts after this property was transferred, and that the property transferred was of merely nominal value. A state of facts could be imagined even much more favorable to the grantor, Bray, than the foregoing, and which would be perfectly reconcilable with the fact of actual insolvency, and the absence of fraudulent intent at the time of the making of the conveyances; and, conceding the trial court would be justified in drawing the inference of fraudulent intent from such a state of facts, this court would not and could not say that such intent would flow therefrom as a matter of law. It is difficult to see how trivial gifts, made with fair, honest intentions, can be adjudged to have been made with a fraudulent intent, when intent is declared to be a matter of fact in all cases.

In the case of *Carpentier v. Mendenhall*, 29 Cal. 484, it was held that a finding of a demand by one tenant in common to be let into possession, and a refusal by his co-tenant, was not a finding of ouster. The court said:

"The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover, but it is settled that demand and refusal is not conversion, but only evidence of it, for the consideration of the jury. In the absence of all explanation, the court would be justified in directing or advising the jury to infer a conversion or an ouster, in a case like the one at bar, from the fact of demand and refusal, but the inference is to be made by the jury and not by the court." There appears to be no reason why the legal principles declared by this court in the criminal case of *People v. Mize*, 80 Cal. 44, are not applicable here. The defendant was charged with an assault with intent to commit murder. It is a statutory offense, and the intent is the essential ingredient. The trial court gave the following instruction: "The jury are instructed that the natural and probable consequence of every act deliberately done by a person of sound mind is presumed to have been intended by the author of said act; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, did shoot at said Henry Coffey, as charged in the information, and that the natural and ordinary consequences of said shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Coffey with intent to kill him." This court said: "It is doubtless true that a man is presumed to have intended the immediate and natural consequences of his act, but, when an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the Statute to constitute the offense existed in the mind of the defendant." This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they were acting in self defense, and upon real and apparent danger. To tell the jury, therefore, if they believed that the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. So, in the case at bar, if a voluntary transfer by the defendant insolvent carries with it a conclusive fraudulent intent, the defendant would be precluded from showing his motives and good faith in making the conveyance, and the question of intent, which a jury may have been called to try, which in all cases is a question of fact, and which is the fact in the case, would be driven from the case by the court calling to its aid presumptions which, as we have already seen, are not only liable to attack, but are put to

flight at the moment they come in contact with a substantial fact.

The case of *Hager v. Shindler*, 29 Cal. 58, 59, holds that insolvency is but a circumstance from which fraud may be inferred or argued; evidence of fraud, but not by any means conclusive or irrebuttable evidence. In that case the court said: "In a case like the one at bar, insolvency is not a fact of jurisdictional consequence, nor is it *per se* a condition of relief. . . . A complaint framed for the purpose named, while stating that the deed was without consideration, should aid or help out the averment, not by averring insolvency, for that is but a circumstance, not by averring generally that the deed was fraudulent, for that is but a conclusion of law, but by averring the fact superadded by the Statute, to wit, that it was made with 'intent to hinder, delay, or defraud creditors.' The state of the grantor's worldly affairs may be used as evidence to elucidate the intent, if disputed; but as matter of pleading it is not necessary that insolvency should be averred in the complaint, and for the obvious reason that the fact does not enter as a term into the legal proposition. A rich man may make a fraudulent deed as well as one who is insolvent."

The Civil Code provides that the mere want of consideration does not of itself render a conveyance fraudulent as to creditors; and considering this section in connection with the presumptions recognized by the court in *Swartz v. Hazlett*, *supra*, the distinction between sales for an inadequate consideration and voluntary conveyances is entirely imperceptible, and the question in both cases at once becomes one of intent to be decided from all the evidence in the case. The difference in these two classes of conveyances is only in degree; for the grantor must upon appellant's theory be presumed to know his condition, and to know that the consideration is inadequate, and that he is thereby depriving his creditors of the portion of the "fund" which is represented by the difference between an adequate and inadequate consideration, he must be presumed conclusively to intend to defraud them *pro tanto*, for the conveyance is voluntary to that extent. But *McFadden v. Mitchell*, 54 Cal. 629, holds that inadequacy of price and insolvency of the debtor are only circumstances more or less potential in the determination of fraud as a question of fact; and, referring to certain instructions given by the trial court, *Justice McKee* says: "By these instructions the court in effect took away from the jury the consideration of fraudulent intent as a question of fact, and as they are contrary to the plain rule established by the Code the cause is remanded for a new trial." Appellant's position in this case takes away from the jury the consideration of fraudulent intent as a question of fact. In *Jamison v. King*, 50 Cal. 186, the court, speaking through *Justice McKinstry*, said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud; but inadequacy or failure of con-

sideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law. By our Statute it is provided: 'The question of fraudulent intent, in all cases arising under the provisions of this Act, shall be deemed a question of fact and not of law: nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration.' In the case before us the district court did not find fraud as a fact or as a conclusion of law, nor does the amended complaint allege it." In *Miller v. Stewart*, 24 Cal. 504, the court uses this language: "Whether the transactions in question were entered into by the Millers with intent to hinder, delay, or defraud their creditors is a question which the Statute leaves to the determination of the jury upon such evidence as may be presented for their consideration. The intent is expressly declared to be a question of fact, and must therefore be for the jury, and not the court. In the instruction above quoted the court in effect takes the question from the consideration of the jury, and assumes the decision thereof." In *Harris v. Burns*, 50 Cal. 141, it appears, the trial court instructed the jury that certain facts, if proven, were conclusive as to the intent of the assignor to hinder, delay, and defraud his creditors. In the opinion of this court, Chief Justice Wallace says: "This instruction cannot be supported. The question of fraudulent intent is a question of fact; it is so declared by the Statute. . . . The instruction, in effect, took away from the jury the decision of the question of fact, and established the fraudulent intent by mere legal conclusion from an isolated circumstance. This we held erroneous in *Jamison v. King*, 50 Cal. 182, at the present term." This decision is not based upon the theory that the facts referred to by the trial court in the instruction were in themselves too weak to justify a conclusive presumption of a fraudulent intent; but it declares that the intent being a question of fact, such a presumption could not be indulged in under our Statute.

If the Legislature had intended a gift by an insolvent to constitute a constructive fraud or fraud in law, it was easy to have said so. Instead of that, they expressly legislated away all the reasons upon which the decisions so holding profess to stand. When the Legislature did intend to preserve the doctrine of fraud in law, they did so in ex-

press language, by section 8440, Civil Code, and then provided that in all other cases the question of fraudulent intent is one of fact, and not of law. It is impossible to comprehend how any decision or series of decisions of other States can make the question of fraud in this State, and in this character of action, a question of law. No decision or series of decisions can repeal a statute.

Let the order be affirmed.

We concur: **DeHaven, J.; Harrison, J.; McFarland, J.; Paterson, J.**

Beatty, Ch. J.:

I concur. It does not seem possible to avoid the conclusion that the law of California on the subject of voluntary conveyances by insolvent debtors is such as in the opinion of Justice Garoutte it is declared to be. But I cannot refrain from expressing the belief that it is most unfortunate that the court should be forced to that conclusion. When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is rightfully theirs, and the law ought to pronounce such transaction *ipso facto* fraudulent and void as to them. Our Legislature, however, has deliberately chosen to make the rights of creditors in such case depend, not upon the proof of facts susceptible of demonstration, and from which the injury is a necessary result, but upon proof of the secret intent of the debtor; in other words, upon the whim of a jury. Such a law invites fraud, puts a premium upon perjury, and multiplies fruitless litigation. It ought to be changed, but the Legislature alone has the power to change it. In the mean time the courts should give the utmost force and effect to so much of the law for the protection of creditors as remains. There should be no hesitation in stating, and in everywhere insisting upon, the proposition that a voluntary conveyance by an insolvent debtor is prima facie proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud; and it ought not to be held or intimated that such inference will be rebutted by the mere fact that the debtor was at the date of the conveyance ignorant or uncertain as to his insolvency. It ought to be made clear, on the contrary, that he believed, and had good reason to believe, that his property remaining after the conveyance would be amply sufficient to enable him to meet and discharge his obligations as they matured.

PENNSYLVANIA SUPREME COURT.

APPEAL OF Charles M. LUKENS *et al.*

Re Henry KESLER'S ESTATE.

(...Pa....)

1. The testimony of two witnesses or

NOTE.—What is not sufficient consideration for new contract.

The performance of an act which the party is 18 L. R. A.

their equivalent is necessary to modify an ante-nuptial agreement even on the ground of fraud.

2. The resumption of her marital duties by a wife, who has voluntarily estranged herself from her husband because of her dissatisfaction with a valid and binding ante-nuptial con-

under a legal obligation to perform cannot constitute a consideration for a new contract. *Bartlett v. Wyman*, 14 Johns. 250; *Crosby v. Wood*, 6 N. Y.

tract, is no consideration for a revocation of such contract.

- 3. Abandonment of legal proceedings which are without merit,** is no consideration for the revocation of a valid and binding contract.

(October 5, 1891.)

APPEAL by the executors and trustees under the will of Henry Kesler, deceased, from a decree of the Orphans' Court of Philadelphia County awarding Mary R. Kesler one third of decedent's personal estate. *Reversed.*

Mary R. Kesler was the wife of Henry Kesler. Before their marriage they entered into a contract by which she was given a certain annuity in full satisfaction of all claims upon his estate. She claimed that this contract was a fraud upon her rights and the auditing judge disregarded it and permitted the widow to share in the estate as though the testator had died intestate.

Further facts appear in the opinion.

Messrs. Joseph M. Pile and Richard P. White, for appellants:

A party executing a legal instrument is presumed to be acquainted with its contents—where it is unconnected with suspicious circumstances the burden of disproving the presumption lies on him who would impeach the deed.

Greenfield's Estate, 14 Pa. 489.

If one who is about to execute an instrument can read it, and neglects to do so, or being blind or illiterate chooses to act without requiring the contents to be made known to him, he will be bound to it.

Pennsylvania R. Co. v. Shay, 82 Pa. 203.

389; 2 Parsons, Cont. 437; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party. *Pollock*, Cont. 181; *Crosby v. Wood*, 6 N. Y. 389; *Deacon v. Gridley*, 15 C. B. 295.

"Nor is the performance of that which the party was under a previous valid legal obligation to do a sufficient consideration for a new contract." 2 Parsons, Cont. 437.

Illustrations of the rule.

When certain sailors had signed articles to complete a voyage, but at an intermediate port refused to go on, and the captain thereupon promised to pay them increased wages, it was held that the promise was without consideration. *Bartlett v. Wyman*, 14 Johns. 260.

A firm having a contract to build a railroad found the contract unprofitable, whereupon the railroad company promised if they would go on and complete the contract they would repay to the contractors all of the obligations which they had or would incur in consequence of their completion of the work. Held no consideration. *Ayres v. Chicago, R. I. & P. R. Co.* 52 Iowa, 478.

The payment of the accrued interest upon a promissory note which is past due does not constitute a valid consideration for the extension of the note; it is the payment of interest in advance that will support and enforce an extension. *Waters v. Simpson*, 7 Ill. 570; *Warner v. Campbell*, 26 Ill. 280; *Dennis v. Piper*, 21 Ill. App. 169.

When a mortgagor, as a condition to the pay-
13 L. R. A.

Evidence to destroy a written contract must be clear, precise and indubitable. This can only be done by the testimony of two witnesses or one witness corroborated by circumstances equivalent to another.

Thomas v. Loose, 5 Cent. Rep. 193, 114 Pa. 35.

Declarations of the testator cannot be received to establish a fact, since the testator is not a party to the conflict over the disposition of his estate.

Herster v. Herster, 123 Pa. 239.

Messrs. Samuel P. Hanson and John G. Johnson, for appellees:

The deed of marriage settlement was void because procured through fraud. There is no rule of evidence which requires that fraud shall be proven by more than one witness.

In *Thomas v. Loose*, 5 Cent. Rep. 190, 114 Pa. 35, the evidence referred to was evidence of facts which varied or changed the writing. Fraud is a fact like any other, which can be proved without overcoming that weight of inference which sustains a written instrument against an effort to modify it by parol.

The presumption as against a person of sound mind, who signs an instrument, that he or she is acquainted with its contents necessarily falls after uncontradicted proof has been offered, of the existence of a deliberate fraud, calculated to induce the execution.

If there be affirmative proof of fraud, the settlement will not be permitted to stand. The woman does not bear such a position towards the man as enables him to induce her signature to the settlement by any deceit.

See *Shea's App.* 1 L. R. A. 322, 121 Pa. 302; *Neely's App.* 124 Pa. 424; *Kline v. Kline*, 57 Pa. 120; *Tiernan v. Binns*, 92 Pa. 243; *Dar*

ment of his mortgage, exacted from the mortgagee an obligation that he would procure the cancellation of a certain outstanding bond executed by the mortgagor, or pay him the sum of \$100, said bond being given to indemnify against some apparent incumbrance, it was held that, it not being shown that there was any incumbrance existing against the land, the obligation was without consideration. *Conover v. Stillwell*, 34 N. J. L. 54.

A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpoenaed, is without consideration. The attorney did nothing except what he was legally bound to do. *Smithett v. Blythe*, 1 Barn. & Ad. 514.

Part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue. *Pabodie v. King*, 12 Johns. 428; *Reynolds v. Ward*, 5 Wend. 501; *Gibson v. Renne*, 19 Wend. 388; *Smith v. Bartholemew*, 1 Met. 278; *Deacon v. Gridley*, 15 C. B. 294.

So a promise to pay increased compensation for services which the party was under a prior legal obligation to render is not valid. *Stilk v. Myrick*, 2 Campb. 317; *Harris v. Carter*, 3 El. & Bl. 556; *Voorhees v. Woodhull*, 38 N. J. L. 494.

The relinquishment of a security deposited by a debtor with his creditor, as collateral security for a debt, which was afterwards discharged by a composition deed, is no consideration for a promise by the debtor to pay the residue of the debt beyond the amount of the composition; the debt being released and the debtor entitled to the return of the security, the creditor cannot make its surrender a consideration of a new promise. *Cowper v. Green*, 7 Mees. & W. 688; *McDonald v. Neilson*, 21 Cl. 140; *Crosby v. Wood*, 6 N. Y. 389.

lington's App. 86 Pa. 512; *Miskey's App.* 107 Pa. 611; *Yardley v. Cuthbertson*, 108 Pa. 395; *Boyd v. Boyd*, 66 Pa. 293; *Russell's App.* 75 Pa. 279; *Boyd v. De La Montagnie*, 73 N. Y. 503; *Comstock v. Comstock*, 57 Barb. 458, 470; *Rhodes v. Bate*, L. R. 1 Ch. App. 252; *Turner v. Collins*, L. R. 7 Ch. App. 329; *Savery v. King*, 5 H. L. Cas. 627, 657, 663; *Hoghton v. Hoghton*, 15 Beav. 278, 814; *Cooke v. Lamotte*, Id. 241, 249; *Whelan v. Whelan*, 3 Cow. 587.

The burden of proof being on the beneficiary under the deed, he must clearly and affirmatively prove that the woman (1) fully knew what she was doing; (2) was entirely competent to act; (3) was wholly free from undue influence; (4) had independent advice; (5) that the transaction was righteous; (6) that it fully expressed her intentions; (7) that "the deed was the well-understood act of her mind," and (8) that she had full knowledge "of its import and effect."

This burden of proof the appellants have not assumed. They have failed to show the existence of any of these requisites.

Story, Eq. § 308; *Kline v. Kline*, *Boyd v. De La Montagnie*, *Shea's App.*, and *Whelan v. Whelan*, *supra*; *Gross v. Leber*, 47 Pa. 525.

In *Thomson v. White*, 1 U. S. 1 Dall. 426, 1 L. ed. 206, it was said: "In the case of *Harvey v. Harvey*, 2 Ch. Cas. 180, three successive chancellors decreed, on the parol proof of a single witness, against a deed of settlement."

See also *Wallace v. Baker*, 1 Binn. 616; *Dinkle v. Marshall*, 3 Binn. 589.

Declarations of an interested party made before, at the time of, or after, a contract, are evidences against him.

Duncan v. Lawrence, 24 Pa. 154; *Shirley v. Shirley*, 59 Pa. 267; *Munger v. Silabes*, 64 Pa. 454; *Simons v. Vulcan & M. Oil Co.* 61 Pa. 202; *Fuller v. Kelsey*, 4 Brewst. 106.

There was a valid contract, upon sufficient consideration, to treat the marriage settlement as void, and to maintain, unrevoked, a codicil giving the wife one third of the testator's real and personal estate.

The settlement of a family difficulty and dispute was a valuable consideration for a promise such as this.

Burkholder's App. 105 Pa. 36; *Rice v. Bizler*, 1 Watts & S. 445; *Chamberlain v. McClurg*, 8 Watts & S. 81; *Paxon v. Hewson*, 8 W. N. C. 197; *Share v. Anderson*, 7 Serg. & R. 62; *Barton v. Wills*, 5 Whart. 225; *Wilen's App.* 105 Pa. 124.

It is immaterial that the [decedent puts his contract into the shape of a codicil.

Smith v. Tust, 127 Pa. 341; *Dufour v. Pereira*, 1 Dick. 419; *Wigram, Wills*, p. 4.

An instrument may operate as a will in one part and as a deed in another.

Wigram, Wills, 27; *Meek v. Holton*, 22 Ga. 491; *Babb v. Harrison*, 9 Rich. Eq. 111; *Brinker v. Brinker*, 7 Pa. 55; *Johnson v. McCue*, 34 Pa. 182.

Sterrett, J., delivered the opinion of the court:

There is certainly no apparent reason why, situated as these parties were, the "law should regard with disfavor" the ante nuptial agreement made by them. Mr. Kesler was advanced in years, had already accumulated a for-

tune, and had a family by a former marriage; while Mrs. Davidson was lifted out of poverty and comfortably provided for by it. Persons, situated as they were, do not usually act from mere impulse, or contract without consideration; and the court below has accordingly found that "every requirement of the law seems to have been complied with in the execution of this contract. A full disclosure was made to the intended wife, and every opportunity afforded her either to obtain information as to the nature and character of the instrument she came prepared to execute, or object to its execution if ignorant of its contents, or deceived as to its purpose and object. She was not illiterate, but intelligent and well educated. She was not young and inexperienced, but of mature years and acquainted with marital duties and rights. She was a free agent, of sound mind, and fully capable of protecting herself. Nor was she under any restraint. The deed of settlement, although of great length, is in the usual form adopted by careful and accomplished conveyancers, and its preamble, in clear and perspicuous language, easily comprehended by a person of even ordinary intelligence, specified the terms and objects of the agreement entered into between the parties. That it was understood by the claimant we think there is no doubt. And from her necessities circumstances it is not wholly improbable she was content, assured of the maintenance and comforts afforded by her future husband's wealth during his lifetime and the secured annuity of \$600 for her life after his death, to relinquish all further claim upon his estate." It is impossible to understand how, consistently with these facts, Mr. Kesler can be found to have practiced a fraud upon his intended wife in the execution of this contract. In his senile garrulity he may have made statements to his son-in-law which might better have been left unsaid; but when brought face to face with his wife he distinctly averred, and she did not deny, that she had never asked him any questions in regard to the agreement, and that he had made the settlement "to protect his family; that she might jump over the traces; that he fully intended if she proved a faithful, good wife,—he only had this to protect himself and his family,—if she proved to be what he thought she was, and what she had now turned out to be, he would have given her at the same time one third." (Testimony, pp. 48 and 49). But, whatever may have been his original intention, in view of the findings of the court below, that Mrs. Davison, knowing her rights and fully informed of the situation, deliberately and in writing released all her interest in her deceased husband's estate in consideration of the provision made for her by this agreement and was content, it is incredible that a fraud should have, in fact, been practiced on her. Even assuming that the facts are as claimed by her counsel, the quantum of proof adduced is not sufficient to modify the agreement; they were not proved by two witnesses or their equivalent. *Thomas v. Loose*, 114 Pa. 35, 5 Cent. Rep. 190.

The agreement must be considered as having embodied the real intention of the parties at its date, and therefore conclusive of their rights. Was there a valid revocation of it? It will

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be conceded that there must have been a meritorious or valuable consideration for such revocation (*Stickney v. Borman*, 2 Pa. 67); and it is very clear that neither of these existed here. The sole inducement was the doing of that which Mrs. Kesler was legally bound to do. She had voluntarily estranged herself from her husband because of her dissatisfaction with the ante-nuptial contract; there is no pretense that she had any other cause of complaint. If, as has been shown, that was a valid and binding contract, the estrangement was without justification; it was a wanton abuse of the marital relation for mercenary purposes; and reconciliation was her duty. Public policy forbids that the performance of such duty be made the subject of barter and sale. The law fixes and regulates the marital relation on public considerations, and will not allow the parties to discard and renew it for money. Thus in *Roberts v. Frisby*, 38 Tex. 219, the supreme court held that the husband is not legally bound by a post-nuptial contract in which he hires his wife to live with him. The same principle was affirmed by the Supreme Court of Tennessee in *Copeland v. Boaz*, 9 Baxt. 223; and *Mr. Justice Allen* of the Supreme Judicial Court of Massachusetts well

said: "It is as much against public policy to restore interrupted conjugal relations as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public when it is sold for money, and the law cannot recognize such a consideration." *Merrill v. Peaslee*, 146 Mass. 460, 6 New Eng. Rep. 120.

There are no cases in conflict with this view, decided by this court. It was not involved in *Burkholder's App.*, 105 Pa. 31, upon which the court below relied.

It is said that abandonment of the legal proceedings instituted by Mrs. Kesler for the revocation of the ante-nuptial contract was sufficient consideration. The answer to this is that she was not prejudiced by that act; the question involved there has been raised here, and has been shown to be without merit.

Mrs. Kesler is therefore not in a position to claim the aid of a court of equity; and the decree of the court below must be reversed.

Decree reversed with costs to be paid by the appellee, and record remitted with instructions to distribute the fund in accordance with the foregoing opinion.

MARYLAND COURT OF APPEALS.

J. Fred C. TALBOTT, *Appt.*,
v.
FIDELITY & CASUALTY CO. of New
York.

(.....Md.....)

A Maryland statute providing that whenever the laws of any other State imposed upon Maryland insurance companies seeking to do business within its borders greater obligations or prohibitions than are prescribed for foreign companies seeking to do business in Maryland, the same obligations and prohibitions shall be imposed on companies of such State which shall seek Maryland business, makes such foreign law the rule which Maryland will apply to companies of the foreign State asking permission to do business within its territory; and if a Maryland company is refused a license in the foreign State merely on the ground

of discretion, the latter's companies may be refused license in Maryland on the same ground, although the Maryland statutes do not in terms authorize it.

(June 18, 1891.)

A PPEAL by defendant from an order of the Baltimore City Court directing the issuance of a writ of mandamus to compel the insurance commissioner of the State of Maryland to issue a license to permit complainant to do business in Maryland. *Reversed*.

Argued before *Alvey, Ch. J.*, and Bryan, McSherry, Fowler, and Irving, *JJ.*

The facts are stated in the opinion.

Messrs. William A. Fisher, William Cabell Bruce, and D. K. Este Fisher, for appellant:

It would be strange if the appellant could not exclude the appellee from the State until the

NOTE.—*Foreign corporations; when amenable to local law; the law of comity.*

The corporations of one State have no right to migrate to another, there to exercise their franchises, except upon the assent of such other State, and upon such terms and conditions as the State granting it may think proper to impose. *Lafayette Ins. Co. v. French*, 59 U. S. 13 How. 404, 15 L. ed. 451; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1023; *Osborne v. Mobile*, 85 U. S. 16 Wall. 479, 21 L. ed. 470.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 300, 16 L. ed. 602; *People v. Roper*, 35 N. Y. 623; *People v. Commissioners of Taxes*, 47 N. Y. 501.

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The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 53 U. S. 16 Wall. 244, 21 L. ed. 323; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204.

A corporation, organized and existing under the laws of one State, is a creature of those laws, and beyond its jurisdiction, it carries its corporate life and existence only by sufferance and upon an express or implied consent. It cannot come within another jurisdiction to transact business except by permission, either express or implied. The right of a State to exclude foreign corporations is perfectly settled and not open to debate. *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Bank of Augusta v. Earl*, 38 U. S. 13 Pet. 586, 10 L. ed. 306; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1023; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 722; *People v. Fire Asso. of Phila.* 32 N. Y. 311.

Maryland company is admitted into New York, dependent as the appellee is for its right to engage in business here merely upon the comity of the State to permit it to come into its borders—"a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy."

Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Doyle v. Continental Ins. Co.* 94 U. S. 584, 24 L. ed. 148; *People v. Fire Asso. of Phila.* 92 N. Y. 325; *Fire Asso. of Phila. v. New York*, 119 U. S. 118, 80 L. ed. 346.

The appellant, as the head of a separate and independent department of the government of the State, is vested with a discretion and judgment which he has exercised for the protection of a corporation of this State, and with his discretion and judgment the courts have no power to interfere.

Marbury v. Madison, 5 U. S. 1 Cranch, 187, 2 L. ed. 60; *Kendall v. United States*, 87 U. S. 12 Pet. 608, 9 L. ed. 1214; *Decatur v. Paulding*, 39 U. S. 14 Pet. 497, 10 L. ed. 559; *Gaines v. Thompson*, 74 U. S. 7 Wall. 848, 19 L. ed. 68; *Mississippi v. Johnson*, 71 U. S. 4 Wall. 498, 18 L. ed. 440; *United States v. Black*, 128 U. S. 40, 32 L. ed. 354; *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 569; *United States v. Schurz*, 102 U. S. 378, 2 L. ed. 167; *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656; High, Extraordinary Legal Remedies, § 42; *State v. Register*, 59 Md. 289; *George's Creek Coal & I. Co. v. Alleghany County Comrs.* 59 Md. 259. See also *Devin v. Belt*, 70 Md. 354; *Green v. Purnell*, 12 Md. 329; *Miles v. Bradford*, 22 Md. 184; *Brooke v. Widdecombe* 39 Md. 401; *Magruder v. Swann*, 25 Md. 178.

That the Maryland company was not transacting business in New York when the appellant refused the license to the appellee is immaterial.

Germania Ins. Co. v. Swigert, 4 L. R. A. 473, 128 Ill. 244; *Phoenix Ins. Co. v. Welch*, 29 Kan. 679; *State v. Moore*, 39 Ohio St. 490.

Our statute contemplates the case of a refusal by the insurance commissioner of a sister State to issue a license to an insurance company of the State of Maryland to do business in such State; and of the right of this State to exclude the New York corporation, there cannot be any doubt.

Doyle v. Continental Ins. Co. 94 U. S. 542, 24 L. ed. 152.

Until the requirements of the law have been complied with, a foreign corporation is without power to do any business whatever within the limits of a State. *Utey v. Clard-Gardner Lode Min. Co.* 4 Colo. 369.

Conditions imposed by statute. See note to *State v. Western U. Mut. L. & Acc. Soc. (Ohio)* 8 L. R. A. 129.

The right of a corporation created by the laws of one State to do business in another depends upon the comity of the State in which the business is transacted,—a comity which is never extended where the exercise of such power is prejudicial to its interests or repugnant to its policy. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 1126 L. ed. 644.

A foreign insurance company, doing business in Pennsylvania, under the authority of a statute requiring an agreement that judicial process served upon its agent should have the same effect as if served upon the corporation, is within the 13 L. R. A.

Messrs. Bernard, Carter & Sons for appellee.

Irving, J., delivered the opinion of the court:

The question to be decided in this case arises upon an appeal from a *pro forma* order of Baltimore City Court directing a mandamus to issue against the insurance commissioner of the State, commanding him to issue a license to the Fidelity & Casualty Company of New York to do business in this State. It is especially interesting and important, as it involves a question of comity between the States, and a construction of the statutes of this State and of New York State in relation to each other. The case has been argued with very great ability by the counsel on both sides, and by the aid of that skillful and learned debate we have been able to reach a unanimous conclusion. The record discloses the following state of affairs: The appellee for several years, as a New York corporation, upon paying the requisite license fees, has been transacting business in the State of Maryland, and has outstanding risks in the State of over \$3,500,000. It is a corporation with \$250,000 paid-up capital. In December, 1890, this company, tendering the usually demanded license moneys, asked for its annual license to transact business in Maryland. It was informed that, in consequence of a protest from the American Casualty Insurance & Security Company of Baltimore City, license to transact business in Maryland would not be granted. Thereupon the appellee filed its petition in the Baltimore City Court, alleging compliance or tender of compliance with all the prerequisites to the granting of license, and that the same had been refused. It then asked for mandamus to compel its issuance. Rule was laid on the insurance commission to show cause why the mandamus should not issue. By his answer the following admitted facts were disclosed: The American Casualty Insurance & Security Company of Baltimore City was organized and incorporated in 1890, with a paid-up capital of one million of dollars, and a half million of surplus. Its line of business was manifold, and similar to that of the appellee, and it became the rival of the appellee in insurance business. This company having started business here, desired to open an office and transact business in the City of New York. It applied for license to trans-

meaning of the Act of Congress of 1875, relating to service of process, "found" in that State so as to give jurisdiction to federal courts sitting in that State. *Ex parte Schollenberger*, 96 U. S. 373, 24 L. ed. 863.

There is no sound reason why, in the case of an insurance company doing business in another State, by an agent, under statutes such as those referred to in the principal case, it should not be deemed to be represented in the latter by such agent, and held responsible for its obligations and liabilities there incurred. See also *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 65, 20 L. ed. 354; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 285, 20 L. ed. 576; *St. Clair v. Cox*, 106 U. S. 357, 27 L. ed. 225.

As to the law regulating the terms upon which foreign insurance companies may transact business within a State, see note to *State v. Western U. Mut. L. & Acc. Soc. (Ohio)* 8 L. R. A. 129.

Retaliatory legislation. *Ibid.* See also note to *Boulware v. Davis (Ala.)* 9 L. R. A. 601.

act business in New York City. The insurance superintendent of New York State replied that under the laws of New York he could not grant license to do more than one kind of business in that State. The application was modified so as to ask license for only one kind of insurance, viz., that of steam-boilers. Notwithstanding the company was ready and willing to comply with all the requirements of the State of New York preliminary to the issuance of license, the superintendent refused to grant license, in the exercise of the discretion which the Statute of that State in express terms confided to him. The language of the Statute of New York, to wit, of the second section of chapter 593 of the Acts of 1873, is as follows: "The said superintendent shall have power to refuse admission to any company, corporation, or association applying to be permitted to transact the business of insurance in this State from any other State or country wherever the capital stock shall be impaired, and also whenever in his judgment such refusal to admit shall best promote the interests of the people of this State." In the 188th section of article 23 of our Code of Public General Laws the following proviso is put: "Provided, that when by the laws of any other State any deposit of money or securities is required, or taxes, fines, or penalties, or other obligations or prohibitions are imposed upon insurance companies incorporated or organized under the laws of this State, and transacting business in such other State, or upon the agents of such insurance companies, greater than those required or imposed by the laws of this State, so long as such laws continue in force the same taxes, fines, penalties, and deposits, obligations, and prohibitions shall be imposed upon all agents or insurance companies of such State doing business in this State, instead of those prescribed by the laws of this State." The insurance commissioner of this State, regarding this provision of our Statute as substituting the New York Statute for our Statute whenever the New York law differed from ours, and introduced other and greater "obligations and prohibitions" as affecting Maryland companies desiring to prosecute business in New York State, and being informed that a Maryland company of like character with the appellee had been excluded from New York, and refused license to do business in that State, deemed it his duty to refuse license to the appellee to do business in this State. To test the correctness of his view of the law and conduct in the premises this proceeding was instituted and a *pro forma* order for mandamus was granted, from which this appeal was taken.

The appellee contends that the Statute of Maryland does not give our insurance commissioner any discretion whatever, as the New York law does, in express terms, give to its commissioner or superintendent of insurance; and that, therefore, when the appellee had tendered full compliance with all the provisions of our Statute which section 124 of article 23 of the Code enumerates, it was the imperative duty of the insurance commissioner to grant a license; and that his refusal was without warrant of law. The argument is that, as the Statute says that license shall not be granted

"unless it be fully organized and possessed of the amount of capital required of similar companies formed under the laws of this State, or until the following conditions have been complied with," then, when it is properly organized, and has proper amount of capital, and has complied with the conditions mentioned in the Statute,—as was admitted was the case as respects the appellee,—there was no alternative to the commissioner, and he must issue the license. The appellant controverts this position, and insists that, while a discretion in the matter is not conferred on the commissioner in express language, as is done by the New York Statute to its superintendent of insurance, yet our Statute is a strictly retaliatory one; and when the New York Statute imposes an "obligation or a prohibition" not found in ours, that obligation and prohibition must be treated as if found in so many words in our Statute, and it is to be enforced accordingly. In other words, the contention of the appellant is that, in such case, and for such emergency, our Statute makes the New York law our law to control the action of our commissioner of insurance. This, we think, is the correct view, and justifies the commissioner in refusing license to the appellee.

We cannot agree to the view, pressed with so much earnestness and ability by appellee's counsel, that the exclusion of the Maryland company from New York State by the refusal on the part of the New York superintendent to allow it license, was not a "prohibition" by the law of New York, within the meaning of our Statute. The law of New York vests such absolute discretion in its superintendent of insurance that it is within his power to exclude every Maryland company from working in New York State, if in his judgment it was not to the interest of the New York people to have companies of other States to compete with insurance companies of that State. Now, it is perfectly clear that our law-makers never designed that our statute should be so interpreted as to allow New York companies to have access to our State on the same terms as our own, while ours cannot be allowed in New York State. According to the view of the appellee, that very condition of things might have existed by the action of the New York superintendent, and yet it would not have existed by the law of New York. Clearly that cannot be a sound view which might lead to such result. The Maryland company has been shut out of New York. How has that been effected? By the unappealable determination of the New York officer not to grant it a license. By what authority has that officer so conclusively shut the door upon a Maryland company? By the law of New York, giving him the discretion and power of prohibiting that company from entering the State of New York to do insurance business there. It is the law that enabled the superintendent to prohibit, and that is responsible for the prohibition; and the prohibition must be referred to and charged to the superior authority,—the law of New York. It will not do to say, therefore, that the law of New York does not prohibit. By its express provisions, in certain contingencies, exclusion (which is prohibition most effectual) is allowed; and supposing that contingency as arising, the

superintendent has excluded the Maryland company from New York; so that it is prohibited now, under penalties, from attempting to work there. The facts show it to have been a willful exclusion of the Maryland company from New York. Only two considerations are mentioned in the law giving the superintendent his power to refuse license. One is where there is impairment of the value of the stock of the company seeking license, and the other, when the superintendent for any reason may think it not for the interest of the New York people that such company should be permitted to do business in that State. There was no impairment of the stock, for the company was in unusually safe condition. Its capital was \$1,000,000, all paid up; and it had a half million of surplus. So safe a company could not jeopardize the interests of the people by offering it insurance. It was four times as strong as the New York company in paid-up capital, and with so large a surplus offered an unusually safe medium of insurance in the several directions in which it took risks. It is apparent, therefore, that no justifying reason existed for prohibiting it from exercising its functions in the State of New York, and it was well justified in asking the commissioner in this State to put into force the retaliatory feature of our law; and there would seem to be especial fitness enforcing it as against the appellee, whose business is so especially along the same line and plane as the American Casualty Insurance & Security Company.

The rule for the construction of statutes is that statutes are to be "read according to the natural and obvious import of their language;" and no construction ought to be made against the express letter of the statute, for nothing can so express the meaning of the makers as their own direct words. Sedgw. Stat. & Const. Law, 260. The same author, in the same connection, says that words are to be taken in their ordinary sense, unless such a construction would be obviously repugnant to the intention of its framers. The object and intent of a statute is always to be regarded; and, of course, its language is to be understood and construed as furthering the object contemplated by the makers. A forced construction "for the purpose of extending or limiting their operation" must not be resorted to. The object of our Statute is palpable. The design was to put insurance companies coming from other States into the same position as ours would be in the State whence they came. They were to be admitted on the same terms, and none other than ours would be there. Companies coming from

other States were intended to fare no better than ours would on going to their State. Any obligation or "prohibition" affecting Maryland companies in other States was to operate here on companies coming here from thence. With such an object in view, as very manifestly existed, the "prohibition" can have but one reference and meaning, and it would be forcing it from its natural and obvious meaning in the Statute to suppose, because it is used together with the language, "deposit of money or securities, taxes, fines, or penalties, or other obligations," and "or prohibitions" must have some reference to the subject of money deposits or taxes. After enumerating all the other things that might be demanded to be done, it winds up with "prohibitions," meaning thereby plainly what the word means in its most natural and usual signification. It clearly meant that if our companies were prohibited from a State, theirs were to be prohibited here. The law was intended to be one of strict reciprocity. "Prohibition" means, according to lexicographers, "forbidding to do;" "an inhibition;" "an interdiction." When, therefore, the superintendent refused license to the Maryland company, it was instantly forbidden to attempt to transact business in the State of New York. That such legislation as that of this State which we have been called on to construe is legitimate and constitutional is fully established by authority; but, as that has not been questioned, and the whole argument has rested on the construction of the language of the statutes of the two States, we need not cite authority in support of the law. The enforcement of the law in a fair and just way, as we have construed it, and its authority to the commissioner, cannot operate prejudicially to the people promoting competition. Competition is always in the interest of the masses, and a judicious officer will never unnecessarily do what will prevent it; but action such as he has taken in this case will tend to secure just treatment from other States. If this Maryland company was impaired in credit, and had for that reason been refused license in New York State, its prohibition from doing business there would not have given rise to the exercise of the retaliatory feature of our law, unless it was against some company from that State in like unsound condition.

Being of opinion that the mandamus against the appellant should not have been ordered, *the ordered granting it must be reversed*, and the petition therefor must be dismissed.

Petition for rehearing overruled.

INDIANA SUPREME COURT.

CITY OF RICHMOND, *Appt.*,

v.

Charles E. DUDLEY.

(.....Ind.....)

A city ordinance for regulating the stor-

Note.—Municipal ordinances, unconstitutional and void.

An ordinance which permits one person to carry on an occupation within municipal limits, and pro-
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age of inflammable or explosive oils, which reserves to the common council the right to grant or refuse permission to keep and store such oils according to its discretion, and at its option to revoke such permission at any time, without fixing any rule for determining the con-

hibits another, who has an equal right, from pursuing such business, is unconstitutional. *Cooley, Const. L. 243-247.*

An ordinance prohibiting any person from be-

ditions under which such oils may be kept, which may be compiled with by all alike, is invalid.

(September 17, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court of Wayne County in favor of defendant in an action brought to recover a penalty for the violation of a city ordinance forbidding the keeping within the city limits of large quantities of inflammable oils without permission. *Affirmed.*

A decision was reached and an opinion handed down in this case on January 18, 1891, reversing the judgment of the lower court. A rehearing was subsequently granted and conclusion announced by the opinion given herewith was then reached.

The facts sufficiently appear in the former opinion as reported in 10 L. R. A. 187, and in the opinion given herewith.

Messrs. A. C. Lindmuth and Fox & Robins for appellant.

Messrs. Burchenal & Rupe, for appellee:

Municipal ordinances placing restrictions upon lawful conduct or business, or the use of lawful property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, or the use of such property; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise of any arbitrary discrimination, by the municipal authorities, as between citizens who will so comply.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217; *Re Frazer*, 6 West. Rep. 140, 63 Mich. 396; *Anderson v. Wellington*, 40 Kan. 178; *Chicago v. Trotter* (Ill.) Jan. 22, 1891; *Newton v. Belger*, 8 New Eng. Rep. 722, 148 Mass. 598; *Dillon, Mun. Corp.* §§ 320-322; *Barthet v. New Orleans*, 24 Fed. Rep. 563; *Bills v. Goehen*, 8 L. R. A. 261, 117 Ind. 226; *Grafty v. Rushville*, 5 West. Rep. 868, 107 Ind. 502, 509; *Clark v. South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, 100 Ind. 575.

Miller, J., delivered the opinion of the court:

This was an action brought before the may-

or of the City of Richmond against the appellee for the violation of a city ordinance regulating the storing and keeping of petroleum and other inflammable oils within the corporate limits. Judgment was rendered against the appellee before the mayor, and the cause appealed to the Wayne Circuit Court. In that court demurrers were sustained to the several paragraphs of complaint, and judgment on the demurrer rendered against the appellant. The only question before us is as to the validity of the ordinance. The sections of the ordinance to which the objections are made are as follows: "Section 1. Be it ordained by the common council of the City of Richmond that it shall be unlawful for any person to keep or store any petroleum, naphtha, benzine, gasoline, coal oil, or any inflammable or explosive oils, within the corporate limits of the City of Richmond, in quantities greater than five barrels at a time, except as herein-after provided. Sec. 2. Any person desiring to keep or store any of the oils or products mentioned in the first section of this ordinance within the corporate limits of the City, in quantities greater than five barrels at a time shall present a written petition to the common council, at a regular meeting thereof, setting forth an exact description of the location, premises, and buildings on and in which it is proposed to keep and store such oils and products, and the manner and kind of vessels in which the same are to be kept, the kind of oils, and the purpose for which they are to be kept. Sec. 3. Upon the presentation of the petition, as provided in section two of this ordinance, the common council may, if the location and buildings described in said petition, and the purpose and keeping of such oils and products, are deemed suitable and proper, and that the person presenting such petition is a proper person, grant such permission to the person presenting such petition, to keep and store such oils and products on the premises, and in the manner set forth in the petition, or in the manner which the council may direct, in quantities greater than five barrels at a time, which permission so granted may be revoked at any time at the option of the council; and the rights and privileges to be exercised by the person receiving such permission shall

engage a visitor to any gambling place within certain prescribed limits in a city is not a violation of U. S. Const., 14th Amend., although those limits are generally designated and known as the "Chinese quarter." *Re Ah Kit*, 45 Fed. Rep. 798.

A city ordinance which discriminates against Chinese prisoners in the degree of punishment for offenses committed within the municipal jurisdiction as that awarded to other aliens is void. *Ah Kow v. Nunan*, 5 Sawy. 552.

A municipal ordinance prohibiting the keeping of cows within the city limits without a permit, but which fails to regulate or control the city council as to granting the permission, is not general in its operation among the class, and is void. *State v. Mahner*, 48 La. Ann. —; *State v. Delaney*, 43 La. Ann. —. See First Municipality of New Orleans v. Bireau, 8 La. Ann. 688.

An "eight-hour" city ordinance which attempts to prevent certain parties from employing others in a lawful business is unconstitutional and void. *Re Kubaeh*, 9 L. R. A. 482, 85 Cal. 274.

A municipal ordinance making it unlawful to

engage in laundry business without consent of the board of supervisors, except the business be located in a building of brick or stone, confers a naked, arbitrary power upon the board, and is unconstitutional. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

Any attempt to discriminate, as regards licenses or license fees, between a resident and a nonresident, is a violation of article 4, § 2, U. S. Const. *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Dillon, Mun. Corp.* 400; *Simrall v. Covington* (Ky.) Sept. 20, 1890; *Daniel v. Richmond*, 78 Ky. 542; *Braceville v. Doherty*, 30 Ill. App. 645; *Re White*, 43 Fed. Rep. 918; *American Fertilizer Co. v. Board of Agriculture*, 43 Fed. Rep. 606; *Fecheimer v. Louisville*, 84 Ky. 308; *State v. Bracco*, 108 N. C. 349; *Simmons Hardware Co. v. McGuire*, 30 La. Ann. 848; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368; *State v. North*, 27 Mo. 464.

Scope and effect of municipal ordinances. See note to *Fath v. Tower Grove & L. R. (Mo.)* 13 L. R. A. 76.

not be assignable or transferable by the person receiving the same to any other person directly or indirectly, and any attempt so to do shall be deemed a revocation of all rights and privileges on the part of the person making the attempt." Two objections are urged against the validity of this ordinance: (1) That it gives to the council the power to arbitrarily discriminate between citizens by giving the permission to some and withholding it from others under similar conditions; and because it specifies no terms or conditions to be observed in the keeping or storing of such oils which could be complied with by all citizens alike. (2) That the ordinance is unreasonable, and is an undue restraint upon lawful trade and business.

The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality. Section 3155, Rev. Stat. 1881, provides that the common council of a city shall have power to make by-laws and ordinances not inconsistent with the laws of the State, and necessary to carry out the objects of the corporation. The danger to be apprehended from the storing of large quantities of inflammable or explosive substances in large quantities within the limits of a city to life and property is so great as to invite legislative control of the same by the city government. The principal question in this case is whether or not the ordinance in question is a valid exercise of that power. It will be observed that this ordinance does not establish any general rule for the storage of substances proposed to be regulated; but it reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose and the person presenting the petition "a proper person." It further provides that the permission, when granted, "may be revoked at any time, at the option of the council." Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, cannot well be imagined. The business of keeping, storing, and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen.

In the case of *Mills v. Goshen*, 117 Ind. 221, 8 L. R. A. 261, an ordinance of the city requiring a license for carrying on the business of roller skating, and providing that such license should be issued upon the payment into the city treasury of such sum of money "as the mayor or common council shall determine in each particular case," was held invalid; the objection being that a discretion was lodged in the mayor or common council in fixing the fee to be charged. In the opinion this language is quoted with approval from *Horr & Bemis on Municipal Police Ordinances*: "The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 80 L. ed. 220, an ordinance of the City of San Francisco, prohibiting the carrying on of laundries without a permit from the board of sup-

ervisors, except in buildings constructed of stone, was held invalid. The court says: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, with restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings,—constituting nearly all those in previous use,—it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living."

In *Baltimore v. Radecke*, 49 Md. 217, an ordinance of the City of Baltimore prohibiting the use of steam whistles without the permit of the mayor was held invalid. The objection to the ordinance was that it permitted him to exercise his own discretion in revoking a permit, without general rules to guide or control his action.

In *Barthet v. New Orleans*, 24 Fed. Rep. 564, an ordinance was held invalid which made it unlawful to maintain a slaughter house, "except permission be granted by the council of the City of New Orleans."

In *State v. Mahner* (La.) 9 So. Rep. 480, an ordinance of the City of New Orleans forbidding the keeping of dairies within certain limits, except by the permission of the city council, was held to be null and void.

In *Newton v. Belger*, 148 Mass. 598, 8 New Eng. Rep. 722, an ordinance which permitted the board of aldermen to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire-district was held invalid.

Ordinances, apparently aimed at the "Salvation Army," prohibiting marching through the public streets without first obtaining the consent of the mayor or common council, or some other specified officer, not containing regulations operating uniformly on all processions, have been held invalid in *Re Frazee*, 68 Mich. 396, 6 West. Rep. 140; *Anderson v. Wellington*, 40 Kan. 173; *Chicago v. Trotter*, (Ill.) 26 N. E. Rep. 359.

It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply. We are of the opinion that the ordinance under consideration is objectionable for the reasons indicated. Having arrived at a conclusion that will necessarily not only dispose of the case, but invalidate the

ordinance, we deem it unnecessary to pass upon the other objection to its validity. The ordinance, in its present form, cannot be enforced; and, if another one should be enacted,

we must presume that the municipal authorities will, in their wisdom, enact a proper and reasonable ordinance.

Judgment affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

FARIST STEEL CO. v. CITY OF BRIDGEPORT.

(.....Conn.....)

1. **Compensation must be paid to a riparian owner by a city which in establishing harbor lines appropriates a portion of the land lying between high and low water mark adjacent to his property under a charter which gives power to establish such lines but preserves to landowners the same rights that they have under the section of the charter providing for the opening of highways, where the latter section makes full provision for compensation for whatever damage a landowner may suffer.**
2. **The establishment of harbor lines by a city under power conferred by its charter will not preclude it from altering them by the subsequent establishment of new ones, as proper occasion may require, without further legislative authority, and the legal discontinuance of the old lines will be accomplished by the legal establishment of new ones without any specific declaration of discontinuance.**
3. **Under a charter provision that harbor lines established by a city may be laid out and designated by a committee appointed by the city council for that purpose, no legal layout can be made by the adoption by the council of a mere recommendation by the committee of the acceptance of a resolution previously passed by the council to the effect that the lines be laid out.**
4. **Although the presumption is that the establishment of harbor lines is for a public use in the interest of navigation, yet if the record shows that their purpose was to prevent a new bridge from being marred by the erection of structures on either side of and connected with it, the proceedings will be held void.**

(March 20, 1891.)

RESERVATION by the Superior Court for the Fairfield County for the opinion of the Supreme Court of Errors of an appeal from the action of the common council of Bridgeport in establishing harbor lines and assessing damages therefor. *Judgment for appellant advised.*

The facts are fully stated in the opinion.

Messrs. Morris W. Seymour, A. M. Tallmadge and H. H. Knapp, with Messrs. D. B. Lockwood and A. B. Beers, for appellant:

Though the Legislature has given power to

establish harbor lines it nowhere in express terms gives the power to discontinue or alter such lines.

Municipal corporations have no inherent powers respecting wharves and docks; all their powers respecting them must be derived from the Legislature.

Murphy v. Montgomery, 11 Ala. 586; *Dillon, Mun. Corp.* 1st ed. § 74; *Nichols v. Bridgeport*, 28 Conn. 208; *Tiedeman, Pol. Powers*, p. 378.

The common council having once exhausted this right, there can nowhere be found express authority in the charter to again exercise it.

Hudson & D. Canal Co. v. New York & E. R. Co. 9 Paige, 323, 4 L. ed. 718; *Brigham v. Agricultural B. R. Co.* 1 Allen, 816; *Morris & E. R. Co. v. Central R. Co.* 31 N. J. L. 205; *Lodge v. Philadelphia, W. & B. R. Co.* 8 Phila. 345; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Mills, Em. Dom.* § 58.

The right of eminent domain, even when full compensation is given, can be exercised only for public purposes.

Sedgw. Stat. & Const. Law, 478; *Dillon, Mun. Corp.* § 45; *Eggleston, Damages*, p. 263.

If there be no public necessity there is no public right.

2 *Parsons, Cont.* p. 542; *Beekman v. Saratoga & S. R. Co.* 8 Paige, 45, 3 L. ed. 50; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535; *Boston Water Power Co. v. Boston & W. R. Co.* 23 Pick. 393; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Scott v. Toledo*, 36 Fed. Rep. 394; *Tiedeman, Pol. Power*, p. 379.

The plaintiff is owner in fee of certain real estate consisting of upland, and is a riparian owner of the mud-flats, adjacent thereto. For taking our mud-flats and depriving us at certain states of the tide of access to the channel, we claim we are clearly and legally entitled to substantial damages.

Simons v. French, 25 Conn. 346; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 337; *New Haven S. Co. v. Sargent*, 50 Conn. 199; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. ed. 801; *Murray v. Sharp*, 1 Bosw. 539; *Gould, Waters*, § 149; *Angell, Watercourses*, p. 642; *Mills, Em. Dom.* 379; *Wadsworth v. Tiltonson*, 15 Conn. 366; *Myers v. St. Louis*, 32 Mo. 367.

The sounder and better rule is that riparian owners upon waters the bed of which belongs to the public, have valuable rights.

Lewis, Em. Dom. § 76.

These riparian rights are property and can-

NOTE.—The exhaustive and discriminating briefs of the respective council leave nothing to be supplied in the way of annotation. On the question of littoral rights, the practitioner is also referred 13 L. R. A.

to the notes to *Case v. Loftus*, 5 L. R. A. 634; *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89; *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632.

not be taken away without paying just compensation.

Union Depot Street R. & Transf. Co. v. Brunswick, 31 Minn. 297; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Lyon v. Fishmonger's Co. L. R.* 1 App. Cas. 662; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Providence Steam Engine Co. v. Providence & S. S. Co.* 12 R. I. 848; *Chapman v. Oshkosh & M. R. Co.* 33 Wis. 629; *Clement v. Burns*, 43 N. H. 606; *Yale College v. New Haven*, 57 Conn. 1.

A franchise is property, and when the public necessities require it, it may be taken for public purposes on making suitable compensation.

Richmond, F. & P. R. Co. v. Louisiana R. Co. 54 U. S. 13 How. 83, 14 L. ed. 60; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 534, 12 L. ed. 546; *Crosby v. Hanover*, 36 N. H. 404; *Van Dolsen v. New York*, 17 Fed. Rep. 819; *Weber v. State Harbor Comrs.* 35 U. S. 18 Wall. 57, 21 L. ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Lyon v. Fishmonger's Co. L. R.* 1 App. Cas. 662, 35 L. T. N. S. 569.

There has been no layout of the proposed harbor line "in question by any committee in accordance with the charter of the City."

Gregory v. Bridgeport, 52 Conn. 43.

Messrs. John J. Phelan and George W. Wheeler, for appellee:

The harbor line established in 1886 was discontinued by the establishment of another harbor line in 1889.

Com. v. Boston & A. R. Co. 150 Mass. 176; *Brook v. Horton*, 68 Cal. 554; *Hark v. Gladwell*, 49 Wis. 177; *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158; *Bowley v. Walker*, 8 Allen, 21; *Bliss v. Deerfield*, 13 Pick. 102; *Johnson v. Wyman*, 9 Gray, 186; *Hobart v. Plymouth*, 100 Mass. 159; *Dillon, Mun. Corp.* 4th ed. § 666, note 1; *Bowers v. Snyder*, 33 Ind. 302; *Patton v. Cresswell*, 120 Ill. 149; *Elliott, Roads & Streets*, p. 661.

The establishment of a harbor line is the exercise of legislative power and is a continuing power which never becomes exhausted, but lives on to be exercised from time to time as the public need requires.

Gosler v. Georgetown, 19 U. S. 6 Wheat. 593, 5 L. ed. 839; *Pontiac v. Carter*, 32 Mich. 171; 2 *Dillon, Mun. Corp.* 4th ed. §§ 686, 780; *Lewis, Em. Dom.* § 107; *Cooley, Const. Lim.* 206, 207; *Elliott, Roads & Streets*, p. 335; *Horr & Bemis, Mun. Pol. Ord.* § 9; *Fellowes v. New Haven*, 44 Conn. 257; *Healey v. New Haven*, 47 Conn. 815; *Kokomo v. Mahan*, 100 Ind. 244; *Russell v. Burlington*, 30 Iowa, 263; *Macy v. Indianapolis*, 17 Ind. 269; *Smith v. Washington*, 61 U. S. 20 How. 135, 15 L. ed. 858; *McCormack v. Patchin*, 53 Mo. 38; *Re Furman Street*, 17 Wend. 668; *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 724; *Callender v. Marsh*, 1 Pick. 418; *Karst v. St. Paul R. Co.* 23 Minn. 121; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 509; *Kelley v. Milwaukee*, 18 Wis. 85; *Jelliff v. Newark*, 2 Cent. Rep. 234, 48 N. J. L. 108; *McKewitt v. Hoboken*, 45 N. J. L. 485.

The convenience and necessity of the proposed improvement are implied by the action of the common council in making the layout.

Townsend v. Hoyle, 20 Conn. 8.

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The municipality is the judge of the necessity for the establishment of a harbor line.

Dillon, Mun. Corp. § 689; *Macy v. Indianapolis*, 17 Ind. 269; *Smith v. Washington*, 61 U. S. 20 How. 135, 15 L. ed. 858; *Delphi v. Evans*, 36 Ind. 91; *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 724; *Waddell v. New York*, 8 Barb. 96; *McCormack v. Patchin*, 53 Mo. 38; *Dunham v. Hyde Park*, 75 Ill. 373; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 579; *Fellowes v. New Haven*, 44 Conn. 251; *Healey v. New Haven*, 47 Conn. 814; *Park Eccl. Soc. v. Hartford*, 47 Conn. 99.

The legality of the establishment of a harbor line cannot be tested by an inquiry into the motive impelling those who established it.

Freeport v. Marks, 59 Pa. 259; *Park Eccl. Soc. v. Hartford*, 47 Conn. 92; *Dillon, Mun. Corp.* § 811; *Milhan v. Sharp*, 15 Barb. 212; *Miners Bank of Dubuque v. United States*, 1 G. Greene, 558; *Cooley, Const. Lim.* 189; *State v. Cincinnati Gas Light & C. Co.* 18 Ohio St. 802; *Plum v. Morris Canal & Bkg. Co.* 10 N. J. Eq. 260.

The title of a riparian owner terminates at ordinary high-water mark, and the State is the owner in fee of the flats between high and low water mark.

Chapman v. Kimball, 9 Conn. 41; *Welles v. Bailey*, 4 New Eng. Rep. 841, 55 Conn. 316; *State v. Sargent*, 45 Conn. 373; *Mather v. Chapman*, 40 Conn. 395; *Church v. Meeker*, 34 Conn. 428; *Simons v. French*, 25 Conn. 358; *Nichols v. Lewis*, 15 Conn. 138; *East Haven v. Hemingway*, 7 Conn. 208.

The Commonwealth has sovereign dominion, jurisdiction, and ownership over the seashore.

The State by virtue of such sovereignty establishes harbor lines and regulates the erection of wharves upon the shore (*State v. Sargent*, 45 Conn. 373; *Com. v. Alger*, 7 Cush. 58; *Engs v. Peckham*, 11 R. I. 226); appoints harbor masters (*Vanderbilt v. Adams*, 7 Cow. 349); establishes a board of harbor commissioners (*State v. Sargent*, 45 Conn. 360); incorporates a company to remove obstructions to navigation (*Hollister v. Union Co.* 9 Conn. 436); regulates drawbridges and dams (*New Haven & E. H. Toll Bridge Co. v. Bunnell*, 4 Conn. 54; *Holyoke W. P. Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 188); controls the construction of public works in navigable waters.

Gould v. Hudson River R. Co. 6 N. Y. 522; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Atlee v. North Western U. Packet Co.* 38 U. S. 21 Wall. 394, 22 L. ed. 620.

All this may be done without making any compensation to the riparian owner because the State owns the land below high-water mark, while the riparian owner has the right to reclaim the same until the State has otherwise decided. Until he has reclaimed he has no title, no property to be taken, hence no compensation to be given.

Pennsylvania R. Co. v. New York & L. B. R. Co. 23 N. J. Eq. 159; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532; *Gould v. Hudson River R. Co. supra*; *Tomlin v. Dubuque, B. & M. R. Co.* 32 Iowa, 109; *Ravenswood v. Flemings*, 22 W. Va. 52; *Barney v. Keokuk*, 94 U. S. 335, 24 L. ed. 227; *Langdon v. New York*, 93 N. Y. 159; *New York v. Hart*, 95 N. Y. 407; *Martin v. O'Brien*, 34 Miss. 37; *Wood v.*

Fowler, 26 Kan. 682; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389; *Com. v. Alger*, 7 Cush. 53; *Wood, Nuisances*, p. 623, *note 2*; *State v. Sargent*, 45 Conn. 358; *Gerhard v. Seekonk River Bridge Comrs.* 2 New Eng. Rep. 619, 15 R. I. 384; *Gould, Waters*, § 138.

Seymour, J., delivered the opinion of the court:

The finding of facts states that the plaintiff is the owner in fee of certain real estate in the City of Bridgeport, consisting of uplands, and, as a riparian owner, of the mud flats adjacent thereto, on the east side of Bridgeport harbor. It further appears that in the year 1886 the common council of the City legally designated and established a harbor line on the east side of the Bridgeport harbor, which line ran over the mud flats of the plaintiff and others, and assessed benefits and damages resulting therefrom to the respective parties interested. At that time, and for many years before, a bridge existed over the harbor, with which certain buildings were connected along the sides of the east end thereof. In pursuance of a vote of the common council passed December 5, 1887, the City proceeded to lay out a new bridge or public highway in substantially the same location as that of the bridge above mentioned, which new bridge was completed and opened as a public highway about December 8, 1888. At the time the new bridge was completed the buildings along the sides of the east end thereof were connected with it, and still continue to be so connected. On the 3d day of September, 1888, the board of public works made the following report to the common council: "That in their judgment it would be wise, before the completion of the said new lower bridge, to take such action as would prevent the erection of buildings either on the north or south sides of the iron portion of said structure, and connecting therewith on either side. Such action should be taken, however, in accomplishing this purpose as will result in the least injury to private rights. The board suggests the advisability of condemnation by the City, for public use, of so much of the adjoining property as will be necessary to secure the result desired, and recommend that the matter be referred to some appropriate committee for action." This report was accepted, and referred to the street committee by the common council. On the 10th day of December, 1888, the committee on streets reported to the common council on the report of the board of public works, and made the following recommendation: "That such action be taken as will result in preventing the erection of buildings on either the north or south sides of the iron portion of the new lower bridge. The committee fully agree with said board that this expensive and slightly structure should not be marred by placing buildings on either side thereof; and they further report that they have consulted the city attorney in reference to the subject, and, as a result of such conference, have come to the conclusion that the most desirable course to pursue, in order to accomplish the object desired, would be to establish harbor lines on both sides of said bridge." The committee recommended the adoption of the following resolution: "Resolved, that the com-

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mittee on harbor improvements is hereby directed to take such preliminary action as will result in the establishment of harbor lines on both sides of the lower or Bridgeport bridge, extending from the present harbor lines at the western end of the eastern causeway of said bridge, westerly to the draw of said bridge." This report was accepted and the resolution adopted by the common council. On the 7th day of January, 1889, the committee on harbor improvements reported on the report of the street committee relative to establishing harbor lines on both sides of the lower bridge, and recommended the adoption of the following resolution: "Resolved, that the clerk is hereby directed to notify owners of property and parties in interest to appear before this common council at the council room, on Monday evening, January 21, 1889, at 8.30 o'clock, and be heard in relation to the establishment of harbor lines on the east side of Pequonnock River, as follows: Beginning at a point in the harbor lines as already established, at the old wall or point of rocks, on property belonging to the Farist Steel Company; thence northeasterly in the direction of the common center of Kossuth Street and the new bridge, 340 feet; and thence northerly in a straight line to a point in the harbor line as already established at Howe's dock, at the foot of Howe Street, excepting that so much of said line as may lie upon or pass over the eastern approach to the new lower bridge shall remain inoperative and of no effect." The report was accepted and the resolution adopted by the common council. On the 21st day of January, 1889, the board of aldermen and the board of councilmen assembled in joint convention, and hearings were had relative to the establishment of said harbor line. On the 4th day of February, 1889, the committee on harbor improvements reported to the common council relative to the establishment of harbor lines on the east side of Pequonnock River, a hearing upon which was had before the common council January 21, 1889. They recommended the adoption of the following resolution: "Resolved, that harbor lines be and are hereby ordered laid out and established on the east side of Pequonnock River, north and south of the new lower bridge, commencing at the old wall or point of rocks on property of the Farist Steel Company, and extending northeasterly in the direction of the common center of Kossuth Street, 340 feet; and thence northerly, in a straight line to a point in the established harbor lines at Howe's dock, at the foot of Howe Street. Resolved, that Messrs. John McNeil, Richard B. Cogswell, and Charles R. Brothwell be and are hereby appointed a committee, whose duty it shall be to make such layout of harbor lines, and report in writing their doings to the common council, which report shall embody a survey and particular description of said lines." On the 18th of February, 1889, the committee reported, recommending the adoption of the following resolutions: "Resolved, that harbor lines or dock lines be and are hereby established on the east side of Pequonnock River, in accordance with a map thereof herewith submitted, and the following description of survey: Beginning at a point in the harbor line, as already established at the old wall or point

of rocks on property belonging to the Farist Steel Company; thence extending northeasterly in the direction of the common center of Kossuth Street and the new lower bridge, 840 feet; and thence northerly in a straight line to a point in the harbor line, as already established, at Howe's dock at the foot of Howe Street, except in that so much of the line as may lie upon or pass over the eastern approach to said lower bridge shall remain inoperative and of no effect. Resolved, that the mayor appoint appraisers to estimate the damages and benefits resulting from the foregoing layout of harbor lines." The resolutions were adopted and the mayor thereupon appointed appraisers on said layout who proceeded to assess benefits and damages thereon, and on July 1, 1889, reported to the common council. In their report they did estimate, ascertain, and determine that the appellant will receive an equal amount of damages and benefits from the establishment of the harbor line. On the 15th of July, 1889, the common council accepted the report, whereupon this appeal was taken. It seemed to be conceded on the argument that the report of the appraisers, that the appellant's damages and benefits are equal to each other, proceeded upon the theory that he is entitled to no damages on account of the establishment of the harbor lines. The finding states that a tract of land is taken by the layout of the proposed harbor lines, and the appellant is deprived of the use, benefit, and worth of the same, and of all the privileges and franchises connected therewith, without compensation.

The first question, therefore, which we shall consider relates to the general right of the owner of lands abutting on navigable waters to damages for the legal establishment of a harbor line over the abutting flats, between high and low water marks. In Connecticut the public is the owner in fee of the flats adjoining navigable waters up to high-water mark, such title being vested in the public for purposes of navigation and commerce. *Simons v. French*, 25 Conn. 346.

The owner of the adjoining uplands has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil, and of using it for any purpose which does not interfere with navigation, and it may be conveyed separately from the adjoining uplands. Over it he has the exclusive right of access to the water, the right to accretions, and generally to reclamations. Because the soil, between high and low water marks, is held to be *publici juris*, the right of the owner of the adjoining upland in it is termed a "franchise." But it is none the less a well-recognized, substantial, and valuable right. It constitutes, as the court says in *Simons v. French*, *supra*, speaking of the right of wharfage, like other franchises, a species of property, which, like other property, is alienable by the owner, and alienable as well before the right has been exercised as it would be after a wharf had been actually erected. It is claimed by the appellee that, inasmuch as the fee of the flats is in the State, therefore the State has the undoubted right, by itself or by those to whom it delegates the right to take and use them for any public purpose without giving compensation therefor, so

long, at least, as the upland proprietor has not appropriated them to such uses as he legally may. There are cases which sustain such a claim. On the contrary there are cases which hold that riparian owners upon navigable waters have rights appurtenant to their estates of which they cannot be deprived, when once vested, except in accordance with established law, and upon due compensation. This, says Lewis, in his recent work on Eminent Domain, after reviewing the cases, seems the better and sounder rule. It certainly seems more in harmony with our Connecticut decisions that the right of wharfage—perhaps the most valuable franchise attached to the upland—is as much the subject of sale by the owner of the right before it has been exercised as it would be after.

The common council of Bridgeport, in establishing harbor lines, acts under the delegated power of the State. If the State might take the mud flats of the appellant in the legal establishment of harbor lines, without granting compensation therefor, on the ground that it owns them, and if the council, representing the power of the State, might, if it were so authorized, possess the same power, yet no such power is given or intended. The State has a right to give compensation, and to require the city to do so; and this it has expressly done. Section 38 of the city charter provides that the common council shall have power to designate and establish a line or lines on or along either or both sides of Bridgeport harbor or Pequonock River, or on any part thereof, from the mouth of the harbor to Berkshire mill; and in designating and establishing such line or lines for the purposes aforesaid similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had, and the persons whose land or mud flats are thus taken and appropriated, or who are especially benefited or damaged thereby, shall have the same rights, and be subject to the same obligations and liabilities, as in the case of the lay-out, alteration, or enlargement of highways, streets, public walks, etc., in said city. Section 32 of the charter provides that, before the common council shall determine to lay out, alter, extend, enlarge, discontinue, or exchange any highway, street, public walk, etc., in said City, they shall cause reasonable notice to be given, describing in general terms such proposed lay-out or alteration, and specifying a time and place when and where all persons whose land is proposed to be taken therefor may appear and be heard in relation thereto by the common council assembled in joint convention for such hearing; at which time and place, and at any meeting adjourned therefrom, the common council shall hear all the parties in interest who may appear and desire to be heard in relation thereto. Section 33 provides that if, after such hearing, the common council shall resolve to lay out, alter, extend, enlarge, discontinue or exchange such street, highway, walk, avenue, park, or landing place, they shall appoint a committee, whose duty it shall be to make such lay-out or alteration and report in writing their doings to the common council, which report shall embody a survey and particular description of such street, high-

way, etc., or alteration thereof. Section 34 provides, if said report shall be accepted, for the appointment of three judicious and disinterested freeholders of the City to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from the taking of such land for public use or from such lay-out, alteration, etc. Said freeholders shall be sworn, and before making any such assessment of damages and benefits shall give reasonable notice to all persons interested of the time and place when and where they shall meet for that purpose. They shall meet at the designated time and place, and at such other times and places as they shall adjourn to therefrom, and shall hear all parties in interest who may appear; and they shall thereupon ascertain and determine what person or persons will be damaged by such taking of land or such lay-out or alteration, and the amount thereof over and above any damages they may receive therefrom; also who will receive an equal amount of damages and benefits therefrom. Thereupon they shall report to the common council. The report shall be continued to its next general meeting and published. Upon the acceptance of the report at the next meeting of the common council the same shall be recorded, and the common council shall cause a notice containing the names of the persons assessed, with the amounts of their respective assessments, to be published, as in the section directed, and such publication shall be deemed to be legal and sufficient notice to all persons interested in the assessments. Section 35 provides that upon the acceptance of the report of the freeholders, the survey and particular description which the charter requires to be made (section 33) shall be signed by the mayor, or, in his absence, by the president of the board of aldermen, and recorded in the records of the board of aldermen. Section 42 provides that any party who shall feel aggrieved by any act of the assessors in making any of the assessments of benefits or damages authorized in the charter, may make application for relief to the superior court or court of common pleas in and for Fairfield County, which court may confirm, annul, or modify the assessments, or make such order in the premises as equity may require. These extracts from the charter show that whatever right the State might have to take the property of the appellant in the flats between high and low water mark, yet it has authorized the council to take it only upon the payment of just compensation therefor; and upon this appeal the appellant has, of course, a right to be heard upon the question of damages, if the other proceedings should be held to be regular, so that a legal assessment can be made. But the appellant not only claims that the assessment gives it no compensation for the taking of its property, and is therefore unjust and illegal, but it also claims that the assessment was invalid, because, to state it generally, there has been no legal discontinuance of the harbor line established in 1886, and because the action of the common council in the matter of establishing the harbor lines in question has been irregular and illegal, so that no lawful lay-out of said lines has been made, and no legal assessment of damages and benefits has

been or could be made thereon. The reasons are set forth particularly in the appeal, and are based upon the facts stated in the finding and reservation. We see no good reason for holding that the council, having in 1886 established harbor lines on the east side of the harbor, is thereby precluded from altering them by the subsequent establishment of new lines as proper occasion may require, without further legislative authority. We think, also, that the legal establishment of new harbor lines would of itself be, to all intents and purposes, a legal discontinuance of the old lines, without any specific action declaring them to be discontinued.

We come now to the question whether the harbor lines were legally established according to the provisions of the charter. That instrument, as we have seen above, provides that, in designating and establishing harbor lines, similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had as in the case of the lay-out, alteration, or enlargement of highways, streets, public walks, etc., in said city. That is, as will appear by reference to the proper section, and adapting it to these proceedings, if after certain preliminary steps, the common council shall decide to designate and establish a harbor line, they shall appoint a committee, whose duty it shall be to make such lay-out and designation, and report in writing their doings to the common council, which report shall embody a survey and particular description of such harbor line. By reference to the finding incorporated in the early part of this opinion it appears precisely what was done in relation to the lay-out, after the steps preliminary to the appointment of the committee to make such lay-out had been taken. To briefly summarize it: February 4, 1889, the committee on harbor improvements reported resolutions, which the council adopted, and by which a committee was appointed to lay out the harbor lines, and report their doings to the council. February 18, 1889, the last-named committee reported and recommended resolutions for adoption, which the council adopted. Now the appellant claims that it appears from an examination of the above proceedings in detail that there has been no legal lay-out and establishment of said harbor lines; that it appears, and that such is the fact, that no action whatever was taken by the committee respecting the lay-out and establishment of harbor lines, except to report back and recommend the acceptance of the resolution in substance passed by the common council February 4, 1889; that the committee neither laid out nor established, nor does their resolution purport to lay out and establish, any harbor line, but only to recommend that the same be established by the common council, and that the common council in adopting the resolution, itself laid out and established such line. This precise point, among others, was discussed in *Gregory v. Bridgeport*, 53 Conn. 40. In that case a petition for widening a highway was referred by the common council to a committee. The committee subsequently reported as follows: "The committee on streets and sidewalks beg leave to report concerning the widening of the approach to the lower bridge, and recommend

the adoption of the following resolutions: 'Resolved, that the widening of the western approach to the lower bridge from the present north line of the street approaching the bridge, extending along the harbor seventy feet south on a line with the present wharf, and extending from the wharf westerly to the railroad, according to the map and survey thereof made by the city surveyor, and submitted herewith, be accepted and approved, and the same be and become, after the final settlement of assessments, a part of the highway thereto. Resolved, that the mayor appoint a special committee of three judicious and disinterested freeholders to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from said widening.'" Upon this state of facts the court said: "There is nothing here which purports even that the committee had laid out the widened part of the street. . . . Obviously the report is nothing more than a recommendation to the council that the widening should be made in accordance with the map and survey submitted. Again the court says: "If what was done October 3d [the day the report was accepted] can be construed as a lay-out of the alteration of the street, the lay-out was made by the common council alone, contrary to the express provisions of the charter. The committee simply recommend the alteration described to the common council for their acceptance and approval. The council accepted and approved; and if, by so doing, the alteration was laid out, who did it? The committee, by their report and recommendation, do not pretend to have done it. They described the alteration, it is true, but this was necessary to enable the common council to know what alteration should be laid out. . . . It is clear, if there was any lay-out here, that it was done by the common council, and not by the special committee, as the present charter requires. But there was no lay-out of this improvement, and consequently no basis for the assessment of damages or benefits, and the assessment was therefore void." Manifestly, if that case is still an authority, there has been no legal lay-out and establishment of the harbor line in dispute.

It is claimed, however, that it is overruled on that point by *Hough v. Bridgeport*, 57 Conn. 290. It is true that it would seem from the case as stated in the opinion that the same question might have been made. If it was, there is no intimation that it was considered and decided, and no suggestion that anything therein contained overruled the point so explicitly stated in the former case. Instead of overruling, it distinguished, the case of *Gregory v. Bridgeport* from the one then under consideration. The first held that, under the charter, which provides that if, after certain preliminary proceedings, the council shall resolve to lay out a street, it shall appoint a committee to make such lay-out, the standing committee on streets and sidewalks was not of itself, and without such special reference, such a committee as was intended by the charter. In point of fact, as the opinion shows, upon receipt of the petition for widening the highway, the council immediately referred it to the standing committee on streets and side-

walks. That committee subsequently reported resolutions that the common council should order the widening to be made according to plans which it submitted. The resolutions were adopted, and furnished the first indication that the council resolved to make the lay-out. The charter was not followed; no committee was appointed to make the lay-out after the council had resolved that it should be made. The only committee which acted was the standing one on streets and sidewalks, to which the matter was referred before the lay-out was resolved upon by the council. Now, in *Hough v. Bridgeport*, the standing committee on streets and sidewalks was also appointed a committee to make the lay-out. Relying upon the general statement of the syllabus in *Gregory v. Bridgeport*, it is evident that the claim was made that such a reference was contrary to the charter. Thereupon the court distinguishes the two cases, and shows that whereas, in the former case, the petition was referred to the standing committee immediately upon its receipt, not to make a lay-out, but to examine and report what should be done, and no committee was appointed to make the lay-out after the council had resolved upon it, yet in the latter case the regular steps in this behalf were taken, and, though the lay-out was committed to the standing committee on streets and sidewalks, it was as a special committee, appointed after the council had resolved to make the lay-out, and consequently the decision in *Gregory v. Bridgeport* was not applicable. The second point made was that the committee appointed after the council had resolved upon the lay-out was not appointed to lay out the street, but to procure and report to the council a survey, etc. This the court says is a distinction without a difference, and that, taken in connection with its fellow resolution ordering the extension, it is to be construed as a direction to the committee to lay out the street, as well as to procure and report a survey of it. No other point which was in any respect common to the two cases was discussed or decided. If the point made in *Gregory v. Bridgeport* and in the case at bar, that the council, and not the committee, made the lay-out, was made, the law respecting it, as laid down in the former case, was not in terms overruled. We are not disposed to overrule it nor evade it. Under the charter it is necessary, and upon general principles it is expedient, that a committee should make the lay-out. In theory, at least, it is not a mere formal thing which anybody can do off-hand upon paper, but should be done carefully, and, as far as possible, with a view to the convenience of individuals, even after general directions have been given by the council.

One other point demands consideration. It is claimed that, even if all the proceedings were legal in form, yet there is a fatal objection to the validity of the assessment, in that the case itself discloses the fact that the harbor lines were established and the appellant's land condemned in order that the new bridge, that "expensive and slightly structure, should not be marred by placing buildings on either side thereof," and not for any legitimate public use whatever. The appellant says that, except for public uses, private property cannot be

taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *prima facie* a taking for public use. The Legislature so considered it in granting the charter to the City of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the Constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith, and for a public use naturally connected with their establishment. Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the Constitution, when this purpose is spread upon the very records

which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established, nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid out for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights.

It is unnecessary to consider the other questions which were discussed. Upon those already considered we advise the Superior Court to render judgment for the appellant, annulling the assessment appealed from.

The other Judges concurred.

MINNESOTA SUPREME COURT.

Homer E. WARDWELL, *Respt.*,

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *Appt.*

(.....Minn.....)

***1. Plaintiff, without a ticket, though he had full opportunity to procure one, boarded defendant's train at Faribault, to go to Owatonna, and, when he told the fare collector where he was going, the latter told him the fare was fifty cents, which he paid. This was more than the ticket fare, but six cents less than the train fare. Before the train arrived at Walcott, the first station at which the train was to stop, the collector informed plaintiff of his error in the amount of the fare, and required him to pay the six cents, which plaintiff refused, and the collector told him unless he paid it he must leave the train. On arrival at Walcott, where the train stopped, the plaintiff persisting in his refusal, the collector put him off, and then returned him the fifty cents, less the fare from Faribault to Walcott. Held, that the collector, on discovering the mistake, might, within a reasonable time, require plaintiff to pay the other six cents.**

2. Also that, notwithstanding his first refusal, the plaintiff might, at any time before the arrival at Walcott, still pay the six cents, and secure the right to be carried to Owatonna.

3. Also that the collector's retention of

*Head notes by GILFILLAN, CH. J.

the fifty cents till the arrival at Walcott was not a waiver of the right to require payment of the six cents. Qualifying *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49 (Gil. 29).

4. Also that the Company had a right to be paid the fare from Faribault to Walcott, and the collector might retain it out of the fifty cents. Overruling *Du Laurans v. First Div. St. Paul & P. R. Co.* *supra*.

5. Also that the collector could not retain the entire amount, and also put plaintiff off, but could put him off only upon first returning to him the fifty cents, less the fare to Walcott, and, having put him off before doing so, the expulsion was wrongful.

(July 7, 1891.)

A PPEAL by defendant from an order of the District Court for Steele County denying its motion for new trial of an action brought to recover damages for the alleged wrongful expulsion of plaintiff from defendant's train in which a verdict had been returned in favor of plaintiff. *Affirmed*.

The facts are stated in the opinion.

Mr. F. W. Root (*Mr. W. H. Norris*, of counsel), for appellant:

Respondent endeavoring to secure from the collector reduced transportation, knowing that such act on the part of the collector would be against the rules of the carrier, and that in permitting it the collector would be disobedient to his rules and instructions, amounts to a fraud

NOTE.—Ejection of passenger for nonpayment of fare. See notes to *McKay v. Ohio River R. Co.* (W. Va.) 9 L. R. A. 182; *McGowen v. Morgan's L. & T.* 13 L. R. A.

R. & S. Co. (La. Ann.) 5 L. R. A. 817; *Carson v. Northern Pac. R. Co.* (Minn.) 9 L. R. A. 668.

on the part of the respondent; and he is not, in such case, entitled to a passenger's rights.

McVeety v. St. Paul, M. & M. R. Co. 45 Minn. 268.

It is a reasonable regulation which prohibits persons from traveling upon railroads without purchasing tickets or paying fare, and a person going on the road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road.

Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245.

Being unlawfully upon the train for one purpose, he was unlawfully there for all purposes, and the appellant had the right to expel him at any time or place, provided care was taken not to expose him to serious injury or danger.

Wyman v. Northern Pac. R. Co. 34 Minn. 210, 213.

The act of the collector in retaining a portion of the amount paid by respondent as his fare to Owatonna, was no waiver on the part of the company.

Trottinger v. East Tennessee, V. & G. R. Co. 11 Tenn. 533, 13 Am. & Eng. R. R. Cas. 49.

The collector had not the power to waive the additional ten cents, nor had he the right to receive any sum less than that fixed by the rules and regulations of the company. Knowing this, the respondent was guilty of fraud in tendering any sum less than fifty-six cents, or in endeavoring to persuade the collector to accept anything less than this amount.

Alabama G. S. R. Co. v. Carmichael, 9 L. R. A. 388, 90 Ala. 19.

The collector had the right to retain an amount sufficient to pay the respondent's fare to Walcott, even though respondent had not so consented.

McCarthy v. Chicago, R. I. & P. R. Co. 41 Iowa, 482.

The company was under no duty to immediately, upon respondent's refusal to pay fare, stop the train and expel him.

Harrison v. Fink, 42 Fed. Rep. 792.

Messrs. Amos Coggswell and Sawyer & Sawyer, for respondent:

Du Laurans v. First Div. St. Paul & P. R. Co., 15 Minn. 49 (Gil. 29), is "on all fours" with the case in hand and determines every question that can be raised here against the appellant; and unless that decision is squarely overruled the order appealed from must be affirmed.

Gillilan, Ch. J., delivered the opinion of the court:

The plaintiff, without procuring a ticket, though he had full opportunity to do so, boarded a passenger train of defendant at Fairbault to go to Owatonna. The ticket fare was forty-six, the train fare fifty-six, cents. Soon after the train started the fare collector came to plaintiff, and asked him where he was going, and, on being told to Owatonna, said the fare was fifty cents, which plaintiff then paid him. A few minutes after, and before the train reached Walcott, the first station from Fairbault, the collector came again to plaintiff, and told him he had made an error in the amount of the fare, and insisted that he should pay the other six cents, and, on plaintiff refusing, told him unless he paid it he would put him off the train. Plaintiff still refused, and on 13 L. R. A.

the arrival of the train at Walcott, plaintiff persisting in his refusal, the collector put him off, and, after he was off, returned to him the difference between the fifty cents and the fare from Fairbault to Walcott. Assuming (what, in view of the defendant's regulations posted up in its passenger stations and passenger cars, can hardly be assumed) that the collector had authority to accept for the fare any less than the fifty-six cents and waive the Company's right to full train fare, the receipt by the collector, through mistake, for the full fare, of less than the fare, did not amount to such waiver. The collector had a right, on discovering the mistake, to require the plaintiff, certainly within a reasonable time, on informing him of the error, to pay the remainder of the train fare, just as anyone on discovering a mistake in payment may, within a reasonable time, require its correction. And it was the duty of the plaintiff, on being informed of the error, to pay the remainder of the full train fare, as demanded by the collector. Nor was the collector's retention of the money paid him by plaintiff (still assuming his authority to waive any part of the train fare) until the arrival of the train at Walcott, and while the question whether the plaintiff would pay the remaining six cents or leave the train was an open one (for notwithstanding his previous refusal, the plaintiff might, until the arrival at Walcott, where the train was to stop without regard to his matter, still pay and secure the right to go to his intended destination), such waiver, and especially as the collector insisted on payment of full train fare, and informed plaintiff that he must pay or leave the train. The rule laid down in *Du Laurans v. First Div. St. Paul & P. R. Co.*, 15 Minn. 49 (Gil. 29) to the effect that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, is (assuming the conductor's authority to waive it) undoubtedly correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of his destination. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But it cannot correctly be applied to a case like this. It would be equivalent to the proposition that the collector waived payment while insisting upon it, a proposition contradicting itself.

To determine whether he would pay the difference demanded, or persist in his refusal and leave the train, the plaintiff had until the train stopped at a place where he might be put off. So long as he had that election, the collector might retain the amount paid him to abide it. As soon as it was made, to wit, when plaintiff finally refused at

Walcott, the right of the collector to retain the entire sum paid ceased, except he chose to retain it for the very purpose for which it was paid him; that is, for the full fare to Owatonna. He could not retain the entire sum, and also eject the plaintiff. As precedent to the right to expel him from the train, he should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion. We have said the collector ought to have returned to him what he was entitled to of the money (not the whole of the money), because we hold that where a passenger refuses to pay the fare rightfully demanded of him to his place of intended destination, and the carrier puts him off at a proper place, because of such refusal, the carrier has a right to be paid the proper fare for carrying him to that place, and to retain it out of any money the passenger may have paid on account of fare. This is contrary to what was decided (the court being divided upon it) in the *Du Laurans Case*. The reasons given for the decision in that case were that the passenger does not intend to make a contract to be carried to the place short of his intended destination, where he is put off, and that the carrying the passenger in that case to the place where he was put off was no benefit, but, on the contrary, a detriment to him.

When, under circumstances that imply a request, a railroad company carries a passenger

from one point to another, it is no concern of the company, as affecting its right to compensation, that it is or is not to the advantage of the passenger to be carried to and left at the latter place, and it is therefore immaterial. The sole question is, Was the service rendered at the request, express or implied, of the passenger? When one voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has a right to put him off before reaching that place, a request must be implied to be carried to the place where the company may rightfully put him off. His intention must be taken to be to ride to the destination expressed by him, if the company will carry him to that place, without his paying the fare, and, if it will not, then to ride to such place where the company may rightfully put him and does put him off. That in such case he may be carried to and left at such place is what he must be presumed to expect and intend. And he can have no right to expect that the company will put him off, till the train reaches its first regular stopping station. The train need not stop for the mere purpose of putting him off. The facts upon which we hold that the expulsion of the plaintiff from the train was wrongful were established at the trial, and not disputed, so that he was entitled to a verdict. The instructions of the court, assigned as error, going only to the right to a verdict, were therefore, if erroneous, harmless. We see no error in the instructions touching the measure of damages.

Order affirmed.

MISSISSIPPI SUPREME COURT.

J. H. ALSUP, Admr., etc., of N. M. Alsup,
Deceased, *Appl.*,

v.

R. M. BANKS *et al.*

(.....Miss.....)

1. A written lease for five years of a valuable plantation is not terminated by the death of the lessee before the expiration of that time, and his administrator will be liable for the rent for the unexpired term.
2. Reletting real estate at the best price obtainable to a third person, after the death of the lessee, before the expiration of the term, with notice to the latter's administrator, who has abandoned the premises,

that he will be held for the rents, and that the premises will be let on account of his intestate's estate, will not constitute an annulment of the original lease, nor release the administrator from his liability for the rents.

(May 25, 1891.)

APPPEAL by defendant from a decree of the Chancery Court for Tunica County in favor of complainants in an action brought to recover rent. *Affirmed.*

Plaintiffs leased a plantation to N. M. Alsup, in December, 1888, for the term of five years, and in the following October the lessee died. His administrator abandoned the leased premises, and plaintiffs let them to a stranger at a less rent than deceased had agreed to pay, and

NOTE.—Lease, not terminated by death of lessee.

Upon the death of a tenant, the lease vests in his executor or administrator. *James v. Dean*, 15 Ves. Jr. 241; *Doe v. Porter*, 3 T. R. 18.

It vests for the usual purposes to which testator's assets are applied, and the legatee has no right to enter without the executor's special assent. 1 Wms. Exrs. 60.

Although he does not enter into possession of the premises, he may be sued as assignee of the lease, for the rents subsequent to the death of the lessee. *Wollaston v. Hakewell*, 3 Man. & G. 297.

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If he enters upon the demise premises he becomes personally liable for the accruing rent. *Hopwood v. Whaley*, 6 C. B. 744.

Where the land yields some profit, but less than the rent, he may tender the amount of such profit or pay it into court. *Patten v. Reid*, 6 L. T. N. S. 281.

But by assigning the term he may free himself from liability for future rent, and for subsequent breaches of covenant. *Taylor v. Shum*, 1 Bos. & P. 21. See *Collins v. Crouch*, 13 Q. B. 542, cited in *Wood, Land. & T.* § 366, p. 560.

brought this action to recover the difference. Defendant claimed that the lease was terminated by the lessee's death; that it was canceled by the reletting of the premises; and filed a cross-bill alleging the insolvency of the lessee's estate, and asking that plaintiffs pay him, for the benefit of other creditors, the difference between their *pro rata* share of the assets, according to their full claim, and the amount they realized from the reletting.

Further facts appear in the opinion.

Mr. St. John Waddell, for appellant:

Where a contract is executory, and the administrator can do all that the deceased could have done, it may be enforced.

Wood, Land. & T. § 356.

But where the death of a party to a contract puts a stop to his business, and leaves no legal right in his administrator, except to close it up with the least loss to the estate, no recovery can be had against the administrator.

Terrington v. Greene, 7 R. I. 589, 84 Am. Dec. 580.

This was an executory contract, and the administrator could not carry it out.

Chalmers, Probate Law & Practice, § 281, and cases cited.

Mr. Banks took possession, and this was *prima facie* evidence that there had been a revocation of the contract.

Bedford v. Terhune, 80 N. Y. 453, 86 Am. Dec. 402; *Wilbourn v. Wilbourn*, 48 Miss. 38; *Harby v. Thomas*, 28 Miss. 544. See also *Baumgartner v. Haas*, 68 Md. 82.

Messrs. Perkins & Percy, for appellees:

It must be proved that the lessor and lessee mutually agreed to a surrender of the term.

Bedford v. Terhune, 80 N. Y. 453, 86 Am. Dec. 402.

The surrender of demised premises by a tenant during the term, to be effectual, must be accepted by the lessor.

Auer v. Pennsylvania, 99 Pa. 870, 44 Am. Rep. 114.

Taking possession, repairing, advertising the house for rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent.

Breckmann v. Twibill, 89 Pa. 58.

Where acts are relied upon as evincing an agreement to surrender, they should be such as are not easily referable to a different motive.

Martin v. Stearns, 52 Iowa, 845-849; *Thomas v. Nelson*, 69 N. Y. 118; *Nelson v. Thompson*, 23 Minn. 508; 2 Taylor, Land. & T. § 507.

Whether the administrator is personally liable where he enters after the death of the lessee, and how he may exonerate himself from that liability, have been inquired into in numerous cases, quite a number of which are cited in the note to Wood on Landlord and Tenant, § 856, p. 560.

It has been held that the administrator may discharge himself from all liability as such by alleging that the term is of no value, and that he has fully administered the assets which have come into his hands.

Wood, Land. & T. p. 561.

Woods, J., delivered the opinion of the court:

That the demurrer to the cross-petition was properly sustained is too clear to require any 18 L. R. A.

remark. Equally non-maintainable is the proposition that the contract of lease was terminated by the death of the lessee, and that no suit to enforce the same could be prosecuted against his administrator. That a contract of lease for a very valuable plantation, running for a term of five years, does not fall in the small class of contracts ended by the death of the lessee is perfectly clear. The execution of this contract was not with reference to a business which could not be carried on without the personal presence of the lessee. Such a thought cannot be supposed to have occurred to the parties to the contract, for the execution of it was not at all contingent upon the continued existence of the parties, or either of them.

The remaining contention on the part of appellant rests upon the proposition that there was an annulment of the lease contract, by agreement or by implication in law, from the acts of the parties and a surrender by the administrator. The facts are that after the death of the lessee, and at the beginning of the second year of the term, the appellant signified to appellees his purpose not to carry out the contract, and to abandon and surrender up the premises, which was met by an expression of unmistakable unwillingness to that course, by appellees; that soon afterwards appellant did abandon and vacate the premises; that appellees notified him that they would hold the estate of the lessee for the rents, according to the terms of the lease, and that they would let the premises for the account of the intestate's estate, and hold it for any deficiency that might arise; that appellees, after appellant's abandonment of the premises, took possession and rented the place to others, at an annual rental less by about a thousand dollars than that agreed to be paid by the deceased lessee; that appellees did all they could to obtain the best terms in renting to others, and that the price obtained was the highest and best that could be secured. That there was no surrender, in the sense that there was such yielding of possession of the leased premises, by mutual agreement, which worked a cancellation of the original contract and an extinguishment of the leasehold estate, appears certain to us. There can be no reasonable inferences drawn from the facts above recited tending even to show such mutual agreement and purpose. On the contrary, we have the expressed declaration of the unwillingness of appellees to that course, and their declared purpose, in the event of appellant's abandoning the premises, to let them and hold the lessee's estate for the difference between the sum thus obtained and that stipulated for in the lease contract. On these facts, the case seems manifestly against appellant's contention.

Nor do the facts that appellees took possession of the premises, after their abandonment by appellant, and rented them on the best terms obtainable, release appellant from his liability to pay, as the representative of the deceased lessee; for all these acts of appellees were in the interest and for the benefit of the lessee, equally as for the interest and benefit of the lessors. There was no taking by the lessors of possession unqualifiedly and unconditionally, and a dealing with the premises in a manner inconsistent with the continuance of

the unexpired lease. True, the lessor might have permitted the premises to remain vacant and untilled, and have recovered the entire rental from the lessee or his representative; but he was not compelled to take this course. He wisely and lawfully took the other course, whereby the interests of the lessee's estate were largely subserved.

The decree of the court below conforms to these views, and *must be affirmed.*

C. M. STRICKER, Appt.,

v.

T. P. LEATHERS *et al.*

(.....Miss.....)

A common carrier by water who receipts for goods marked for delivery at a private landing cannot, without excuse or justification, deliver them at another landing

without liability for the damages so occasioned. And if such delivery is made with a willful purpose to harass and injure the owner, punitive damages may be recovered.

(June 1, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Wilkinson County in favor of defendants in an action brought to recover damages for defendants' breach of their contract as common carriers to deliver goods at plaintiff's wharf. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. J. H. Jones and D. C. Bramlett,* for appellant:

The evidence clearly established a contract on the part of defendants to carry the freight to plaintiff's landing. The conduct of defendants in refusing to comply with their obligation as common carriers was oppressive and willful. The question of damages should have been submitted to the jury.

2 Sedgw. Dam. § 322 *et seq.*, and authorities

NOTE.—Exemplary or punitive damages; when allowed.

Exemplary damages grow entirely out of the nature of the act of the defendant for which the plaintiff recovers. They are given in enhancement, merely, of the ordinary damages on account of the bad spirit and wrong intention of the defendant, and are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff. *Hoadley v. Watson*, 45 Vt. 289.

Other terms sometimes used are "punitive" or "punitive" damages, and "smart money." These terms are usually employed indifferently in describing these damages. *Hackett v. Smelsley*, 77 Ill. 109; *Roth v. Eppy*, 80 Ill. 283; *Giles v. Eagle Ins. Co.* 2 Met. 148; *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556; *Stonesseifer v. Sheble*, 81 Mo. 243; *Kennedy v. North Missouri R. Co.* 36 Mo. 351; *Green v. Craig*, 47 Mo. 90; *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Freidenheit v. Edmundson*, 36 Mo. 226; *McKeon v. Citizens R. Co.* 42 Mo. 79.

Exemplary damages belong alone to actions of tort. *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

Where the damage to the plaintiff is merely nominal, and there is no evidence of actual damage, there is no foundation upon which exemplary damages can attach or rest. *Kuhn v. Chicago, M. & St. P. R. Co.* 74 Iowa. 137.

Punitive damages may be awarded when a wrongful act is done willfully in a wanton or oppressive manner, or even when it is done recklessly. *Fotheringham v. Adams Exp. Co.* 1 L. R. A. 474, 36 Fed. Rep. 252; *Reeves v. Winn*, 97 N. C. 246.

A common carrier becomes liable to exemplary damages in cases of injury to the passenger by his negligence, only when his conduct has been such as to justify charge him with wanton or reckless indifference to the passenger's safety. Whenever this is the case, the law allows punitive damages, not because the plaintiff is entitled to anything more than strict compensation, but for the sake of the salutary effect which such examples may have in deterring the perpetration of similar wrongs. *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556; *Bannon v. Baltimore & O. R. Co.* 24 Md. 108; *Memphis & C. R. Co. v. Green*, 52 Miss. 779; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607; *Williamson v. Western Stage Co.* 24 Iowa, 171; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235; *Kentucky Cent. R. Co. v. Dills*, 4 Bush, 568; *Bowler v. Lane*, 3 Met. (Ky.) 13 L. R. A.

311; *Millard v. Brown*, 35 N. Y. 297; *Hutchinson, Carr.* § 812.

The doctrine of exemplary or punitive damages, as applicable to common carriers, is not sanctioned in Louisiana. *Rutherford v. Shreveport & H. R. Co.* 41 La. Ann. 793.

Such damages as a punishment or example cannot be recovered in a civil action, in Colorado. *Greeley, St. L. & P. R. Co. v. Yeager*, 11 Colo. 345.

In cases other than for personal injuries.

Exemplary damages are allowed whenever fraud, malice, oppression, or other aggravating circumstances accompany an injury to property. *Day v. Woodworth*, 54 U. S. 13 How. 363, 14 L. ed. 181; *Sherman v. Dutch*, 16 Ill. 289; *Cutler v. Smith*, 57 Ill. 252; *Whitfield v. Whitfield*, 40 Miss. 352; *Storm v. Green*, 51 Miss. 103.

The conduct and motives of the injuring party are open to inquiry. If he acted recklessly, or willfully and maliciously, with a design to oppress and injure the plaintiff, the jury may, as a punishment, and as a protection to society against a violation of personal rights, award such additional damages as in their discretion they may deem proper. This rule is applied in torts amounting to misconduct and recklessness. *Smalley v. Smalley*, 81 Ill. 70; *Voltz v. Blackmar*, 64 N. Y. 440; *Tift v. Culver*, 3 Hill, 180; *Wade v. Thayer*, 40 Cal. 578; *Tillotson v. Cheetham*, 3 Johns. 56; *Malecek v. Tower Grove R. Co.* 57 Mo. 17; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155; *Taylor v. Grand Trunk R. Co.* 48 N. H. 320; *Fox v. Stevens*, 13 Minn. 272; *Magee v. Holland*, 27 N. J. L. 86; *Storm v. Green*, 51 Miss. 103; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Titus v. Corkins*, 21 Kan. 722; *Fleet v. Hollenkemp*, 13 B. Mon. 219; *Robinson v. Burton*, 5 Harr. (Del.) 325; *Dibble v. Morris*, 26 Conn. 416; *Bradshaw v. Buchanan*, 50 Tex. 492; *Cochran v. Miller*, 13 Iowa, 123; *Dalton v. Beers*, 38 Conn. 529; *Hoadley v. Watson*, 45 Vt. 289; *Western U. Tele. Co. v. Eysar*, 2 Colo. 141; *Raynor v. Nims*, 37 Mich. 34; *McWilliams v. Bragg*, 3 Wis. 424; *Gilreath v. Allen*, 62 N. C. 67; *Grable v. Margrave*, 4 Ill. 373; *McBride v. McLaughlin*; 5 Watts, 375; *Huckle v. Money*, 2 Wils. 205; *Slater v. Sherman*, 5 Bush, 206; *Merest v. Harvey*, 5 Taunt. 442; *Brewer v. Dew*, 11 Mees. & W. 625.

If a railroad company refuses to carry goods through ill will or willful disregard of the rights of the shipper, it may be charged with exemplary damages. *Avinger v. South Carolina R. Co.* 29 S. C. 265.

cited; 5 Am. & Eng. Encyclop. Law, 21 *et seq.*, and authorities cited. See also *Day v. Woodworth*, 54 U. S. 13 How. 363, 14 L. ed. 181.

Plaintiff was entitled to recover punitive damages. At all events he was entitled to actual damages by way of compensation.

1 Sedgw. Dam. 70, 71, and *notes*.

Messrs. H. S. Van Eaton and A. G. Shannon, for appellees:

A steamboat is not bound to deliver freight to the consignee at his private landing or place of business.

Kohn v. Packard, 3 La. 224, 23 Am. Dec. 454; *Risk v. Newton*, 1 Denio, 45, 48 Am. Dec. 649; *Bansemmer v. Toledo & W. R. Co.* 25 Ind. 434, 87 Am. Dec. 867; 2 Wait, Act. & Def. 52; *The "Eddy"*, 72 U. S. 5 Wall. 481, 18 L. ed. 486; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657.

A steamer is not bound to stop at every landing unless so advised.

Universal Encyclop. Law, § 1970 *et seq.*

Woods, J., delivered the opinion of the court:

The court below erred in striking out the plaintiff's evidence, and entering judgment for defendants. It is perfectly clear that defendants gave receipts to consignors for two shipments (those from the Red Star Shoe Store and from Durner) marked to appellant, for his

landing, at Ft. Adams, and that there was willful refusal to deliver according to contract. It is equally clear that seventy-two other packages, as appears from the evidence of the witness Price, were marked for delivery at Stricker's landing, but, in disregard of the contract, were delivered at another place, without excuse or justification on the part of appellees. For the small damages sustained by appellant in these instances, at any rate, the plaintiff was unquestionably entitled to a recovery. But on the evidence, taken as a whole, it appears that the conduct of appellees, in refusing to comply with their obligations to Stricker to deliver the packages of freight at his landing, after they had undertaken so to do, was not only without sufficient excuse, but was plainly the result of a willful purpose to harass and injure the appellant, and would fairly seem to entitle him to punitive damages to some extent. At least, under the evidence offered by appellant, he was entitled to have had his claim, in both the aspects adverted to, submitted to a jury, and, in the absence of countervailing evidence, he should have had a verdict for such amount as the proofs warranted. While a common carrier by water may not be required to stop at any and all mere private landings, yet when he contracts so to do he cannot be permitted capriciously to disregard his obligation and duty.

Reversed and remanded.

RHODE ISLAND SUPREME COURT.

Supreme Assembly of ROYAL SOCIETY OF GOOD FELLOWS

John H. CAMPBELL *et al.*

(.... R. L.)

1. An agreement between all the next of kin of one who died a member of a benefit society, before anyone knew in whose favor the certificate was made payable, that the fund should be collected by the administrator and divided equally among them, is sufficiently supported by consideration in the mutual surrender by each of the chance to receive a larger share, and will be binding on the one who proves to be the beneficiary named.

2. An agreement between the next of kin of a decedent that all his property,

including money due on life insurance policies, payable to some of them, shall be collected by the administrator, and a certain portion of the proceeds used in the ornamentation and care of decedent's burial lot and the remainder divided equally among the next of kin, will be supported as a family settlement and the beneficiaries in the insurance policies cannot claim their proceeds.

3. An agreement by a man, on behalf of his wife, to a family settlement of an estate in which she is interested, by which certain insurance policies payable to her are made part of the general fund, is ratified by her subsequently joining in an application for the appointment of an administrator and the execution of a power of attorney to enable him to collect the money in accordance with the agreement, and it will be binding on her although the husband had no authority to make it.

4. A married woman may sell and con-

NOTE.—*Courts favor the compromise of litigation.* A prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. *Penn v. Baltimore*, 1 Ves. Sr. 144; 1 Parsons, Cont. 7th ed. p. 467.

Compromises and settlement of litigated suits by the parties are favored by the courts, and are held binding upon the parties. *Steele v. White*, 2 Paige, 473, 2 L. ed. 965; *Shank v. Shoemaker*, 18 N. Y. 439; *Potter v. Smith*, 14 Johns. 444; *Magee v. Badger*, 30 Barb. 246.

They are to be encouraged because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise but will hold the parties concluded by the settlement. *Williamson v. Field*, 2 Sandf. 542, 7 L. ed. 697; *Palmerton v. Huxford*, 4 Denio, 166; *Coon v. Knap*, 8 N. Y. 402; *Cornell v. Masten*, 35 Barb. 157.

13 L. R. A.

Compromises of disputed claims, fairly entered into, are conclusive, and will be sustained by the courts without regard to the validity of the claims. *Wehrum v. Kuhn*, 61 N. Y. 623; *Kidder v. Horrobin*, 73 N. Y. 159; *Williams v. Irving*, 47 How. Pr. 440; *Farmers Bank of Amsterdam v. Blair*, 44 Barb. 641.

A compromise of an alleged claim, the extent of which is unknown, there being no bad faith or concealment, is a valid and highly favored consideration. *Feeter v. Weber*, 78 N. Y. 384; *Flannagan v. Kilcome*, 58 N. Y. 443; *Crans v. Hunter*, 28 N. Y. 389; *White v. Hoyt*, 73 N. Y. 505; *Clark v. Gamwell*, 125 Mass. 428; *Dunham v. Griswold*, 1 Cent. Rep. 305, 100 N. Y. 224; *Clark v. Turnbull*, 47 N. J. L. 285; *Conover v. Stilwell*, 34 N. J. L. 54; *Graham v. Meyer*, 90 N. Y. 611; *Bofinger v. Tutes*, 120 U. S. 198, 30 L. ed. 649; *Russell v. Cook*, 3 Hull, 504; *Kidder v. Horrobin*, and *Wehrum v. Kuhn*, *supra*; *Morey v. Newfane*, 8 Barb. 645; *Home Ins. Co. v. Watson*,

vey her right to recover upon policies of life insurance made payable to her without the intervention of a trustee, under Pub. Stat., chap. 166, § 6, authorizing her to sell and convey any of her personal property other than that described in section 5, with the same effect as though she was unmarried.

5. Agreement by the beneficiary in certain life insurance certificates to the family settlement of the estate of the insured, which provides that they shall go into the general fund and be collected by the administrator for equal distribution among the next of kin, signing a power of attorney to enable the administrator to collect the money due on them and leaving them with him, amounts to an equitable assignment of the life insurance fund.
6. A power of attorney to enable an administrator to collect the amount due on life insurance certificates, which have been equitably assigned to him, is coupled with an interest so as to be irrevocable.

(June 20, 1891.)

BILL of interpleader against the administrator and next of kin of Duncan Campbell, deceased, to determine who is entitled to the proceeds of certain benefit certificates which he had taken out in his lifetime. *Judgment in favor of the administrator.*

The facts are stated in the opinion.

Messrs. Frank H. Jackson and John Haskell Butler for complainant.

Messrs. Cooke & Angell, for J. I. Greenhalgh and wife:

Upon the death of Duncan Campbell this fund was a chose in action. It was due to Phebe A. Greenhalgh exclusively. It was hers individually. It was no part of the estate of Duncan Campbell.

Aetna L. Ins. Co. v. Mason, 14 R. I. 588; *Holland v. Taylor*, 9 West. Rep. 606, 111 Ind. 12, 6 Am. Prob. Rep. 536, and cases cited in foot note.

The agreement signed by her husband purporting to be for his wife, was void *ab initio*. Pub. Stat. chap. 166.

The husband was prevented by the statute from reducing the fund to "possession."

Arnold v. Ruggles, 1 R. I. 165.

The agreement was in excess of his powers because made in ignorance of the fact that his wife was the only loser by the scheme and to what amount she would lose by it.

If the husband had been duly authorized to include such funds, the agreement, however

worded, would still be void, because revoked before acted upon.

Elderkin v. Rowell, 42 How. Pr. 390; *Parish v. Stone*, 14 Pick. 198; *Carr v. Silloway*, 111 Mass. 26; *Mace v. Sage*, 8 Week. Dig. 509; *Snyder v. Guthrie*, 21 Hun, 341; *Cottage St. M. E. Epis. Church v. Kendall*, 121 Mass. 528; *Hamilton College v. Stewart*, 1 N. Y. 581.

The brothers of Mrs. Greenhalgh procured this agreement with a motive of personal gain and expected to gain by it, but these are not considerations.

Philpot v. Gruninger, 81 U. S. 14 Wall. 577, 20 L. ed. 744.

In spite of all probable opposition even, everything would have been compulsory upon the administrator that this agreement called for, except the application of these funds. Even a court of law would brand this as unconscionable and void.

Hume v. United States, 21 Ct. Cl. 328; *Shepard v. Rhodes*, 7 R. I. 470.

Mr. John J. Arnold for the other respondents.

Matteson, Ch. J., delivered the opinion of the court:

This is a bill of interpleader to determine to whom shall be paid a benefit fund of \$1,000 due from the complainant on account of the death of Duncan Campbell, one of its members. This fund is claimed on the one hand by the respondent John H. Campbell, administrator of the estate of the deceased, by virtue of an agreement entered into as herein set forth, and on the other hand by the respondent Phebe A. Greenhalgh, wife of the respondent James I. Greenhalgh, who, under the name of Phebe A. Metcalf (her name prior to her marriage with Greenhalgh), is designated as a beneficiary in the certificate of membership issued by the complainant to the deceased. The deceased died December 7, 1887, unmarried, leaving as his next of kin the respondents, Catherine Campbell, his mother; John H. Campbell, Frank E. Campbell, his brothers; and Phebe A. Greenhalgh, his sister. On December 12, 1887, a meeting was held, at which all the respondents except Mrs. Greenhalgh were present, for the purpose of arranging for the settlement of his estate. At this meeting an agreement was entered into by which it was provided that John H. Campbell should be appointed administrator; that he should pay all bills owed by the deceased at his death;

59 N. Y. 396; *Cooper v. Parker*, 14 C. B. 121; *Callisher v. Bischoffshelm*, L. R. 5 Q. B. 449.

Where the compromise is voluntary, and there is the absence of fraud or imposition, it will be upheld however disadvantageous. *Ackerman v. Ackerman*, 44 N. J. L. 174; *Steele v. White*, 2 Paige, 478, 2 L. ed. 995.

The party compromising cannot be relieved from it, although he shows that it was not beneficial to him, or that he had the right to recover in the suit in point of law. *Brooklyn Bank v. Waring*, 2 Sandf. Ch. 5, 7 L. ed. 484.

Where there is a real controversy between parties, and the case is one of any doubt, the court will not set aside a compromise fairly made by them, though it should afterwards appear that one has thereby received property to which he was not legally entitled. *Jordan v. Stevens*, 51 Me. 78; See 18 L. R. A.

Trigg v. Read, 5 Humph. 529. See *Day v. Sizer*, Clarke, Ch. 199, 7 L. ed. 91.

A doubtful claim prosecuted in good faith is a good consideration for a promise made on compromising and settling it; and the promise cannot be impaired by showing that the claim was invalid. *Brooklyn Bank v. Waring*, *supra*.

Compromise of family disputes is favored.

The compromise, among the members of the same family, of disputed claims with reference to family property, has always been regarded by the courts as constituting a valid consideration for the contracts entered into effecting the settlement. *Adams v. Adams*, 70 Iowa, 258. See *Stapilton v. Stapilton*, 1 Atk. 2; *Westby v. Westby*, 2 Drew. & W. 502; *Zane v. Zane*, 6 Munf. 406; *Paris v. Dexter*, 15 Vt. 379; *Cruger v. Douglas*, 4 Edw. Ch. 438, 6 L. ed. 930.

that he should put in order the burial lot in Swan Point cemetery according to the rules and regulations of the cemetery; that a suitable head-stone should be erected to the memory of the deceased, at a cost not exceeding \$100; that the administrator should have orders on the different organizations to which the deceased belonged for the full amount of insurance in such organizations, and that the moneys collected thereon, or from any other source, should be placed in a general fund; that the sums required for the purposes specified, and also to provide for the perpetual care of the burial lot, should be paid by the administrator out of such general fund; and that the next of kin should share equally in the residue, no matter to whom the certificates of membership held by the deceased in the several societies might have been made payable. Mrs. Greenhalgh was represented at this meeting by her husband, and he entered into and signed the agreement in her behalf. The valuable papers of the deceased were contained at the time of his death in a package kept in the safe of the Providence Gas Company. These papers were taken by John H. Campbell to the meeting; but the package was not opened until the signing of the agreement, and none of the respondents knew, until after the package was opened, who had been named as beneficiary in the certificates of membership. Pursuant to the agreement, John H. Campbell was subsequently appointed administrator, and accepted the office, Mrs. Greenhalgh and her husband both signing the application for his appointment. Powers of attorney from Mr. and Mrs. Greenhalgh to the administrator, dated December 19, 1887, were prepared and executed, authorizing him to demand, recover, receive, and receipt for all sums of money due or payable to Mrs. Greenhalgh, formerly Phebe A. Metcalf, from the societies of which the deceased was a member, by reason of his death. These powers of attorney were subsequently left by the administrator with these societies; but before the moneys due from them had been paid to the administrator Mr. and Mrs. Greenhalgh caused notices to be served upon the different societies revoking the powers of attorney, and forbidding the payment of the moneys. The administrator first learned of the revocation of the powers of attorney about the first of the following February or March, and had in the mean time, on the faith of the agreement, ordered a head-stone, and contracted for the improvement of the burial lot, and for its perpetual care. The complainant declined to pay the money to Mrs. Greenhalgh without the surrender of the certificate issued by it to the deceased.

Mrs. Greenhalgh thereupon requested the administrator to deliver the certificate to her, but the administrator refused to comply with her request. Up to this time the certificate had remained, without objection, in the possession of the administrator. No adjustment of the matter having been made by the respondents, the complainant, after a year or more had elapsed, filed this bill.

In behalf of Mrs. Greenhalgh it is contended that the agreement was void for want of con-

sideration. The purpose of the agreement was to provide for the settlement of the affairs of the deceased, and the amicable distribution among his next of kin of the surplus of his estate, including the benefit funds of the several societies referred to, after payment of his debts, and the sums required for the objects specified. The distribution was not unreasonable, for it was an equal distribution among the next of kin, and the same which the law makes of intestate estates. There is no charge of fraud or undue influence, and, so far as the testimony discloses, all of the parties to the agreement were possessed of equal knowledge, and stood upon an equal footing. In the uncertainty as to who had been named as beneficiary or beneficiaries, each was willing to surrender his chance of getting a larger share, or the whole, for the certainty of an equal share with the others. If there was no other consideration for the agreement than this mutual surrender by each of his or her chance to receive a larger share, we think the agreement could be supported. There are numerous cases of compromises of doubtful or disputed rights, not only between members of families, but between strangers, which rest upon no other consideration than the surrender by the parties of a portion of such doubtful or disputed rights, and which have been upheld, though it may have appeared upon subsequent investigation or adjudication that one of the claimants had no right, or not so great a right as the share he received by the compromise, in the property in doubt or in controversy. In *Dunnage v. White*, 1 Swanst. 137, 151, 152, the master of the rolls remarks: "Undoubtedly parties entitled in different events may, while the uncertainty exists, each taking his chance, effect a valid compromise." The agreement in the case at bar was not strictly a compromise, since at the time it was made no dispute had arisen between the parties, and neither had made any claim to any greater share in the whole or any part of the estate than the others. There are, however, cases which do not involve any element of disputed right, and which, therefore, were no more compromises than the agreement in question, which rest upon the consideration of a mutual chance.

In *Beckley v. Newland*, 2 P. Wms. 182, the complainant and respondent had married sisters, who were cousins and presumptive heirs of a Mr. Turgis, a very rich man. Turgis made a will, in which he left a large estate, real and personal, to the respondent, but only a small real estate to the complainant. Before the execution of the will the complainant and respondent had entered into articles by which they agreed that whatever should be given to either should be equally divided. The Lord Chancellor said: "A performance of these articles ought to be decreed, though there was no other consideration for them than the mutual benefit of the chance."

In *Harwood v. Tooke*, 2 Sim. 192, the complainant was a nephew, heir-at-law, and one of the next of kin of William Tooke, a man of large property. The respondent was not related to William Tooke, but was an inti-

mate friend. The complainant and respondent, both having expectations from him, agreed by parol to divide equally whatever he might leave them. He died in 1802, having left a much larger portion of his property to the complainant than to the respondent. The respondent, not wishing to hold the complainant to the full extent of their agreement, proposed to accept £4,000 in satisfaction of his claims, and the complainant gave him a promissory note for that sum. The respondent afterwards indorsed the note to Sir Francis Burdett as the consideration for the purchase of an annuity. The bill prayed that the note might be declared to have been unduly obtained from the complainant, and without good or valuable consideration, and that it might be delivered up to be canceled, and that the defendant might be restrained from using, applying, negotiating, or paying it away, or bringing an action against the complainant respecting the note. Lord Eldon granted the injunction, and the money was paid into the court; but subsequently, upon hearing, dismissed the bill, and upon rehearing the decree of dismissal was affirmed. In *Wethered v. Wethered*, 2 Sim. 183, two sons agreed to divide equally whatever property they might receive from their father in his lifetime, or become entitled to under his will or by descent or otherwise from him. It was held that the agreement was not against public policy, and would be enforced in equity.

But there is a class of cases of family arrangements, relating to the settlement of property, in which there is no question of doubtful or disputed rights, and in regard to which a peculiar equity has been administered, in that they have been supported upon grounds which would hardly have been regarded as sufficient if the transaction had occurred between strangers. In these cases the motive of the arrangements was to preserve the honor or peace of families or the family property. When such a motive has appeared, the courts have not closely scrutinized the consideration. *Trigg v. Read*, 5 Humph. 529, 546; *Burkholder's App.* 105 Pa. 31; *Wilen's App.* Id. 121; *Walworth v. Abel*, 52 Pa. 370; *Farnsworth v. Dinmore*, 2 Swan, 38; *Williams v. Williams*, L. R. 2 Ch. App. 294, 304; *Houghton v. Houghton*, 15 Beav. 278; *Wycherley v. Wycherley*, 2 Eden, 175; *Frank v. Frank*, 1 Ch. Cas. 84; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 587; *Cory v. Cory*, 1 Ves. Sr. 19; *Head v. Godlee*, Johns. V. C. 536, 569.

In the case at bar the motive for the agreement was, as we have seen, to provide, among other things, for the amicable distribution among the respondents of the surplus of his estate, including the moneys payable on the benefit certificates, after the payment of debts, etc. This motive constituted a sufficient consideration within the law relating to family arrangements, and the agreement is therefore sustainable as a family arrangement.

In *Houghton v. Houghton*, 15 Beav. 278, 300, it is said: "If the transaction is one which tends to the peace and security of the family, to the avoiding of family disputes

and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as upon the most comprehensive experience have found to be most for the interest of families."

Williams v. Williams, L. R. 2 Ch. App. 294, was a case the facts in which were as follows: A. died in 1831, possessed of real estate held in socage, gavelkind, and borough English tenures, and also of leaseholds, stock in trade, and other personal property. He made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally, but, the will being incomplete was refused probate. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should not be "mine or thine, but ours." No agreement in writing was made, but for twenty years after the death of A. the two sons carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally. The widow never insisted upon her rights in her husband's property. In 1851 the partnership was dissolved. The younger brother having died, his representatives brought two suits,—the first to determine the rights of the two brothers in certain real estates, alleging that a family arrangement had been made between them that they should be equally entitled to those estates; the second to take the accounts of the partnership which had been carried on between the two brothers. The elder brother, the respondent, denied any such arrangement as was alleged. The vice-chancellor held that such a course of dealing had been proved as established the existence of a family arrangement which the court would uphold, and declared the complainant entitled to the relief prayed. The respondent appealed from this decree. Turner, Lord Justice, in his opinion affirming the decree of the vice-chancellor, remarks: "Nor do I think there was any want of consideration. The vice-chancellor has, and I think correctly, rested this part of the case upon the footing of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property." He then refers to the resettlement of family estates upon an arrangement between father and the eldest son on his attaining 21 as a branch of these cases, and adds: "Certainly this court does not in such cases inquire into the quantum of consideration." *Wycherley v. Wycherley*, 2 Eden, 175, was a case of the resettlement of property, in which a son upon his marriage had joined with his father in the resettling of the estate, and by a memorandum executed at the same time agreed to secure £500 to each of his sisters. It was held that there

was a sufficient consideration for the court to decree specific performance of this agreement. The Lord Chancellor said: "I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say that it has done so) attend to slight considerations for confirming family settlements and modifications of property. They pay a regard to reasonable motives and honorable intentions. In these cases they will not weigh the value of the consideration. They consider the ease and comfort and security of families as sufficient consideration." But, independently of the considerations above mentioned, the agreement provides for putting in order the burial lot and also for its perpetual care. These are matters outside of the administration. Each of the parties to the agreement, presumably on the faith of it, has, by signing it, consented to the reduction of his or her distributive share of the estate by his or her proportion of the sums required for those purposes. It is possible that but for the agreement this consent would not have been given. This, of itself, would seem to furnish a sufficient consideration, and, as we have seen above, in cases of family arrangements courts do not inquire into the quantum of the consideration.

It is further contended in behalf of Mrs. Greenhalgh that it clearly appears from the testimony that the only authority that her husband had was to represent her in relation to Duncan Campbell's estate, and not to give away her separate property; and that this fund was no part of his estate, but a gift from him to her. There would be some force in the suggestion were it not that Mrs. Greenhalgh subsequently joined in the application for the appointment of the administrator and in the execution of the powers of attorney to the administrator for the collection of the moneys in pursuance of the agreement, and thereby ratified the making

of the agreement by her husband and cured the lack of authority, if the lack existed. The counsel for Mrs. Greenhalgh further contend that the fund in question, being a chose in action, could not be conveyed by Mr. and Mrs. Greenhalgh, but could only be disposed of by a trustee of her estate, appointed under R. I. Pub. Stat., chap. 166, § 18, or § 22. A chose in action is personal estate. R. I. Pub. Stat., chap. 166, § 8, authorizes any married woman to sell or convey, or to make contracts respecting the sale and conveyance of any of her personal property other than that described in section 5 of the same chapter, with the same effect, and with the same rights, remedies, and liabilities, as if she was *sole* and unmarried. The personal estate described in section 5, though it embraces some choses in action, does not include such a chose as the fund in question. We are of the opinion that the signing of the agreement and the subsequent ratification of it by Mrs. Greenhalgh, the execution and delivery of the power of attorney to collect the money, and the leaving of the certificate with the administrator for the purpose of enabling him to collect the money, were consistent only with an intention to transfer the fund to the administrator under the agreement, and operated as an equitable assignment of the fund accordingly. *Clemson v. Davidson*, 5 Binn. 391, 398; *Spain v. Hamilton*, 68 U. S. 1 Wall. 604-624, 17 L. ed. 619-625; *Newby v. Hill*, 2 Met. (Ky.) 530-532; *Wiggins v. McDonald*, 18 Cal. 126, 127; *Garnsey v. Gardner*, 49 Me. 167, 171, 172; *Wallace v. Walter Heywood Chair Co.* 16 Gray, 209.

We are further of the opinion that, an equitable assignment of the fund having thus been made, the power of attorney was coupled with an interest, and therefore not revocable.

We decide that *the respondent John H. Campbell, administrator, is entitled to the fund in suit.*

CALIFORNIA SUPREME COURT.

D. K. SWIM, *Respt.*,
v.

John Scott WILSON, *Appt.*

(...Cal....)

A stockbroker who receives stock from one who has stolen it, sells the same and

pays over the proceeds to his principal, is liable to the true owner for its value although he has acted in good faith, without notice, and in reliance on the thief's representations of ownership.

(*Beatty, Ch. J., and Paterson, J., dissent.*)

(July 1, 1891.)

NOTE.—Rights of the owner of stolen stock certificates.

Different rules from those affecting negotiable paper obtain as regards stock certificates indorsed in blank and subsequently lost or stolen. A purchaser of such certificates is not in any sense a bona fide holder for value or entitled to protection, nor is any subsequent purchaser of that identical certificate. The real owner may compel the corporation which originally issued the certificate to register the stock as his on its books, or he may have an action for damages against a bona fide transferee of the thief where such transferee sold with notice. *Barstow v. Savage* Min. Co. 64 Cal. 388; *Winter v. Belmont* Min. Co. 59 Cal. 428; *Anderson v. Nicholas*, 28 N. Y. 600; *Biddle v. Bayard*, 13 13 L. R. A.

Pa. 150; *Given's App.* (Pa.) Nov. 5, 1888; *Cook, Stock and Stockholders*, § 368.

If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title. *Kimball v. Billings*, 55 Me. 147; *Koch v. Branch*, 44 Mo. 543; *Hoffman v. Carow*, 22 Wend. 225.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to recover the value of certain mining stock which defendant had sold, and delivered its proceeds to a third person. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Wilson & Wilson for appellant.

Messrs. Tilden & Tilden, for respondent:

A stock broker who sells and transfers stolen stock cannot escape liability by paying the proceeds of such sale to the thief.

Cerke v. Waterman, 63 Cal. 34; *Baretov v. Savage Min. Co.* 64 Cal. 388; *Swim v. Bernard*, 4 West Coast Rep. 525; *Pease v. Smith*, 61 N. Y. 480; *People v. Bank of North America*, 75 N. Y. 547. See also *Harpending v. Meyer*, 55 Cal. 555.

De Haven, J., delivered the opinion of the court:

The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employé in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment

against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." *Kimball v. Billings*, 55 Me. 147; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542.

In *Stephens v. Ellwall*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defend-

unauthorized disposition of it by the person so intrusted. *Ballard v. Burgett*, 40 N. Y. 314.

The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title. *Covill v. Hill*, 4 Denio, 323.

Where the stock sold and converted was indisputably the property of another, the purchaser acquires no title thereto by the delivery thereof to him by the person who purloined the same. He has no greater or better title to it than that possessed by the person from whom he received it. *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *Anderson v. Nicholas*, 28 N. Y. 600.

Certificates of stock of an incorporated company are within the statutory definition of personal property, and are the subjects of larceny. *People v. Griffin*, 38 How. Pr. 475.

Where an owner has been deprived of his stock without either his consent or negligence, and by means of a forged power of attorney, he may compel the corporation to issue a certificate to him equal to the amount of shares lost or stolen and to pay him the dividends accruing thereon. *Ashby v. Blackwell*, 2 Eden, 299; *Sloman v. Bank of England*, 14 Sim. 475; *Midland R. Co. v. Taylor*, 8 H. L. Cas. 751; *Pollock v. National Bank*, 7 N. Y. 274; *Sewall v. Boston Water Power Co.* 4 Allen, 277.

A stock certificate is a mere evidence of property. *Ang. & A. Corp.* 483.

13 L. R. A.

Stock certificates are denied the attributes of negotiability such as characterize bills of exchange or promissory notes. Title, however, may pass to the transferee by the indorsement and delivery of the owner, but not without his consent; and it cannot pass under a forged power of attorney. *Davis v. Bank of England*, 2 Bing. 398; *Pollock v. National Bank*, 7 N. Y. 274.

Even a stolen bank note may be recovered from anyone not a bona fide holder. *Solomons v. Bank of England*, 13 East, 135, note; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 621; *Sherwood v. Meadow Valley Min. Co.* 50 Cal. 412.

The assignee takes them subject to all the equities which exist against the assignor. They are choses in action. *Cornick v. Richards*, 3 Lea, 1; *Young v. South Tredegar Iron Co.* 85 Tenn. 189; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 600; *McCready v. Rumsey*, 6 Duer, 574; *Clarke v. Rochester*, 23 N. Y. 604; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Bush v. Lathrop*, 22 N. Y. 535.

Where a stock certificate, having attached to it a blank power of attorney authorizing its transfer, which was duly signed by the original holder, of whom the loser purchased it, was either lost or stolen, and upon the faith of which a transferee obtained a new stock certificate which he subsequently sold, the purchaser will be protected in his possession of the stock. *Mandlebaum v. North American Min. Co.* 4 Mich. 465.

ant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying upon his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. *Barstow v. Savage Min. Co.* 64 Cal. 888; *Sherwood v. Meadow Valley Min. Co.* 50 Cal. 418.

The precise question involved here arose in the case of *Berich v. Marye*, 9 Nev. 812. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to the bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The bona fide purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a bona fide holder. . . . The rule of law protecting bona fide purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not bona fide purchasers, nor to their agents."

Indeed, we discover no difference in princi-

ple between the case at bar and that of *Rogers v. Huie*, 2 Cal. 571, in which case Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them; or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 68 Cal. 84. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

We concur: Garoutte, J.; McFarland, J.; Sharpstein, J.

We dissent: Beatty, Ch. J.; Paterson, J.

KANSAS SUPREME COURT.

State of KANSAS, *Plff. in Err.*,
v.

W. O. BUSH.

(....Kan....)

*1. That portion of section 15 of chap- *Head notes by the COURT.

NOTE.—Statutory offense, indictment for.

Where an indictment avers facts which certainly charge defendant with the commission of the act forbidden by statute, it is sufficient. *State v. Melville*, 11 B. I. 417; *McCarthy v. Territory*, 1 Wyo. 311.

But all the facts and circumstances which go to constitute the offense must be stated. *Humphreys v. State*, 17 Fla. 331; *State v. McKenzie*, 42 Me. 362; *Davis v. State*, 39 Md. 365; *Wood v. People*, 58 N. Y. 18 L. R. A.

ter 80 of the Laws of 1879 which prescribes a criminal punishment for improperly registering the names of voters is not unconstitutional or void.

2. A criminal information setting forth that B., the city clerk of a city of the second class, registered the name of a person as a voter who did not appear in person, and was not

511; *Kinney v. State*, 21 Tex. App. 348; *Com. v. Clark*, 2 Ashm. 106; *State v. Strauss*, 77 N. C. 500.

An indictment which charges all the acts necessary to constitute the offense is good. *Kersh v. State*, 24 Ga. 191; *United States v. Donau*, 11 Blatchf. 168.

Where the statement of the case necessarily includes a knowledge of the illegality of the act an averment of knowledge or of intent is not necessary. *Com. v. Stout*, 7 B. Mon. 247.

present, and did not give his name, age, occupation, or place of residence, may be sufficient, without expressly alleging any criminal intent.

3. When the commission of an act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed.

(On Rehearing.)

4. A slight departure from some directory provision of the Act relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure anyone, or operate to interfere with or defeat the purpose of the Act, is not punishable as a felony, or within the penalty described in section 15 of the Act.

(January 10, 1891.)

ERROR to the District Court for Butler County to review a judgment in favor of defendant in a proceeding to punish him for violating the provision of the Statute relating to the registration of voters. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. L. B. Kellogg, Atty-Gen., and E. H. Hutchins for the State.

Messrs. Clogston, Hamilton, Fuller & Cubbison for defendant in error.

Valentine, J., delivered the opinion of the court:

This was a criminal prosecution in the District Court of Butler County, under § 15, chap. 80, Laws 1879 (Gen. Stat. 1889, par. 711), in which the defendant, W. O. Bush, who was the city clerk of the City of El Dorado, a city of the second class, was charged, upon information in two counts, with registering J. N. Hanna as a voter, Hanna not being present, nor appearing in person, nor giving his name, age, occupation, or place of residence. The title to the Act in which the aforesaid section 15 is found, and sections 8 and 15 of such Act, read as follows: "An Act to Provide for and to Regulate the Registration of Voters in Cities of the First and Second Class, and to repeal all prior Acts in Relation thereto." "Sec. 8. No person shall be registered unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation, and particular place of residence, as required to make the proper entries in the poll-books." "Sec. 15. If any officer shall neglect or refuse to perform any duty required by this Act, or in the manner required by this Act, or shall neglect or refuse to enter upon the performance of any such duty, or shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time than as prescribed by this Act, or shall enter, or cause or permit to be entered, on such list, the name of any person not entitled to be registered thereon, according to the provisions of this Act, or shall destroy, secrete, mutilate, alter, or change any such

registry books, he shall, upon conviction, be punished by confinement and hard labor in the penitentiary, not exceeding one year, and shall forfeit any office he may then hold."

The portions of the foregoing sections particularly applicable to this case are those which read as follows: "No person shall be registered, unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation and particular place of residence. . . . If any officer [a city clerk] . . . shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time, than as prescribed by this Act, . . . he shall, upon conviction, be punished," etc. The defendant moved the court to quash the information, upon the following grounds, to wit: "*first*, that the Act of the Legislature of the State of Kansas, under which said information is pretended to be drawn, to wit, chapter 80 of the Session Laws of 1879, is unconstitutional, being in contravention of § 16 of article 2 of the Constitution of the State of Kansas: *second*, that no offense is charged against the defendant in said information: *third*, that neither of the counts of said information states and charges an offense against the laws of the State of Kansas." The court sustained the motion, and discharged the defendant, and the State of Kansas appeals to this court. No brief for the defendant has been filed in this court, but from the plaintiff's brief, and the defendant's motion to quash, we can probably obtain a correct understanding as to what were the grounds upon which the court below quashed the information. It is claimed, as we understand, that the title to the Act is not broad enough to authorize a provision in the body of the Act creating a criminal offense, or prescribing a punishment therefor. We think it is. *State v. Barrett*, 27 Kan. 213, and cases there cited; *Durein v. Pontious*, 34 Kan. 353. The offense in the present case, and the punishment therefor, have relation to the general subject contained in the title to the Act, which is the registration of voters in certain cities, and such offense and punishment are included within such subject, within the meaning of the Constitution. They clearly relate to the registration of voters.

It is further claimed, as we understand, that the information is defective, for the reason that it does not allege any criminal intent on the part of the defendant. Of course, a crime cannot be committed unless the person committing the acts supposed to constitute the crime entertains a criminal intent, and that criminal intent must, in some manner, be averred in the information or indictment, either expressly or impliedly. But when the commission of an Act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to al-

lege the commission of the act, and the intent will be presumed. In the present case, the wrong committed was the registration of the name of J. N. Hanna as a voter, without his appearing in person, or being present, and without his giving his name, age, occupation, or place of residence. In such a case, all that is necessary is simply to allege the fact that the defendant so registered the name of Hanna, without also stating that he so registered such name with the intent to so register the same. It is alleged in the information that the defendant "unlawfully and feloniously" so registered the same. Mr. Bishop, in his work on Criminal Procedure (vol. 1, § 521), uses the following language: "Starkie says: 'To render a party criminally responsible, a vicious will must concur with the wrongful act. But, though it be universally true that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment.' For, in a large part of the crimes the vicious will appears, *prima facie*, in the act itself; hence to allege simply the act makes the required *prima facie* case, and any non-concurrence of the will therein is a matter of defense." And in *note 2* to the same section he uses the following language: "Where the act is in itself unlawful, an evil intent will be presumed, and need not be averred, and, if averred, is a mere formal allegation, which need not be proved by extrinsic evidence."

In the American and English Encyclopedia of Law (vol. 4, p. 681) the following language is used: "Where the Statute contains nothing requiring acts to be done knowingly, and the acts done are not *malum in se*, nor infamous, but are merely prohibited, the offender is bound to know the law, and a criminal intent need not be proved. The intent is immaterial where the Statute declares it a misdemeanor to obstruct a public road. When the Statute does not make intent an element of the crime, intent need not be alleged, although, under general principles, it must be proved; and it is held that one who does that which the law forbids is presumed to have had the criminal intent." In the present case, we think the criminal intent was impliedly and sufficiently alleged by the allegations setting forth and averring the commission of the prohibited acts.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concur.

A petition for rehearing was subsequently filed, in support of which Messrs. E. N. Smith and Redden & Schumacher, for defendant in error, contended:

This section, examined and interpreted in the light of common sense, simply means that no officer shall fraudulently violate the provisions of the Act regulating the registration of voters. To hold that the clerk is guilty under the admitted facts in this case would be such a harsh construction of the criminal law that its enforcement would simply be revolting. Upon referring to other sections

of the Act it appears that if the clerk is guilty on the stated facts in this case, every officer in the city is equally guilty; and one half of the city officers in the State of Kansas are liable to prosecution and conviction for the violation of the letter of the law. The statement of such a proposition is sufficient.

See 4 Am. & Eng. Encyclop. Law, §§ 4-6, p. 679; 7 Crim. L. Rep. p. 278, article by W. F. Elliott.

Johnston, J., on October 10, 1891, delivered the opinion of the court:

Upon the original hearing no argument or appearance in behalf of the defendant was made, but upon this application for a rehearing the defendant appears by his counsel, and insists that the information filed against him is inadequate in its averments, and fatally defective in not charging a culpable intent. It is stated, in substance, that he was the city clerk of El Dorado, and that he unlawfully and feloniously registered J. N. Hanna as a qualified voter, when Hanna did not appear in person, or was not present in the office of the city clerk, giving his name, occupation, and place of residence, as the Statute directs. It is stated that, at the hearing of the motion to quash, the county attorney informed the court "that there would be no effort made to show any fraudulent intent on the part of the defendant in the simple act of registering J. N. Hanna, who was at that time a resident and otherwise a legal and qualified elector in the City of El Dorado, but who did not appear in person before said clerk on the day on which he was registered." It is also stated that the district court held that unless "the defendant by his act intended to commit some wrong, either in registering a person not entitled to vote, or intending to injure or defraud a person with a right to vote out of his vote, or intending to injure or defraud some candidate before the election, the defendant would not be guilty of violating the law;" and, as none of these things were contended for by the prosecution, the motion to quash was sustained.

It is earnestly contended that it was not within the legislative intent to punish as for felony every omission or failure of the officers to carry out the minute and minor details of the Registration Act, and that, although the prohibition of the Act was general in its terms, it fairly embraced only the mischiefs which the enactment was intended to prevent. It is therefore urged that the information should contain statements showing a culpable intent on the part of the defendant to defeat the obvious purpose of the statute, or allegations of some acts or omissions of the defendant of a substantive character necessarily resulting in the wrong or injury which the Legislature intended to suppress. The writer hereof is now inclined to think that the allegations of the information are insufficient; but the majority of the court are of opinion that the language of the charge, stating that the act was unlawfully and feloniously done, characterizes it as a crime, and therefore the information is not so inadequate in statement as to be fatally defect-

ive. The court, however, does not decide, as counsel seems to think, that every departure from the letter of the Statute comes within its prohibition and penalty, and therefore the hardships which counsel imagine will result from the enforcement of the Act do not exist. It is true that the language of section 15 is sweeping in its terms, and, if construed with literary severity, would embrace the slightest departure from any direction or detail which the Statute contains, however innocent and harmless the act or omission of the officer might be. It is evident from the provisions and penalty of the Act that such was not the purpose of the Legislature. The Act is a general one, giving specific and minute directions and details as to the preparation for and the regulation of the registration of voters in cities of the first and second classes. Minute directions are given as to the various steps to be taken, and the manner thereof, some of which are very important, while others are of less importance; and at the end of the chapter it is provided that if any officer shall neglect or refuse to perform any act required by the Statute, and in the manner required by it, he shall be guilty of a felony, and punished by confinement and hard labor in the penitentiary, as well as to forfeit the office which he then holds. The Legislature doubtless intended to impose upon the officers a faithful observance of the provisions of the Act, with a view of carrying out its purposes; but it will hardly be contended that the Legislature intended to visit so severe a punishment upon an officer, free from any wrong intent, for some slight departure from an unimportant detail of the law, which does not and cannot operate to defeat its object. We may properly look at the mischief proposed to be remedied, and to some extent the severity of the penalty imposed in determining the true legislative intent in framing the Act. It has been held that the purpose of the Registration Act is to preserve the purity of the ballot-box by ascertaining in advance, by proper proofs, who are entitled to vote at an election, thus securing, ten days before the election, the full registry of all persons entitled to vote, which registry can be examined and scrutinized by any interested party. *State v. Butts*, 31 Kan. 537.

Any substantive act or omission of an officer which appears to operate to defeat this purpose comes within the prohibition and penalty of the Statute; but a strict compliance with a minor detail that could have no such effect was not intended to be punished as a felony. For instance, the Act provides that on January 1st of each year the mayor and council shall procure and open a poll-book for each ward in the city. Would the inadvertent omission to furnish a poll-book until the following day subject these officers to imprisonment in the state penitentiary? The Statute further provides that the poll-books shall at all times be kept in the office of the city clerk. If the clerk should take one book out for repairs after office hours, and return it in time for the opening of business the next morning, would he be liable to a felon's punishment? Again, the Act requires

that the books shall be open at all times during the year, except for ten days preceding the election; but, it will not be contended that the clerk must keep them open during the night-time, or be held liable to the rigorous penalties of the Act. This is the more apparent, for another section provides for registration during the usual office hours. If the clerk, as a matter of courtesy and accommodation, should remain in his office a short time beyond the usual office hours, and should then register legally qualified voters, would he be held liable to the penalties of the law. He is required to enter the names of the persons registered in alphabetical order; but if he should, by mistake, fail to enter a name in that order, he would hardly be guilty of felony, although the work was not done in the manner provided in the Act. It is also provided that no person shall be registered unless he appear in person at the city clerk's office, and apply to be registered; but if a qualified voter who was an invalid was driven in a carriage to the city clerk's office, but was unable to enter there, and should call the city clerk out in the street, or should chance to meet him in the street, and there apply to be registered, and the city clerk, knowing that he was unquestionably a qualified voter, should register him, would this deviation from the strict letter of the Statute be within the severe penalties provided in section 15? We think not. These and many other like acts and omissions are within the letter of the Statute; but manifestly the Legislature did not contemplate that such acts or omissions should be punished as felonies. A departure from some directory provision, made without fraudulent intent, and which, in its nature and effect, cannot injure anyone, or operate to defeat or interfere with the purpose of the Act, cannot be regarded to have been in the mind of the Legislature in prescribing the penalties of the Act. Although such departure appears to be within the strict letter of the Act, a consideration of the mischief intended to be prevented, the remedy proposed, and the punishment provided, indicate clearly that such was not the intention of the makers of the Statute. It has already been held that, when the intention of the Legislature can be discovered, it should be sensibly followed, although such interpretation may seem contrary to the letter of the Statute. *Intoxicating Liquor Cases*, 25 Kan. 751, 762.

The motion for a rehearing will be denied.
Horton, Ch. J., concurs.

Valentine, J. :

I concur in overruling the motion for a rehearing, but I do not wish to express any opinion upon any matter not involved in the consideration of this question. The fundamental question to be considered is whether the defendant's motion in the court below to quash the information should have been sustained or not; and as to when informations may be quashed, and when not, see the case of *State v. Morrison*, 46 Kan. —.

The only substantial question now presented is whether the information states a

public offense as against the defendant or not. Or, in other words, the question is this: Where a criminal information states and charges everything and all things necessary, under the statutes, to constitute a public offense, and states the same substantially, and almost literally, in the language of the Statute defining the offense, and charges that the acts of the defendant constituting the offense were committed by him "unlawfully and feloniously," does such an information state a public offense or not? Or perhaps, in still other words, the question is this: May a person unlawfully and feloniously violate a criminal statute without being guilty of any offense?

In the case of *Wong v. Astoria*, 13 Or. 538, it was held that to allege that an act was done "willfully and unlawfully" was equivalent to alleging that it was done "knowingly." In the case of *Weinzorpfen v. State*, 7 Blackf. 186, 195, it is said, among other things, as follows: "'Feloniously' is substituted for it [the word 'unlawfully'] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been feloniously, and not unlawfully, done." In the case of *Carder v. State*, 17 Ind. 307, it is said "that the word 'feloniously,' in the connection in which it was used in the indictment, was identical in its import with the word 'purposely.'" In the case of *Com. v. Adams*, 127 Mass. 15, 17, it is said: "But the allegation that the defendant maliciously and feloniously incited and procured the principal to commit the felony imports that she acted with an unlawful intent." In the case of *Allen v. Hundred of Kirton*, 3 Wils. 318, it is said as follows: "Here he [the prosecutor] has alleged in his declaration, and proved at the trial to the satisfaction of the jury, that the same was committed and done feloniously; and that act, which was committed feloniously, was certainly done

willfully, unlawfully, and maliciously; for doing an act feloniously is doing it *malò animo*, viz., with malice. Therefore Sergeant Burland concluded that the declaration was perfectly right; and of that opinion was the whole court, and gave judgment for the plaintiff." In Webster's International Dictionary it is said that the word "felonious" means "having the quality of a felony; malignant; malicious; villainous; perfidious; in a legal sense, done with intent to commit a crime." The Encyclopædic Dictionary says that the word "felonious" means, in law, "of the nature of a felony; done with deliberate purpose to commit a crime." And the word "feloniously" means, in law, "in a felonious manner; with deliberate intention to commit a crime." See also the Imperial Dictionary and the Century Dictionary, substantially to the same effect.

Under the foregoing authorities, and under the allegations of the information, the defendant did all that was necessary to be done, under the statutes, to constitute his acts a criminal offense; and as he did the same "unlawfully and feloniously," he did the same "with intent to commit a crime." (Webster, Int. Dict.); or "with deliberate intention to commit a crime" (Encyclop. Dict.). It would therefore seem that the information ought to be held to be sufficient. Can a person violate a criminal statute "with deliberate intention to commit a crime," and still be innocent and blameless? Where a statute prohibits a thing, and makes the doing of the same a criminal offense, but nevertheless a party does such thing, and does it "unlawfully and feloniously," or, in other words, does it "with the intent to commit a crime," is he still innocent and blameless? Will it be claimed that the Statute in the present case is a bad law, and that the Legislature has no right to pass a bad law, and therefore that the same should be annulled by the courts?

NEW YORK COURT OF APPEALS.

Frederick HABERMAN, *Respt.*,
v.

John O. BAKER, *Appt.*

(....N. Y....)

1. The mere fact that a map bearing a prior date and showing a road not mentioned in a deed is annexed to a subsequent deed is not sufficient to show that the earlier conveyance was made with reference to the road.
2. A conveyance of land bounded "along" a certain road which was laid out entirely on the grantor's land, but on the margin thereof, carries the fee in the whole roadbed.
3. Lands purchased at a mortgage sale by the mortgagee's administrator c. t. a. in his own name although held by him in trust, take on in his hands the character of the mortgage indebtedness and are as personality of which he can convey a good title that cannot be disputed by the mortgagee's heirs.

(October 6, 1891.)

12 L. R. A.

APPPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to compel specific performance of a contract to purchase real estate.

Affirmed.

The facts sufficiently appear in the opinion.

Mr. Robert Sturgis, with **Messrs. Daly, Hoyt & Mason**, for appellant:

The vendor of a lot carved out of a larger plot owned by him can impose no servitude upon the lot so sold in favor of the portion retained by him, in derogation of his grant, without an express reservation in the grant.

Sloat v. McDougal, 30 N. Y. S. R. 912; *Burr v. Mills*, 21 Wend. 290; *Oakley v. Stanley*, 5 Wend. 528.

It is therefore evident that Stillwell had no idea of conveying the fee in this roadbed to Robert L. Bowne, or Charlton or Adams for their exclusive use and enjoyment as against his own use, or that of the purchasers from him.

The courts will not extend the effect of a conveyance, so as to carry title to the centre lines of roads adjoining property so conveyed.

Bissell v. New York Cent. R. Co. 23 N. Y. 61; *Perrin v. New York Cent. R. Co.* 36 N. Y. 120; *People v. Colgate*, 67 N. Y. 512; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *English v. Brennan*, 60 N. Y. 609; *Mott v. Mott*, 68 N. Y. 246; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 287; *Story v. New York Elev. R. Co.* 90 N. Y. 161; *Hussner v. Brooklyn City R. Co.* 96 N. Y. 16; *People v. Jones*, 112 N. Y. 597.

Where the vendor fails to show he has a marketable title, a purchaser will not be compelled to specifically perform.

Schriber v. Schriber, 86 N. Y. 684.

Messrs. Samuel Untermeyer and Moses Weinman, for respondent:

The intention and effect of the deeds from Stillwell to Bowne and Charlton was to convey the fee of the property in the Stillwell Road and the fee in the adjoining half of the Bloomingdale Road.

Re Ladue, 118 N. Y. 218; *Elliott, Roads & Streets*, 1890.

Conceding it to be true, for the sake of argument, that after the conveyance to Bowne, Stillwell laid out a road running along his own property, his deed to Charlton would then convey the fee of the entire roadbed.

Re Robbins, 84 Minn. 99; *Taylor v. Armstrong*, 24 Ark. 102.

Herman Le Roy Edgar, as administrator with the will annexed of William Edgar, deceased, foreclosed the mortgage belonging to the estate. Having purchased the property at the sale, he would be deemed to have purchased it as trustee and he would have a right to convey it without a release from those interested in the estate.

Lockman v. Reilly, 95 N. Y. 64; *Valentine v. Bolden*, 20 Hun, 587.

Gray, J., delivered the opinion of the court:

In this action, which was brought to compel the defendant to perform his point of an agreement with plaintiff, and to complete his purchase of the plaintiff's land, various objections to the plaintiff's title were raised, and have been more or less discussed. If any of them are substantial, the defendant should not, of course, be compelled to accept the title tendered by plaintiff. Whether equity will enforce the specific performance of such contracts is a matter resting, it is true, in discretion; but it is a discretion which proceeds, in its exercise, upon settled rules, and not arbitrarily. Where the case is one in which the proceeding is against the purchaser at a judicial sale, to compel him to carry out his bid, the discretion of the court may be influenced differently from a case like the present, where the action is upon the private contract of the parties. But this is just; for, in the former case, the bidder is warranted in assuming, not only that the title to the land is readily marketable but also that the judgment of the court has set at rest all questions which might reasonably be raised concerning the validity of the title offered. In all cases I suppose that the quality of the title must be the same; but where

the deliberate convention of private parties results in a contract for the sale and purchase of lands, the matter of the plaintiff's right to an enforcement of that contract should be considered more favorably; and if, notwithstanding all the legal questions raised by objections, or suggested from the records, the vendor is found to have the legal title to the premises, and has a legal right to convey, as he has agreed, performance by the vendee must be decreed. That precise rules can be laid down, to be observed in the various cases, where the object is to compel the specific performance of agreements for the sale and purchase of lands, I doubt, and their necessity is not apparent. "The discretion of courts in such cases," to cite the observation of Lord Eldon in *White v. Damon*, 7 Ves. Jr. 35, and which Sir John Romilly, master of the rolls, quotes in *Haywood v. Cope*, 25 Beav. 140, "must be regulated upon grounds that will make it judicial." In this case the objections relate to the plaintiff's title to, and right to convey, certain pieces of land, which formerly were included in highways since abandoned. His contract was to sell a distinct parcel or block of land lying between Eighty-Sixth and Eighty-Seventh Streets, the Boulevard, and Tenth Avenue, in the City of New York. At about this point, an old highway, known as the "Bloomingdale Road," skirted, on the west, the lands of which this block is a part, and, in laying out the Boulevard, the old highway was here mainly taken in. From the Bloomingdale Road, at about where Eighty-Seventh Street meets the Boulevard, there led off to the eastward a way, which was known as "Stillwell's Road" or lane. As a consequence of the alternation of lines, caused by opening and regulating the Boulevard, Eighty-Seventh Street, and Tenth Avenue, pieces or gores of land were added to the property of the plaintiff's grantors, to form the present block, to which, from their having previously constituted parts of the abandoned highways, the title is deemed to be in the heirs of Samuel Stillwell. Originally, Samuel Stillwell owned the farm or tract of land of which the block now in question once formed a part, and the lane or road bearing his name was built by him for purposes of convenience of access for himself and to other adjoining parcels of land which he had sold to various parties. It ran wholly upon his own lands and partly upon the northerly margin of the premises in question. For some distance eastwardly from the Bloomingdale Road the land on the other or northerly side of this lane belonged to other owners. The first conveyance made by Stillwell, in the chain of this title, was made in 1803 to John Charlton. The description of the premises conveyed bounded them "along the Bloomingdale Road," and, where they adjoined Stillwell's road, "along said road . . . to the Bloomingdale Road." By such a description a grantor usually is deemed to convey the fee of the soil to the center of the road, where it is the dividing line between properties. In the absence of some express reservation by a grantor of his property in a road, such as would be implied

where an easement over it was alone granted, and the description ran to and along the side of it, as it was in *Jackson v. Hathaway*, 15 Johns. 447, or later, in the case of *Mott v. Mott*, 68 N. Y. 246, a conveyance of lands, generally bounded as along or upon a road, will convey the fee to its center. See *Jackson v. Hathaway*, *supra*.

A recent decision of this court, in its second division, made with respect to another part of Stillwell's property, has settled this question of what passed of this private road, in the case of a grantee of land adjoining, and where the description of the grant was "along the lane of said Stillwell, intended for a road," etc. It was held that, under the deed, the fee of the soil was granted to the center of the road when built. *Re Ladue*, 118 N. Y. 218. To complete the title to all of Stillwell's road, the plaintiff attempts to deduce a title to the further half through the original conveyance of lands made by Stillwell to R. L. Bowne in November, 1796, which comprised a tract extending from the Bloomingdale Road eastwardly, and along the land subsequently laid out and used as a lane. In this deed there was no reference to any road, and the only ground for presuming anything with regard to its dedication or existence at that time was that, in a conveyance of other parts of Stillwell's property, subsequent in time to Bowne's, a map annexed thereto showed this lane laid out. As this map bore a date earlier than that of the deed to Bowne, the plaintiff argues that Bowne's conveyance must have been with reference to the road as shown thereby. I think, however, that such an inference is hardly permissible from the mere fact of the date. Something further was required as proof concerning the map, or of the laying out of the road, in order to ingraft upon the grant to Bowne any such additional right of property. But it is not necessary to depend upon that line of argument in aid of the plaintiff's title to the land formerly comprised within the abandoned highways. From the proofs, I think we must assume that Stillwell conveyed to Bowne with no reference to this lane.

The question, then, is whether, as the road was laid out upon Stillwell's land, a title in fee to the whole roadbed did not pass to Charlton, or his grantees, subject only to any easements in its use as a road. This question, I think, must be answered in the affirmative. That any property in the northerly half of the road should have remained in Stillwell or his heirs would require the support of some presumption, bearing upon his interests, or relating to some necessity in fact, the elements for which, I think, we cannot find. The only interest in the lane, or in its maintenance as such, was possessed by Stillwell's grantees. He had parted with all of his land bordering on the lane. The natural presumption, and one which seems to flow from the established rules, would be that, in bounding his grant to Charlton along this highway, Stillwell had conveyed his fee in the roadbed. Where the highway divides two properties, the owner of each abutting piece is presumed to own to the center of the way. 13 L. R. A.

The presumption is based on the idea that the adjacent owners originally contributed the land for the road, and this presumption assumes that nothing militates against it in the facts of ownership. But, if the grant of the abutting property went only to the side of the road, or the public authorities are vested with the right to the soil of the street, the presumption cannot exist. *Dunham v. Williams*, 87 N. Y. 251.

Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole roadbed, upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highways. What other intention could be consistently supposed?

In the early case of *Jackson v. Hathaway*, *supra*, it was observed that there was reason for intending that the parties to a conveyance of property bounded along or upon a highway meant to the middle of the highway. Would there not be equally reason for the legal intentment that they meant the whole highway, where it was the property of the grantor in its entirety? Can we suppose an intention in the grantor to reserve to himself, or to his heirs, the fee in half of the highway? I think not. As to the grantor, the control and beneficial use of the road have ceased to be of importance; but to the grantee they must be important, if not essential, for many patent reasons.

The case of *Bissell v. New York Cent. R. Co.*, 28 N. Y. 61, though applied to a case where the question of title related to only half of the street, is authority for the proposition that there is no reason to infer an intention in the grantor to withhold his property in, or title to, the land covered by the highway, after parting with all his right and title to the adjoining land.

Our attention has been directed to several cases in the courts of other States where this question has been discussed and similarly decided, and in some of them the reasoning is upon the authority of *Bissell v. New York Cent. R. Co.* *supra*. See *Re Robbins*, 84 Minn. 99, and *Taylor v. Armstrong*, 24 Ark. 102, and, as well, *Watrous v. Southworth*, 5 Conn. 305; *Chaplin v. Hindleton*, 18 Conn. 28.

I am therefore of the opinion that, under Stillwell's grant to Charlton, the ownership of the soil of Stillwell road, where adjacent to the property granted, passed to the grantee as a parcel of the grant. So long as the road was required as such, and an easement had been acquired by the public, the ownership of its soil may have been subjected to the use. But when, after the year 1846, the public easement had been abandoned, and the highway ceased to exist, the land comprising it reverted to primary conditions of ownership and of use, and became a parcel of the adjoining property, from which it was taken originally. The fee in the land of Stillwell's lane being in the plaintiff, and because of the description of the grant as to

the Bloomingdale Road, questions as to the title to the gore produced by the change in the westerly line of the tract by the laying out of the new Boulevard are disposed of. The ownership of the land in the lane carried the fee to the center of the Bloomingdale Road opposite to the lane, and that, with the description along the Bloomingdale Road, comprehended the gore in question. In 1847, Eighty-Sixth Street, but not Eighty-Seventh Street, having been theretofore legally opened and in use, an agreement as to a division of lands was made between John Adams, then in possession of the property composed of the block in question, and Herman Le Roy Edgar, in whom had become vested the legal title to the lands north of Stillwell's Road. The effect of that agreement was to make the south side of Eighty-Seventh Street, subsequently opened, from the Boulevard to Tenth Avenue, *pro tanto* a division line between their properties. But the appellant interposes certain objections as to the title of Le Roy Edgar, and affecting his right to conclude other interests in the land by such an agreement. After Bowne had acquired the title to the tract of land, of which a portion bordered upon the north side of Stillwell's Road, he mortgaged the same in 1809 to William Edgar, as security for the repayment of a loan. Upon a sale decreed in proceedings instituted after the mortgagee's death to foreclose the mortgage, the premises were purchased by Herman Le Roy Edgar in his individual name. He was, however, at the time, the administrator with the will annexed of William Edgar, the deceased mortgagee, and it is argued that he acquired the title to the premises purchased in the capacity of trustee for those interested in the testator's estate, and that releases were needed to cut off their interests. The point is not tenable, however, for though it is true that he held the property in trust, nevertheless the premises so acquired took on the character of the mortgage indebtedness, and were as personality in the administrator's hands, which he could dispose of and was liable to account for as such. The case of *Lockman v. Reilly*, 95 N. Y. 64, 71, is sufficiently in point as to this. In that case it was held that whether the executors took a deed in their names as such executors, or in their individual names, was immaterial. The testator's heirs could take no direct interest in the land so purchased, and could not dispute the title of a purchaser from the executors; and this would be so, it was said, even though no power of sale might be contained in the will.

Another objection raised by the appellant is that the mortgagee, Edgar, had taken possession and had become seised of the property by title, which descended to his heirs, and was not affected by the mortgage foreclosure. The point is not discussed, and does not seem serious. It need be but briefly adverted to in answer. It seems to me to be sufficient to say that, while it is true that the mortgagee went into possession of the mortgaged premises, the possessory right gained thereby was to satisfy the mortgage debt out of the property mortgaged. Had the debt been paid before any adverse title had been gained, the possessory right would have ceased, and the mortgagor would have been entitled to repossess himself of the property. But upon the foreclosure of the mortgage by the executor of the mortgagee, it not only appeared that Bowne, the mortgagor, had regained possession of the mortgaged premises within 18 years of the time that his mortgagee had entered, but all claims to any interest therein were expressly waived, except for the amount due upon the bond and mortgage. Further than this, it is to be observed that it was found as a fact by the trial court that the devisees of William Edgar, Jr., to whom Edgar, Sr., the mortgagee, had bequeathed and devised his residuary estate, in which were comprehended the mortgage interests in question, had conveyed all their right, title, and interest to the grantee, Herman Le Roy Edgar. As that grant conveyed the lands, which included the premises in question, by boundaries as rearranged under the agreement of division between said Edgar and Adams, the plaintiff's predecessor in interest, any possible claims outstanding in William Edgar, Jr.'s, devisees were relinquished, and their conveyance quieted all questions as to any land which, by the rectangulation of the line of the south side of Eighty-Seventh Street, would be left between it, the westerly side of Tenth Avenue, and the north line of what was the old Stillwell lane.

I have discussed those objections which seemed to me to offer any legal question requiring an expression of opinion, and I think neither they, nor any others, are material, or disclose any flaw in the plaintiff's title. The appellant, therefore, should be compelled to perform his contract.

The judgment should be affirmed, with costs.

All concur, except **Finch, J.**, absent.

NEBRASKA SUPREME COURT

John T. BRESSLER, *Ptff. in Err.*,
v.

WAYNE COUNTY.

(.....Neb.....)

*1. The owner of national bank stock,

*Head notes by NORVAL, J.

NOTE.—*Taxation of national bank stock.*

The authority of the States to tax the shares of national bank stock is derived wholly from the 13 L. R. A.

in listing his shares for taxation, is not entitled to deduct his bona fide indebtedness from the value of such shares of stock.

2. The decision on the former hearing of the case, reported in 26 Neb. 488, is overruled.

(September 16, 1891.)

Act of Congress permitting it. Without the consent of Congress such bank-stock shares cannot be taxed by state authority. *McCulloch v. Maryland*,

ERROR to the District Court for Wayne County to review a judgment in favor of defendant in a proceeding brought to compel the correction of plaintiff's tax assessment by allowing him a deduction for debts owed by him. *Affirmed.*

A decision was reached in this case and an opinion handed down at the January Term, 1889, which reversed the judgment below and is reported in 25 Neb. 468. A rehearing was subsequently granted, after which the opinion given herewith was handed down.

The facts sufficiently appear in the opinion. *Messrs. Northrup & Welch* for plaintiff in error.

Messrs. William Leese, Atty-Gen., and J. D. King for defendant in error.

Norval, J., delivered the opinion of the court:

This case is on rehearing, the opinion being reported in 25 Neb. 468. The question involved is the right of the owner of shares in a national bank, having no other credits or moneyed capital, to have deducted, in the assessment and taxation of such shares, his bona fide debts. On the former hearing it was held that, under section 5219 of the Revised Statutes of the United States, he was entitled to such deduction. Said section 5219 permits state taxation of the shares of stock in national banks, subject only to two restrictions: *first*, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;" and, *second*, "that the shares of any national banking association, owned by nonresidents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere."

17 U. S. 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; *Weston v. Charleston*, 27 U. S. 2 Pet. 449, 7 L. ed. 481; *People v. Weaver*, 100 U. S. 539-543, 25 L. ed. 705, 706.

The provision of the National Bank Law, that state taxation on the shares of the banks shall not be at a greater rate than is assessed on other moneyed capital in the hands of citizens of the State, has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705.

It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. *Hepburn v. School Directors of Carlisle*, 90 U. S. 23 Wall. 480, 23 L. ed. 112.

The subject was further considered in the case of *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 360. One of the questions in that case had reference to an exemption from taxation by state authority of bonds issued by a municipal corporation in the hands of individuals. It was held that the exemption did not invalidate the assessment upon the shares of national banks.

Discrimination in favor of other moneyed capital inhibited.

The Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. By the modification of the Act of 1864 by the Act of February 10, 13 L. R. A.

The second limitation is not important in this case, but it is claimed that by not allowing bona fide debts to be deducted, in the assessment of shares in national banks, the State thereby places a higher burden of taxation upon money invested in national banks than is imposed upon other moneyed capital, and therefore contravenes the first restriction imposed by Congress in the section above referred to. The Supreme Court of the United States has in many cases considered and construed the provisions of the Act of Congress which limit the power of the States in the taxation of national bank shares. A reference to some of these decisions will aid in the determination of the question involved in this case.

In *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705, it is held that the Statute of the State of New York, which permits a taxpayer, in listing his property for taxation, to deduct the amount of his debts from the valuation of all his personal property, including moneyed capital, except his bank shares, is in conflict with the Act of Congress, in that shares of national banks are required to be assessed higher in proportion to their real value than other moneyed capital in the hands of citizens of the State is valued for taxation. It is further held that the rule of uniformity in the taxation of such shares applies to the valuation of the shares, as well as to the ratio of percentage laid on such valuation. To the same effect is *Albany County Suprs. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044.

In *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901, it is held that where a state statute provides for the valuation of all moneyed capital for taxation at its true value,

1868, it was intended to provide that the validity of the state tax was hereafter to be determined by the inquiry whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. *Boyer v. Boyer*, 113 U. S. 691, 28 L. ed. 1089.

Although, for the purpose of taxation, the state statutes provide for the valuation of all moneyed capital, including shares in national banks, at the true cash value, yet if the tax officers systematically and intentionally valued the shares at their full value, while other moneyed capital was assessed at far less than its actual value, such assessment was in violation of the Act of Congress. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901. To the same effect is the decision in *Cummings v. Merchant's Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.

In the case of *Hepburn v. School Directors of Carlisle*, 90 U. S. 23 Wall. 480, 23 L. ed. 112, it was decided to be competent for the State to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State.

When national bank shares had been assessed at their full value, while all other property in the State was only assessed at from thirty to forty per cent of its real value, the court held that the assessment was illegal, and that the bank in its corporate capacity was a proper party complainant. *Merchants Nat. Bank of Toledo v. Cumming, Thomp. Nat. Bank Cas.* 928; *Morse, Banks & Banking*, 587.

But a court of equity will not restrain the collection of a tax upon the shares of a national bank

including shares of the national banks, and the taxing officers intentionally assess such shares at their actual valuation, while other moneyed capital was assessed far below its real value, such assessment of national bank stock was in violation of section 5219 of the Revised Statutes.

In *Eransville Nat. Bank v. Britton*, 105 U. S. 822, 26 L. ed. 1053, it is ruled that under the Statute of Indiana, which allows deductions of bona fide debts to be made from all credits, in listing the same for taxation, the assessing of national bank shares, without permitting the shareholders to deduct from the value the amount of his bona fide debts, is a discrimination forbidden by Congress.

In the more recent case of *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, the court, in an able and exhaustive opinion, construed the meaning of the words "other moneyed capital," as used in the Act of Congress. We quote from the opinion: "The key to the proper interpretation of the Act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions in order to provide a uniform and secure currency for the people, and to facilitate the operations of the treasury of the United States. . . . The main purpose, therefore, of Congress, in fixing limits to state taxation, on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of a like charac-

ter. The language of the Act of Congress is to be read in the light of this policy. Applying his rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the Statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms by money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of a corporation; but the property of a corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital; and its business may not consist in any kind of dealing in money, or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the State may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. . . . The business of banking, as defined by law and custom, consists in the

because a state statute does not set forth in express terms that there shall be no greater assessment upon national banks located within the State than upon the state banks. *First Nat. Bank v. Douglas County*, 3 Dill. 380.

Capital stock not taxable.

The capital of a national bank is not taxable by the State. *National Commercial Bank v. Mobile*, 62 Ala. 295; *New York v. Comrs. of Taxes*, 71 U. S. 4 Wall. 244, 18 L. ed. 344; *Bradley v. Illinois*, 71 U. S. 4 Wall. 459, 18 L. ed. 453; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1; *Sumter County v. National Bank of Gainesville*, 62 Ala. 464; *First Nat. Bank v. Douglas County*, 3 Dill. 380.

Capital stock as such cannot be assessed. The only way stock can be reached is by assessment of the different shares of stockholders (*Collins v. Chicago*, 4 Biss. 472), and an assessment on the shares in gross against the bank is not authorized and is illegal. *National Commercial Bank v. Mobile*, 62 Ala. 294.

A bank is not liable to taxation on its capital under a statute which requires owners of property to return it for taxation (*Waco Nat. Bank v. Rogers*, 51 Tex. 606; *State v. Newark*, 40 N. J. L. 558; *Waite v. Dowley*, 94 U. S. 557, 27 L. ed. 181; *Sumter County v. National Bank of Gainesville*, 62 Ala. 468; *Van Allen v. Nolan*, 70 U. S. 8 Wall. 584, 18 L. ed. 234); although it is the owner of all the property of the corporation, real and personal (*Van Allen v. Nolan* and *Sumter County v. National Bank of Gainesville*, *supra*); and it is not liable for either state or municipal taxes on the shares of stock not owned by it, but owned by individual stockholders. 13 L. R. A.

Waco Nat. Bank v. Rogers, 51 Tex. 606; 1 Dexty, Taxn. 377.

In *Minnesota* a state statute requiring all the shares of a national bank to be assessed and taxed at their actual tax value, without any deduction on account of the real property held by the bank, and in which a portion of its capital is invested, does not authorize the taxation of real property, *ex nomine* lawfully owned and used as a place for the transaction of its business, for tax acts are presumed not to impose a double burden. *Rice County Comrs. v. Citizens Nat. Bank of Faribault*, 23 Minn. 280.

In *New Jersey*, to the extent that the capital is invested in the securities of the federal government, it is beyond the power of the States to tax it as against the corporation, for the reason that taxation in that instance would be indirectly a tax upon the credit and securities of the government. *State v. Newark*, 39 N. J. L. 380; *First Nat. Bank of Louisville v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701; *Van Allen v. Nolan*, 70 U. S. 8 Wall. 573, 18 L. ed. 230.

The policy of the *New York* Legislature in regard to the taxation of bank capital and bank shares has been uniform. The stock has been taxed at its nominal value, without deduction for debts or charge for surplus, and, more recently, at its actual value. *People v. Dolan*, 36 N. Y. 52.

In *Wisconsin* the value of stock in a national bank, owned by a taxpayer, must be considered a part of the "debts due or to become due" him from which he is entitled to deduct the amount of his bona fide and unconditional indebtedness, in listing his property for taxation. *Ruggles v. Fond du Lac*, 58 Wis. 436.

issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eye of this Statute, 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress. . . . The terms of the Act of Congress, therefore, include shares of stock or other interest owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loans, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as 'personal property.' "

It follows from these decisions that any method of assessment of taxes which prohibits the owner of national bank shares, who owns no other credits or moneyed capital, from deducting his bona fide indebtedness from the value of such shares, and permits the deduction of such debts in the assessment of like property similarly situated, conflicts with the Act of Congress. Was the rule of uniformity prescribed by the federal statute violated in the assessment of the plaintiff in error? In determining this question, it will be necessary to examine some of the provisions of the Revenue Law of this State. Sections 27, 30, and 33 of the Revenue Law are as follows: "Sec. 27. In making up the amount of credits which any person is required to list for himself, or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person, company, or corporation, to any other person, company, or corporation, for a consideration received; but no acknowledgment of indebtedness not founded on actual consideration, believed when received to have been adequate, and on such acknowledgment made for the purpose of being so deducted, shall be considered a debt, within the meaning of this section; and so much only of any liability, as surety for others, shall be deducted

as the person making out the statement believes he is legally and equitably bound and will be compelled to pay on account of the inability or insolvency of the principal debtor; and, if there are other sureties who are able to contribute, then only so much as the surety in whose behalf the statement is made will be bound to contribute: provided, that nothing in this section shall be so construed as to apply to any bank, company, or corporation exercising banking powers or privileges, or to authorize any deductions allowed by this section from the value of any other item of taxation than credits." "Sec. 30. Every bank (not incorporated), banker, broker, or stock jobber shall, at the time fixed by this chapter for listing personal property, make out and furnish the assessor a sworn statement, showing—*first*, the amount of property on hand or in transit; *second*, the amount of funds in the hands of other banks, bankers, brokers, or others, subject to draft; *third*, the amount of checks or other cash items, the amount thereof not being included in either of the preceding items; *fourth*, the amount of bills receivable, discounted, or purchased, and other credits due, or to become due, including accounts receivable, and interest accrued, but not due, and interest due and unpaid; *fifth*, the amount of bonds and stocks of every kind, state and county warrants, and other municipal securities, and shares of capital stock of joint-stock or other companies or corporations, held as an investment, or any way representing assets; *sixth*, all other property appertaining to said business, other than real estate (which real estate shall be listed and assessed as other real estate is listed and assessed under this Act), *seventh*, the amount of deposits made with them by other parties; *eighth*, the amount of all accounts payable, other than current deposit accounts; *ninth*, the amount of bonds and other securities exempt by law from taxation, specifying the amount and kind of each, the same being included in the preceding fifth item. The aggregate amount of the first, second, and third items in said statement shall be listed as moneys. The amount of the sixth item shall be listed the same as other similar personal property is listed under this chapter. The aggregate amount of the seventh and eighth items shall be deducted from the aggregate amount of the fourth item of said statement, and the amount of the remainder, if any, shall be listed as credits. The aggregate amount of the ninth item shall be deducted from the aggregate amount of the fifth item of such statement, and the remainder shall be listed as bonds or stocks." "Sec. 33. The stockholders in every bank located within this State, whether such bank has been organized under the laws of this State or of the United States, shall be assessed and taxed on the value of their shares of stock therein in the county, town, precinct, village, or city where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. Such shares shall be listed and assessed, with regard to the ownership and value thereof, as they existed on the first day of April,

annually; subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State, in the county, town, precinct, village, or city where such bank is located. The shares of capital stock of national banks not located in this State, held in this State, shall not be required to be listed under the provisions of this Act."

It will be observed that section 27 authorizes the individual tax-payer to deduct the bona fide debts owing by him from the gross amount of his credits, and prohibits any deduction from the value of any other item or property of taxation than credits. The word "credits," as used in the section was not intended to include notes, securities, accounts due, or other credits which are the assets of any bank, banker, broker, or stock jobber but was intended to cover debts due the tax-payer growing out of the other ordinary business transactions. We must therefore look elsewhere for the rule which governs the assessment of moneyed capital invested in the banking business. Section 33 declares that shares of stock in every bank within the State, whether incorporated under the laws of this State or the United States, shall be assessed according to their value, subject to the restriction "that the taxation of such shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of this State." This limitation is the same as imposed by Congress upon the States as a condition to the taxation of national banks. So it cannot be said that the Legislature, in providing for the taxation of national banks, has unfavorably discriminated against them. The word "rate," as used in this section, applies as well to the valuation of the shares of the stockholder as to the ratio of tax to be levied thereon. There must be uniformity, both in the assessment and the levying of the tax. National bank shares cannot be assessed at their full value, and "other moneyed capital" below its actual value. Looking to section 30, we find that in assessing the property of unincorporated bank, and that of bankers, brokers, and stock jobbers, they are allowed to deduct the amount of their indebtedness to depositors and the amount of all accounts payable, other than current deposit accounts, from the amount of their bills receivable, and other credits due, or to become due; but this deduction cannot be made from any other item of their property. The fact that the unincorporated bank is entitled to such deduction is no valid reason why the debts of the owner of national bank stock should be deducted from the value of his shares in assessing them. National banks are assessed solely by taxing the shares of stock. In unincorporated banks there are no shares to tax, and the Legislature, of necessity, was compelled to adopt a different method of taxing them, by assessing the value of the capital therein invested, which is practically the difference between the value of the assets and the amount of liabilities. The shares of a national bank do not represent the assets of the bank, but rather

the difference between the value of its property and its liabilities. While the method of assessing national banks is different from that by which a private bank or banker is assessed, the rule of uniformity is preserved so that it cannot be said that the law of the State requires that national banks shall be taxed at a greater rate than is imposed upon the capital invested in the state banks.

It must, we think, be conceded that the larger part of the moneyed capital of the individual citizens of this State, within the meaning of the words "other moneyed capital" as defined by the Supreme Court of the United States, is in the hands of brokers, stock jobbers, and incorporated and unincorporated state banks. And as the State has not, in the taxation of the capital thus invested, unjustly discriminated against the national banks, the fact that in the assessment of a small portion of the moneyed capital in the State, which is not invested so as to come in competition with the national banks, the tax-payer is permitted to deduct his bona fide indebtedness from credits, is not such a discrimination as violates the rule of equity required by the legislation of Congress. The principle was substantially recognized in the case of *Mercantile Nat. Bank v. New York*, *supra*. In that case, the plaintiff, a national bank located in the city of New York, brought suit against the defendants to enjoin the collection of taxes levied upon the shares of the stockholders of the bank, claiming that the laws of the State exempt from the taxation so much of the moneyed capital of the individual tax-payer as creates a discrimination against capital invested in such shares. The laws of the State of New York exempt from assessment shares of stock in trust companies, life insurance companies, deposits in savings banks, and bonds of the municipalities of the State. The court held the exemptions already mentioned did not effect an unfriendly or unlawful discrimination against national banks, or the capital therein invested, nor does it result in taxing the shares of such banks at a higher rate than is levied upon other moneyed capital in the hands of individual citizens of the State. So in the case of *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369, it is held that taxes assessed on national bank shares are not invalidated by reason of the exemption from taxation by state authority of bonds issued by the City of Nashville in the hands of individuals.

The rule deducible from the decisions of the United States Supreme Court is that, where the rate fixed by the State for the taxation of capital in the hands of individual citizens, situated similarly to that invested in national banks, is not less than that placed upon national bank shares, the rule of uniformity prescribed by the Act of Congress is maintained, even though some moneyed capital in the State, which is invested by individuals in business or enterprises, which do not come in competition with national banks, is exempt from taxation, or is assessed at a less rate than is imposed upon shares of stock in national banks. It is obvious that the laws of this State providing for the taxation of

national banks are in perfect harmony with this rule, and that the plaintiff in error has no legal ground to complain because he was not permitted to deduct the amount of his debts from the value of his national bank stock. If our Statute permitted debts to be deducted from the value of all kinds of property, or from all credits, in listing the same for assessment, as the laws of some of the States allow, then the indebtedness of the owner of national bank shares would have to be deducted from the value of his shares. But the proviso clause of section 27 of the

Revenue Law of this State provides that the rule which allows the deduction of debts from credits shall not "apply to any bank, company, or corporation exercising banking powers or privileges." We therefore reach the conclusion that in this State, in the assessment of shares of national bank stock, the owners thereof are not entitled to deduct their bona fide indebtedness from the value of such shares of stock.

The judgment of the District Court is affirmed.
The other Judges concur.

INDIANA SUPREME COURT.

Dustin M. SPAULDING, Impleaded, etc.,
Appt.,

v.

George W. HARVEY *et al.*

(.....Ind.....)

1. One who, in protection of a mortgage which he in good faith has taken from one who had no legal power to make it, because under guardianship as of unsound mind, satisfies a prior judgment lien on the mortgaged property, is entitled to be subrogated to the rights of the judgment creditor for the collection of the amount paid; especially where he was induced to take the mortgage by fraudulent statements that the guardianship had been terminated.

2. The complaint in an action to obtain subrogation to the lien of a judgment need not allege the insolvency of the judgment debtor, nor that he has no other property out of which the claim may be collected.

(September 19, 1891.)

A PPEAL by defendant Spaulding from a judgment of the Circuit Court for Grant

County subrogating the complainants to the lien of a judgment which they had satisfied for the protection of an invalid mortgage held by themselves. *Affirmed.*

The facts are stated in the opinion.

Mr. John A. Kersey, for appellant:

No one can so contract with a person under guardianship, as a person of unsound mind, as to become entitled to subrogation by paying any claim against the one under such guardianship.

If appellees have any claim whatever on account of having paid the Ferguson judgment, it is a claim against the judgment debtors for money paid to their use, and at their instance and request; and it is not sufficient to work an equitable assignment of the Ferguson judgment to them as against the appellant, who held a judgment against and was the guardian of Ferguson's judgment debtors.

A mere stranger or volunteer who pays a debt cannot be subrogated to the creditor's rights.

Brandt, Suretyship, § 260.

It is only in cases where the person paying

NOTE.—Subrogation defined.

Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself. Bispham, Eq. § 385.

When a man pays a debt which could not properly be called his own, but which it was his interest to pay, the law subrogates him to all the rights of the creditor. 2 Bouvier, Law Dict. 417.

This definition includes the case now under consideration. The complainant paid the debt, not his own, but which it was his interest to pay. Gaskill v. Wales, 36 N. J. Eq. 527.

Doctrine of subrogation.

The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The courts of all the American States, with very few exceptions, have extended the remedy in cases arising between principal and surety, as well as mortgagor and mortgagee. Scribner v. Adams, 73 Me. 541; Kelly v. Herrick, 181 Mass. 373; Pierson v. Catlin, 18 Vt. 77; Hayes v. Ward, 4 Johns. Ch. 123, 1 L. ed. 736; Talbot v. Wilkins, 31 Ark. 411; Dent v. Wait, 9 W. Va. 41; Saffold 13 L. R. A.

v. Wade, 51 Ala. 214; Townsend v. Whitney, 75 N. Y. 425; Steele's App. 72 Pa. 101; Farmers & D. Bank v. Sherley, 12 Bush. 304; McArthur v. Martin, 23 Minn. 74; Hollingsworth v. Pierson, 53 Iowa, 53; Smith v. Rumsey, 33 Mich. 133; McDougald v. Dougherty, 14 Ga. 374; Van Santen v. Standard Oil Co. 81 N. Y. 171; Price v. Trusdell, 23 N. J. Eq. 200; Farham v. Green, 64 N. C. 436; Brown v. Ray, 18 N. H. 102; Lidderdale v. Robinson, 25 U. S. 12 Wheat. 594, 5 L. ed. 740; Prout v. Lomer, 79 Ill. 331. See Pom. Eq. Jur. § 1419, note.

The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view. Acer v. Hotchkiss, 97 N. Y. 335.

One who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. Gans v. Thleme, 93 N. Y. 232. See notes to Boone v. Clark (Ill.), 5 L. R. A. 273, and Wilton v. Mayberry (Wis.), 6 L. R. A. 61.

Right of subrogation; its nature and scope.

The right of subrogation is afforded in cases where a person is required to pay a debt or prior incumbrance to protect his right or to save his property; and whenever to accomplish such protection it is necessary that he have the support of the security so paid, he will be entitled to it if it can be taken without prejudice to the superior rights of others. Cole v. Malcolm, 66 N. Y. 363; Barnes v.

the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, that equity substitutes him in the place of the creditor.

Richmond v. Marston, 15 Ind. 184.

The fraudulent representations being denied, there should have been some proof of them, if they were sufficient for any purpose when proved.

Bevan v. Tomlinson, 25 Ind. 258; *Etna L. Ins. Co. v. Buck*, 6 West. Rep. 419, 108 Ind. 174; *Binford v. Adams*, 1 West. Rep. 911, 104 Ind. 41.

For aught that is averred, the Lockwoods may be amply able to pay appellees any sum due them for any cause or on any account. If that is so they ought not to be allowed subrogation, and thus compel appellant to pay them in order to protect his claim, accruing to him by virtue of his judgment and sheriff's certificate.

Edinburg Am. Land Mortg. Co. v. Latham, 88 Ind. 88.

Messrs. Harvey & Paulus, Marsh & Brownlee and J. L. Custer for appellees.

McBride, J., delivered the opinion of the court:

November 28, 1886, Amaretta Lockwood, one of the appellees herein, was the owner of an undivided interest in certain land in Grant County. On that day one Josiah Ferguson recovered a judgment in the Grant Circuit Court against her for \$30 and costs, which became a lien on her interest in the land. December 28, 1886, she with her husband and co-appellee, James H. Lockwood, were by the Wells Circuit Court adjudged of unsound mind, and incapable of managing their respective estates, and the appellant was duly appointed their guardian. The guardianship was terminated by a judgment of the Wells Circuit Court on the — day of April, 1887, declaring them restored to their right minds, and again capa-

ble of managing their estates. On the 26th day of January, 1887, the Lockwoods applied to the appellees, Harvey & Paulus, to act as their attorneys in the institution and conduct of certain litigation, and represented to them that they had been already adjudged of sound mind, and their guardianships terminated. Harvey & Paulus, not knowing that this was untrue, accepted and entered upon the duties of the employment, and to secure the compensation agreed upon took from the Lockwoods a mortgage on the land in Grant County. On the day the mortgage was executed the land was advertised for sale by the sheriff of Grant County on an execution issued on the Ferguson judgment. Harvey & Paulus, to save the land from sale, and thereby protect their mortgage, paid to the sheriff \$48.43, the amount of the judgment, with costs. This suit was originally commenced to foreclose the mortgage; but the Lockwoods and the appellant, who was joined as a defendant, attacked the validity of the mortgage on the ground of the incapacity of the mortgagors when it was executed. The appellant, also by a separate answer, which was supported on the trial by proof, showed that when he was discharged as guardian the Wells Circuit Court allowed him for services, money expended, etc., \$378.78, which the court adjudged to be a specific lien on the mortgaged land, and that a transcript of the judgment had been duly filed and recorded in the clerk's office of Grant County. Harvey & Paulus thereupon, with leave of the court, and without objection from the defendants, filed a second paragraph of complaint, alleging the facts substantially as above stated, and asking to be subrogated to the lien of the Ferguson judgment. This paragraph also contained averments charging that the representations made by the Lockwoods to Harvey & Paulus that they had been adjudged of sound mind and relieved from guardianship were not only false, but were fraudulently made to induce them to

Mott, 64 N. Y. 397; *Averill v. Taylor*, 8 N. Y. 44; *Snelling v. McIntyre*, 6 Abb. N. C. 409; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; *Twombly v. Cassidy*, 82 N. Y. 155; *Clark v. Mackin*, 95 N. Y. 346; *Platt v. Brick*, 35 Hun, 121.

The sureties on an undertaking on appeal, as between the original parties are entitled to be subrogated to all the rights of the judgment creditor, both as against the judgment debtor and the real estate on which the judgment is a lien. *Mathews v. Aiken*, 1 N. Y. 595; *Craythorne v. Swinburne*, 14 Ves. Jr. 159; *Lewis v. Palmer*, 28 N. Y. 271; *Wells v. Kelsey*, 25 How. Pr. 354; *Munn v. Barnum*, 2 Abb. Pr. 409; *Hinckley v. Kreitz*, 58 N. Y. 533; 1 Story, Eq. Jur. § 499, note 5.

A surety who pays the debt of his principal is entitled to subrogation in equity, and to an assignment of the securities held by the creditor. When, therefore, a second mortgagee pays to the first mortgagee his debt, although the first mortgagee is thereby satisfied, the second mortgagee is entitled to hold the premises as security for the amount paid on the first mortgage. *Ellsworth v. Lockwood*, 42 N. Y. 80.

A party advancing funds to raise the incumbrance upon real estate belonging to a person incapable of making a valid contract may invoke the equitable doctrine of subrogation. *Coleman v. Frazer*, 3 Bush, 300.

If the right to redeem from the mortgage, and 18 L. R. A.

by such redemption to stand in the place of the mortgagee, and hold his interest in the land, is treated as identical with the right to make payment, then this right belongs to every surety for the mortgage debt, even if he has no interest in or lien upon the estate; for, upon the equitable principle of subrogation, a surety who has satisfied a demand is entitled to hold the securities of the creditor and to enforce them as against the person and the fund primarily liable. *Averill v. Taylor*, 8 N. Y. 44.

And it is sufficient to entitle a junior incumbrancer to be subrogated to the rights of a senior mortgagee if he tender to such senior mortgagee the amount secured by his mortgage, with interest and costs before the foreclosure sale. *Marshall v. Ruddick*, 28 Iowa, 457; *Dings v. Marshall*, 7 Hun, 522.

A junior mortgagee or judgment creditor has a right to protect his interest by paying a prior mortgage due and payable, and if he does pay it he succeeds by subrogation to the rights and interests of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or act of transfer by or on the part of the prior mortgagee. 2 Story, Eq. § 1024; *Brainard v. Cooper*, 10 N. Y. 356; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 L. ed. 871; *Dale v. McEvers*, 2 Cow. 118; *McLean v. Towle*, 3 Sandf. Ch. 119, 7 L. ed. 733; *Burnet v. Denniston*, 5 Johns. Ch. 35, 1 L. ed. 999.

act as such attorneys, and accept said mortgage. The circuit court found these averments to be true, and adjudged the mortgage void, but sustained the claim of Harvey & Paulus to be subrogated to the lien of the Ferguson judgment, with priority over the judgment of the appellant. This conclusion of the court is vigorously attacked by the appellant, who insists that, the mortgage being void, and the mortgagors incapable of contracting, the payment by the appellees of the Ferguson judgment was voluntary, and by persons standing in the relation of strangers to the debtors, and will not entitle them to subrogation. In this the appellant is wrong, and the judgment of the circuit court is right. True, the mortgage was void, because the mortgagors were, by the express terms of the Statute, legally incapacitated from contracting. One may, however, be so weak intellectually as to be incapable of managing his estate, and thus be legally subjected to guardianship, and still be capable of perpetrating a fraud. The court has found in this case that these parties, by means of the representations made, not only secured the services of the appellees as attorneys, but also induced them to save their land from sale by the sheriff by paying the Ferguson judgment. It is certain that they obtained a substantial benefit. To sustain their present claim would be to relieve them wholly from liability for the Ferguson judgment, without having rendered any equivalent whatever therefor. The Statute which provides for the guardianship of those *non compos*, and for the conservation of their estates, is intended to protect them from the consequences of their mental weakness, and to guard against the danger of wrong being done to them by the dishonest and the unscrupulous. It was never intended to serve as an intrenchment to shelter them from the consequences of such wrongs as their limited capacity gave them the power to knowingly perpetrate upon others. Indeed, if no question of

fraud or of attempted fraud entered into the transaction, it is a clear case calling for the application of the doctrine of subrogation, which does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund from which in good conscience he ought to be paid. *Sheld. Subr. § 4; 8 Pom. Eq. Jur. § 1419; Rooker v. Benson, 88 Ind. 250.*

Assume that the mortgagors, as well as the mortgagees, acted in good faith; when the mortgagees, to protect what they erroneously supposed was a valid mortgage, paid the judgment, they were neither strangers nor volunteers. The fact that the mortgage proved to be void because the makers had not the legal power to make it affords only stronger reasons why the equitable doctrine of subrogation should be invoked.

The second paragraph of the complaint, asking for subrogation, did not contain any averments of the insolvency of the debtors, or that they had no other property out of which the claim could be collected. Appellant demurred to this paragraph on the ground that it did not state facts sufficient to constitute a cause of action, and, the demurrer being overruled, an exception was saved to the ruling. This ruling is assigned as error, appellant insisting that the omission of such averments or their equivalent makes the complaint bad. The question in this case is as to the preservation of a security in favor of a creditor. The right of a creditor to be subrogated to the securities of one whose claim he has paid does not depend upon the solvency or the insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was an incident.

Judgment affirmed with costs.

MICHIGAN SUPREME COURT.

Stephen COLLAR

v.

Hamblin D. COLLAR, *Appt.*

(....Mich.....)

1. Evidence that a conveyance of his interest by a tenant in common to a

trustee to facilitate a sale of the property and distribution of the proceeds was in fraud of his creditors is immaterial in an action by him to recover his share of the proceeds of the sale, to which they are not parties.

2. When a writing is shown to have been executed for the purpose of conveying an estate held in common to a trustee for sale and

NOTE.—*Parol evidence is inadmissible to vary the terms of a written instrument.*

Few axioms of law have a more extended application or are so universal in their application as that which denies to parol evidence the right to explain, vary, or contradict the terms of a written instrument. *Chapin v. Dobson, 78 N. Y. 74; Croome v. Ledard, 2 Myl. & K. 251.*

Every jurisdiction in this country, without exception, has given indorsements to the rule stated in the text, and while great misconception and contrariety of view exists as to the nature and scope of the numerous exceptions which have engrafted themselves upon the original formula, still it may be affirmed without fear of contradiction that wherever the evidentiary facts disclose a pertinent

case, the courts apply in all its rigor the provisions of the law as stated. *Morrill v. Robinson, 71 Me. 24; Brandon Mfg. Co. v. Morse, 48 Vt. 322; Fay v. Gray, 124 Mass. 500; Carlton v. Vineland Wine Co. 33 N. J. Eq. 466; Weller v. Hottenstein, 102 Pa. 499; Baltimore Perm. Bldg. & L. Soc. v. Smith, 54 Md. 187; Hunting v. Emmart, 55 Md. 265; Trentman v. Fletcher, 100 Ind. 105; Porter v. Sandidge, 32 La. Ann. 449; Tennessee & C. R. Co. v. East Alabama R. Co. 73 Ala. 428; Winona v. Thompson, 24 Minn. 199; Dickson v. Harris, 80 Iowa, 727; Schultz v. Coon, 51 Wis. 416; McLean v. Piedmont & A. L. Ins. Co. 29 Gratt. 861; Service v. Stockstill, 30 Ohio St. 418; Belcher v. Mulhall, 57 Tex. 17; Koehring v. Muemminghoff, 61 Mo. 408; Smith v. Odom, 63 Ga. 499; Gillespie v. Sawyer, 15 Neb. 536; Pickett v. Ferguson, 45 Ark. 177; Mayer*

distribution of the proceeds, it is the best evidence of the terms of the trust and unless it has been lost, parol evidence respecting the terms should be excluded.

3. Although a parol agreement to acquire the interests of all the tenants in common of real estate, convert the same into money and pay over to each his *pro rata* share of the proceeds, is not enforceable under the Statute of Frauds, yet if the agreement is carried out so far that the title is acquired and the property converted into money, a trust will arise to pay over the proceeds. The trust, however, is not enforceable at law unless the trustee has affirmatively recognized his duty to make the payment.

4. Upon the death, before converting the land into money, of one who has received a conveyance of the shares of tenants in common of real estate under a parol agreement to sell the same and divide the proceeds among his grantors, the land descends to his heirs unincumbered by any trust, and a purchaser from them will owe no duty to the orig-

inal grantors arising out of the parol agreement made with them.

(July 23, 1891.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of complainant in an action brought to recover money alleged to have been received by defendant for land in which complainant had an interest and which it was defendant's duty to pay over to complainant. *Reversed.*

For a full statement of the facts of this case, see the former report in 4 L. R. A. 491, from which it appears that George Collar died in 1868 intestate seized of fifty-five acres of land and leaving the following children heirs surviving, being all his heirs-at-law, viz.: Silas, Sylvester, John, Martin, Henry, Cameron, Mary (wife of Jacob Thorne), Stephen and Hamblin D.

In December, 1874, plaintiff and others of the heirs conveyed their interests in this fifty-

v. Adrian, 77 N. C. 88; Falconer v. Garrison, 1 McCord, L. 209; Seckler v. Fox, 51 Mich. 82; Little Kanawha Nav. Co. v. Rice, 9 W. Va. 636; Chamness v. Crutchfield, 37 N. C. 148; Young v. Frost, 5 Gill, 287; Smith v. Gibbs, 44 N. H. 336; Drake v. Starks, 45 Conn. 96; La Farge v. Rickert, 5 Wend. 187; Perrine v. Cheeseman, 11 N. J. L. 207; Hellner v. Imbrie, 6 Serg. & R. 401; Abrams v. Pomeroy, 13 Ill. 133; Pennsylvania & N. Y. Canal & R. Co. v. Betta, 1 W. N. C. 386; Spencer v. Tilden, 5 Cow. 144; Myrick v. Dame, 9 Cush. 248; Rice, Ev. p. 255.

The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption that, if produced, it would give a completion to the case at least unfavorable, if not directly adverse, to the interest of the party. *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957.

On prior and on subsequent occasions the same court has announced a similar principle, and we may safely affirm that it is a cardinal feature of evidentiary law as administered in this country. No evidence shall be received, which presupposes better evidence in the party's possession, and this rule may be regarded as established beyond question. *Taylor v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Cooke v. Woodrow*, 9 U. S. 5 Cranch, 13, 3 L. ed. 22; *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 982; *De Lane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 406; *McPhaul v. Lapeley*, 37 U. S. 20 Wall. 264, 22 L. ed. 344.

The rule that the best evidence must be produced which the nature of the case admits, means, not that the courts require the strongest possible assurance, but that no evidence shall be admitted which presupposes greater evidence in the party's favor. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 3 L. ed. 424.

The reason of the rule that secondary or inferior evidence shall be substituted for any evidence of a higher nature which the case admits of is the attempt to substitute the inferior for the higher implies that the higher would give a different aspect to the case of the party introducing the lesser. *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527; *Taylor v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; *De Lane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 406.

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Analogous reasoning will require the rejection of parol evidence where the best evidence attainable is, for instance, a letter, statement or document, and its non-production is not accounted for, and no foundation is laid for the introduction of secondary evidence. *Mugge v. Adams*, 76 Tex. 448.

Where the best or primary evidence has been lost or destroyed, much latitude is allowed in the admission of parol evidence to supply the omission, and although much latitude may have been carried to its extreme limits, a new trial will not be granted where the finding was substantially right upon the evidence. *McCullough v. Davis*, 6 West. Rep. 579, 108 Ind. 292; *Rice*, Ev. p. 147.

As to the rule that parol evidence cannot vary or contradict a written contract, see *note to La Fayette County Mon. Corp. v. Magoon* (Wis.) 3 L. R. A. 761.

Exceptions to the foregoing rule.

The following American cases illustrate the exception by which parol evidence may be admitted to vary written instruments, on the ground of mistake, in different forms and modes of proceedings: *Peterson v. Grover*, 20 Me. 363; *Bradbury v. White*; 4 Me. 391; *Rogers v. Saunders*, 16 Me. 92; *Goodell v. Field*, 15 Vt. 448; *Lawrence v. Staigg*, 8 R. I. 256; *Quinn v. Roath*, 37 Conn. 16; *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608; *Patterson v. Bloomer*, 35 Conn. 57; *Margraf v. Muir*, 57 N. Y. 155; *Best v. Stow*, 2 Sandf. Ch. 298, 7 L. ed. 601; *White v. Williams*, 48 Barb. 222; *Morganthau v. White*, 1 Sweetney, 385; *Ryno v. Darby*, 20 N. J. Eq. 231; *Conover v. Wardell*, Id. 296; *Perry v. Pearson*, 1 Humph. 431; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Chambers v. Livermore*, 15 Mich. 381; *Van Ness v. Washington*, 29 U. S. 4 Pet. 232, 7 L. ed. 842; *Rice*, Ev. p. 257. See *note to Bulkley v. Devine* (Ill.) 3 L. R. A. 350.]

Parol proof not admissible to vary the terms of a trust.

Where a trust is declared in writing the courts never permit parol proof to contradict the intention as expressed upon the face of the instrument itself. *Lewis v. Lewis*, 2 Rep. in Ch. 77; *Finch's Case*, 4 Inst. 86; *Childers v. Childers*, 3 Kay & J. 310; *Leman v. Whitley*, 4 Russ. 493; *Simms v. Smith*, 11 Ga. 198; *Harris v. Barnett*, 3 Gratt. 339; *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 967. See *notes to Diven v. Johnson* (Ind.) 3 L. R. A. 308; *Bulkley v. Devine* (Ill.) 3 L. R. A. 350; *Minneapolis Threshing Mach. Co. v. Davis* (Minn.) 3 L. R. A. 799; *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 33.

five acres of land to Jacob Thorne, the husband of their sister Mary, for the purpose of enabling him to make a sale of the same, and distribute the proceeds among the heirs according to their equitable interests. In 1876 Jacob Thorne and wife, with such others of the heirs as had not conveyed to Thorne, conveyed said lands to Sylvester, the purpose of which conveyance was the same as it was in the conveyance to Thorne. In 1880 Sylvester died, not having executed the trust or conveyed said lands, and afterwards the defendant Hamlin D. obtained a conveyance of said lands, from the heirs of Sylvester.

Further facts appear in the opinion.

Mr. R. A. Montgomery, with **Mr. Q. A. Smith**, for appellant.

Messrs. Parkinson & Day, for appellee:

Plaintiff had always insisted that he was entitled to a distributive share of the proceeds of the sale of the land in question. The defendant was aware of this and took the title with that understanding on his part.

With this understanding on the 18th of May 1886, he promised plaintiff to pay him \$225 in settlement of this claim. This promise was based upon a good consideration, and such as would support the promise. It was such a claim as defendant saw fit to recognize and compromise.

The precise nature and extent of the claim is not material; it may have been of a legal or equitable nature.

Sheldon v. Rice's Estate, 80 Mich. 299; *Stevens v. Tuller*, 4 Mich. 387; *Gooding v. Hingston*, 20 Mich. 439.

Champlin, Ch. J., delivered the opinion of the court:

On a former trial of this case the defendant prevailed, the trial court holding that upon the showing then made there could be no recovery upon any theory, either as for money had and received, or upon an account stated, or upon the special count, unless the contract was proven. Upon a writ of error to this court, the judgment was reversed, and a new trial ordered. 75 Mich. 414. Another trial has been had, and the plaintiff has recovered a judgment, and we are asked to review the proceedings which led to that result. Thirty-one errors have been assigned, only a few of which demand particular attention in an opinion, although all have been carefully considered. The facts, as developed by the testimony upon this trial, are but slightly variant from those which appeared upon the other trial upon the main issues. At the conclusion of the testimony, the court stated to the counsel the theories upon which he submitted the case to the jury, as follows: "The court: I think this case should go to the jury upon two theories, in both of which there is some tendency, in my judgment, in the proof to support the plaintiff's case, as well as proof having an opposite tendency, and what the truth is about it the jury will determine from the evidence. And the one theory is upon the count for the money had and received. Now, to sustain that, I make this statement that you may understand, generally, what the views of the court are previous to the argument: To sustain the 13 L. R. A.

case upon the theory for money had and received, it must appear that parties in their transactions understood and treated the business of procuring these titles by Hamblin as embracing within it an interest for Stephen. That must have been the understanding all round. Now, whether or no such a condition of things as that existed will be left to the jury to determine under the evidence. The plaintiff also claims that an agreement was made on the 18th of May, 1886, by which the defendant, in settlement of the plaintiff's claimed interest in the lands, agreed to pay him \$225. Now, to make that a valid agreement, if it is proved to the satisfaction of the jury, it must appear that it was made upon a lawful consideration or a good consideration in law. As applied to this case, it is contended on behalf of the plaintiff that there was consideration for making that agreement, in this: That Stephen Collar claimed to have an interest in the lands, and went there to settle with Hamblin for that interest. It is not essential, as has been stated on all hands in the argument, that he should have had a legal interest. If he had such an apparent or claimed interest in the lands as, under the circumstances surrounding the parties, was esteemed by them a thing which it was worth while for Hamblin to settle or consider of value, then, I think, it would be a good consideration. Whether that was the case or not the jury must determine from the evidence. It is true that, so far as anything appears here, the sheriff's deed had alienated Stephen's interest in the land as a matter of law, and from what appears before me I think that is true. The parties may have not considered that that was so, and, if Stephen claimed an interest, notwithstanding that, in the property, and Hamblin yielded to that claim, and for the purpose of settling it, and avoiding a controversy upon it, agreed to pay him \$225 in settlement of that claim, I think that would be a good consideration for the agreement. While the sheriff's deed would, as matter of law, have alienated Stephen's interest in the land, there appears to have been in Sylvester at his death not only the interest which was conveyed by virtue of the sheriff's deed, but also such interest, if any, as could be conveyed by Stephen and his wife by quitclaim of the premises. If the parties regarded the interest acquired by both these conveyances, although the sheriff's deed may have conveyed Stephen's interest entirely, and I think it did, if the parties regarded the interest owned by Sylvester at his death, and by his heirs afterwards, as embracing some equitable interest in Stephen, represented by the quitclaim from Stephen and his wife, or, if they regarded the Secor deed, Secor being the execution creditor, as having been procured in the interest of Stephen, those facts and circumstances should be considered with a view of determining whether or not Stephen did have any equitable interest in the fund."

The defendant's counsel, in the course of their cross-examination of Stephen Collar, attempted to show that the conveyance made by Stephen Collar and his wife to Jacob Thorne on the 28th day of December, 1874,

was fraudulent as to his creditors. The court, however, refused to permit the attorneys for the defendant to go into such inquiry. We do not think that the court erred in excluding this testimony. The creditors of Stephen Collar are not before the court, or making any complaint of the conveyance by Stephen Collar to Jacob Thorne, and we do not think that the inquiry is material to the issue before the court.

It appears in the case that a creditor of Stephen Collar proceeded by attachment against him, and levied upon his interest in the lands in question, and obtained a judgment against him in the State of New York, and levied upon and sold his interest in said lands at public auction, by which the judgment was fully satisfied, the judgment creditor being Joseph S. Secor. The land was bid off at the sheriff's sale by one Isaac Secor, and in due time he received the sheriff's deed therefor. It appears also that the proceedings in the attachment suit, so far as service upon the defendant, Stephen Collar, was concerned, was a substituted service, no personal service upon the defendant having been acquired in the State of New York, and it was claimed on the part of the defendant in this suit that the sheriff's deed conveyed to Isaac Secor all the interest which the plaintiff, Stephen Collar, had in such land. The deed of the sheriff bears date the 29th day of December, 1870, being prior in time to the deed of Stephen Collar to Jacob Thorne; and therefore the defendant in this suit claims that, at the time of the execution of the deed to Thorne, Stephen Collar had no interest whatever to convey, and conveyed nothing whatever by such deed.

It appears, further, that Sylvester Collar acquired the interest of Isaac Secor under the sheriffs' deed by purchase and conveyance from him to Sylvester dated the 25th day of April, 1877. He also obtained a deed from Thorne and wife dated December 6, 1876. Stephen Collar contends that the court in the State of New York obtained no jurisdiction in the suit, and that the sheriffs' deed is invalid, and did not extinguish his title to the land. The circuit judge charged the jury that he was of opinion that the sheriff's deed did extinguish the title of Stephen Collar to the land, but further instructed the jury that, if he insisted that he had a claim upon the land after the sheriff's deed, even after he had conveyed to Thorne and he to Sylvester Collar, such claim would constitute a good consideration for the promise of Hamblin D. Collar to pay him the sum of \$225 for such interest.

We held, when the case was here before, that where lands were conveyed under a parol trust to sell and convert into money, and divide the proceeds, and the trust had been so far executed by the trustee as to sell the land and receive the money, and such trust had been recognized by him, an action for money had and received would lie to recover such money by the person entitled thereto. *Collar v. Collar*, 75 Mich. 414. And in *Bitely v. Bitely*, 85 Mich. 227 (at the April Term of this court) we held also that parol evidence

was admissible to prove that land was conveyed to sell and divide the proceeds among the heirs.

In *White v. Cleaver*, 75 Mich. 17, we held that such a trust was not within the provisions of the Statute of Frauds. Such testimony was admitted upon the trial of this case, but upon this trial it appeared, upon the examination of the plaintiff, that there was a writing having reference to four of the conveyances by the heirs to Sylvester Collar which the plaintiff signed, and that it was sent by Henry to the heirs in Kent County; that this writing was for the purpose of fixing up and to sell the place so as to divide the money with the four heirs, namely, Hamblin, Cameron, Mary, and himself. When this fact appeared, such writing was the best evidence. It defined the trust, and all parol evidence respecting the trust, upon which Sylvester obtained the deeds from such heir, should have been excluded. There was no sufficient showing of the loss of such writing as to permit the introduction of parol evidence of its contents. Such parol evidence, when introduced, was objected to, and when it appeared later that there existed such writing, such objections became effective. It appears that such writing did not include or provide for all the heirs, but it did include the plaintiff, and measured the rights of those who were parties to it and Sylvester Collar. The plaintiff also testified that at his talk with the defendant on May 18, 1886, he represented these same four heirs, and wanted to settle only for those four interests. It is very important that it should appear what agreement Sylvester had with those four heirs, and the writing is the best evidence of that. The parol testimony tended to show that the trust which Sylvester assumed was not a trust in land, but a trust arising out of the disposition of land conveyed to him for a specific purpose. It was a trust arising out of the confidence reposed in him by the heirs in conveying their interest to him, without any other consideration to them than that he should dispose of the land, and divide the proceeds *pro rata* among them. The agreement was executory and contemplated action on the part of Sylvester. He was to acquire the interests of all the heirs, and sell and convert the real estate into money, and pay over to each his *pro rata* share. So far as the agreement relating to the purchase and disposition of real estate rested in parol, it was void under the Statute of Frauds. *Wright v. King*, Harr. Ch. 12; *Bernard v. Bougard*, Id. 180; *Trask v. Green*, 9 Mich. 358; *Newton v. Sly*, 15 Mich. 391; *Cobb v. Cook*, 49 Mich. 11; *Pulford v. Morton*, 62 Mich. 25; *Shafter v. Huntington*, 58 Mich. 810.

It was only after Sylvester had proceeded in the execution of the parol agreement, and had obtained title of all the heirs, and converted the real estate into money, that the trust would arise, founded upon equity and good conscience, to pay over the proceeds; and, before such trust could be enforced at law, some new promise must have been made, and his duty to pay over must have been

affirmatively recognized before an action could be maintained. *Culder v. Moran*, 49 Mich. 17.

But what becomes of the remedy of the heirs so deeding, if the grantee dies before performance on his part of those provisions which are void by the Statute of Frauds, and before the property is converted into personality, so that a trust can attach? At such time it is not such a trust as equity will lay hold of, and appoint a new trustee to carry out the parol trusts which are void by the Statute of Frauds. The most that can be said in such a case is that the parties have voluntarily conveyed away their interest in the real estate, and placed it beyond recall. They would have been in the same predicament as if Sylvester Collar, after having obtained the absolute deeds of conveyances from all the heirs, had refused to sell or convey the land, or further perform the parol agreement. The heirs could not have compelled a specific performance, because the parol agreement is void under the Statute of Frauds. Sylvester Collar died before the parol trust attached, and the rights of the heirs to have a performance died with him. It was said by *Mr. Justice Campbell* in *Bulen v. Granger*, 56 Mich. 208: "As our statutes have abolished the old doctrine of resulting trusts, a person who deliberately conveys land to a wife or other relative stands in no better condition as to enforcing such a trust than anyone else." The plaintiff could not have maintained this action against the heirs of Sylvester Collar, even though they had sold the fifty-five acres for \$3,000 and received the money. The land was incumbered by no trust when it descended to them. It does not become subject to any trust in the hands of the purchaser from them, nor does such purchaser owe to the heirs any duty arising out of the original parol agreement between Sylvester and the heirs. But, if there was an express trust evidence in writing, other considerations obtain, and what the rights and remedies of the parties would be in such a case depends entirely upon the writing; and, until that is produced or established with sufficient certainty, it is impossible to determine whether the present action could be maintained or not. When the case was here before, the opinion was based upon the statement that "in 1880 Sylvester Collar died, not having executed the trust or conveyed said lands, and afterwards the defendant, Hamblin D. Collar, obtained a conveyance of said lands from the heirs of Sylvester Collar, deceased, which included the interest of the plaintiff which had been conveyed to Thorne, and afterwards to Sylvester for the same purpose. . . . It was also proposed to be shown that the defendant obtained the whole title to this land from the heirs of Sylvester, and that he knew his brother had taken the title to the land for the purpose of thus distributing the proceeds, and that, although he had recognized the rights of all the other heirs, and paid them on the basis of the agreement made with the plaintiff, of May 18, 1886, he had not paid the plaintiff, and refused to recognize his rights in any funds, though he has the funds representing that

interest in his hands." Such is not the case disclosed by this record. It is not shown that the defendant acquired conveyances from Sylvester's heirs for the same purpose as Sylvester had obtained deeds from the heirs; nor is it shown that he recognized the rights of all the other heirs to a share of the proceeds of sale of the land. On the contrary, it now appears that the agreement under which Stephen Collar claims an interest through Sylvester was in writing, defining the purposes for which Sylvester received the conveyances entered into between four of the heirs, including the plaintiff, and it was with reference to these same four heirs that the original promise to pay \$225 was made on May 18, 1886.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

Alice] B. CANFIELD, *Appt.*,
v.

Great Camp of the KNIGHTS OF MACCABEES, for the State of Michigan.

(.....Mich.....)

A benefit society may lawfully provide that death claims shall be finally determined.

NOTE.—*Mutual benefit associations; binding effect of their judicial decisions.*

Where private beneficial associations adopt laws for their government to be administered by themselves, to which everyone who joins them consents, the decisions of their tribunals under such laws are binding upon the courts of the State. *Oseola Tribe*, No. 11 I. O. of R. M. v. Schmidt, 57 Md. 96. See *Black & White Smith's Soc. v. Vandyk*, 2 Whart. 309; *Logan Tribe*, I. O. of R. M. v. Schwartz, 19 Md. 565.

If a by-law is reasonable and valid, not oppressive or against public policy, it forms part of the contract and the member is bound by its terms. See *Almunt v. Subsidiary High Court of U. S. A. O. of F.* 62 Mich. 110.

With voluntary associations, the court, before it will interfere, must see that it is under obligations to act, and that it can effectually act in the premises. *Ellison v. Bignold*, 2 Jac. & W. 508.

Where there are no property rights the court will not interfere at all. *Rigby v. Connol*, 28 Week. Rep. 660.

Courts should not as a general rule interfere with the contentions of voluntary associations so long as the government is fairly and honestly administered; the remedy for grievances should be sought in the first instance in their rules and regulations. *Lafond v. Deems*, 81 N. Y. 507; *Fischer v. Raab*, 57 How. Fr. 87.

The officers of a medical society, as to the question of expulsion of a member, are to that extent a court, and chancery is not the proper tribunal to correct their errors and irregularities. *Gregg v. Massachusetts Med. Soc.* 111 Mass. 185.

But courts are not bound by decisions made by such officials concerning the force and effect of contracts of the association. *Manson v. Grand Lodge A. O. U. W.* 80 Minn. 508.

Power of benevolent associations to make by-laws. See *note* to *Supreme Lodge, K. of P. v. Knight* (Ind.) 3 L. R. A. 409.

Death claims of deceased members. See *note* to *Lawler v. Murphy* (Conn.) 8 L. R. A. 118.

terminated by a committee designated by itself, and that there shall be no right of appeal to the courts; and such provision will be conclusive on the beneficiary named in a certificate, although not a member of the society, and prevent the maintenance by him of an action on a claim rejected by the committee. In the absence of a charge of fraud or violation of the rules or regulations of the order.

(October 9, 1891.)

APPEAL by plaintiff, on a case made from a judgment of the Circuit Court for Macomb County, in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate issued to plaintiff's husband for her benefit. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Eldredge & Spier*, for appellant:

A by-law or constitutional provision which undertakes to make the decision of a tribunal, created of its own members, and therefore interested, conclusive upon a claim of a beneficiary, made pursuant to a certificate, in the nature of a policy of insurance upon the life of a member, is unreasonable, against public policy, and void.

Austin v. Searing, 16 N. Y. 112-123; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262.

Such restrictive provisions are repugnant to art. 6 of the Constitution of this State. The judicial power is vested in certain courts, and consists of the power to hear and determine controversies between adverse parties, and questions in litigation.

Story, Const. § 1640 *et seq.*

This power can only be conferred upon courts.

Re Buddington, 29 Mich. 472-474; *Rowe v. Rowe*, 28 Mich. 358; *Risser v. Hoyt*, 53 Mich. 185-193; *Underwood v. McDuffee*, 15 Mich. 361.

In *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 445, 22 L. ed. 365, even the statute of a State, aimed to restrict the right of insurance companies of other States to remove suits against it to the United States courts, was held unconstitutional and void.

The effect of these restrictive provisions of defendant, if held valid, would be to deprive the claimant of property of the right to a jury trial. A statute having that effect cannot be sustained.

Edwards v. Symons, 8 West. Rep. 784, 65 Mich. 348-354, and cases cited; *Wood v. Humphrey*, 114 Mass. 184-186.

It is not in the power of the parties to a contract (by a general arbitration clause) to oust the courts of their jurisdiction.

Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80.

The rule we contend for is enforced in *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460.

Messrs. Markey & Hall, for appellee:

The laws, by-laws, rules, regulations and constitution of the order are binding upon the members.

Niblack, Mut. Ben. Soc. par. 12; *Bacon, Ben. Soc. & Life Ins.* pars. 69, 79, 81; *Hirschl, Law of Fraternities & Societies*, p. 33; *Morawetz, Priv. Corp.* par. 491; *May, Ins.* par. 426; *Union Mut. Aid Asso. v. Montgomery*, 14 West. Rep. 877, 70 Mich. 586; *Van Poucke v. Nether-* 18 L. R. A.

land St. V. De P. Soc. 6 West. Rep. 182, 63 Mich. 378; *Arthur v. Oddfellows Ben. Asso. of Columbus*, 29 Ohio St. 557, 560; *Osceola Tribe No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 106.

The rights of a member or his beneficiary to be paid any part of the fund provided for the benefit of the widow and orphan is governed entirely by his benefit certificate and the constitution, laws, and regulations of the order. The parties are bound by just such contracts as they make which are free from fraud or illegality. Courts cannot make contracts for parties or render a party liable on a different basis from that upon which his liability is mutually stipulated for.

Lorscher v. Supreme Lodge, K. of H. 2 L. R. A. 208, 72 Mich. 326.

Where one has a claim against an association like defendant, under its laws, which has been disputed and decided adversely by the proper tribunal acting under the laws of the order, a court of law has no jurisdiction as he is concluded by the forum of his choice.

Anacosta Tribe No. 12, I. O. of R. M. v. Murbach, 13 Md. 91; *Osceola Tribe No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 98; *Yoram v. Howard Ben. Asso.* 4 Pa. 519; *Poultney v. Bachman*, 31 Hun. 49; *Lafond v. Deems*, 81 N. Y. 507; *Harrington v. Workingmen's Ben. Asso.* 70 Ga. 340, 27 Alb. L. J. 488; *Black & White Smith's Soc. v. Van Dyke*, 2 Whart. 309; *Sperry's App.* 116 Pa. 391; *McAtees v. Supreme Sitting Order of Iron Hall (Pa.)* 12 Cent. Rep. 415; *Woolsey v. Independent O. of O. F. Lodge No. 23*, 61 Iowa, 492; *Harrison v. Hoyle*, 24 Ohio St. 254; *Van Poucke v. Netherland St. V. De P. Soc. supra*; *Elliott v. Royal Exch. Assur. Co. L. R. 2 Exch. 237*; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257.

The exact point at issue was before the court in *Rood v. Railway Pass. & Freight C. Mut. Ben. Asso.* 31 Fed. Rep. 62, where the court said it was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the association should be final. This view has been practically adopted by our court.

Van Poucke v. Netherland St. V. De P. Soc. supra; *Lorscher v. Supreme Lodge K. of H.* 2 L. R. A. 208, 76 Mich. 326.

Plaintiff not being a member of the order cannot assail this law, as she can recover only under the provisions regulating the membership of her deceased husband. This attack cannot be sustained, because if it was admitted that the rule of the association is bad as a by-law, it may be good as a contract.

Ang. & A. Corp. par. 342; *Austin v. Searing*, 16 N. Y. 112; *Goddard v. St. Louis Merchants Exch.* 78 Mo. 609.

Grant, J., delivered the opinion of the court:

This case was tried by the court, and the finding contains the following material facts: Defendant is a mutual benefit association incorporated under Act 89, Pub. Acts 1888, for the improvement morally, socially, and intellectually of its members, and for the purpose of establishing a benefit fund, from which shall be paid a certain sum to the member, or his

widow, or certain other relatives, as [he may direct, and as the endowment laws of the order provide. Its constitution provides for a great camp, composed of certain officers and one representative from each of the subordinate tents in the State. This Great Camp meets annually, and its members are selected annually. Three of the principal officers constitute the executive committee. Article 18, § 2, of its laws reads as follows: "The executive committee shall have power to pass on all death claims, and if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased members thereof, and give them, or their attorneys, an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness or validity of such claim, and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding upon such claimant, unless an appeal is taken to the Great Camp. The notice of the appeal from the decision of the said committee must be filed with the great record keeper within sixty days thereafter. The decision of the Great Camp, in all such cases, shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary." Plaintiff's husband, now deceased, became a member of the defendant, and received what is termed a "half endowment certificate," which entitled him to receive one assessment on the membership not exceeding \$1,000, as a benefit to his wife, upon satisfactory proof of his death, and the surrender of the certificate, provided he shall have, in every particular, complied with all the rules and regulations of the order. Upon his death plaintiff presented her claim to the committee, which decided against it on the ground that at the time of his death he was not a member in good standing, but had been duly and regularly suspended therefrom, in accordance with the rules and regulations thereof. She then appealed to

the grand camp, which also disallowed the claim, after a full examination and hearing. She then brought this suit, and judgment was rendered therein against her.

It is claimed on behalf of plaintiff that the provision above quoted, which makes the decision of the Grand Camp final, is contrary to public policy, and void, in that it ousts the court of jurisdiction. No charge is made that either the committee or the grand camp acted fraudulently, or in any manner contrary to the rules and regulations of the order. I am unable to see any difference between the present case and that of *Van Pouvcke v. Netherland St. V. De. P. Soc.* 63 Mich. 378, 6 West. Rep. 162. These organizations are purely voluntary, and it may well be considered by their members important that claims of this character should be determined by methods more inexpensive than resorts to the courts. This reason is well expressed by my Brother Champlin in the case above cited. Plaintiff seeks to maintain a distinction between that case and the present one, in that the plaintiff was himself a member claiming for "sick benefits," while the plaintiff here is not a member, and had no voice in the selection of members of the tribunal. Her right depends solely upon the voluntary act of her husband in becoming a member. Her right to receive the benefit depended upon his complying with the constitution and rules to which he assented, and which became a part of his contract. I can see no reason why a different rule should apply to plaintiff than to a member making a claim for benefits. Similar provisions have been sustained by the courts. *Anacosta Tribe No. 12 I. O. of R. M. v. Murbach*, 18 Md. 91; *Toram v. Howard Ben. Assn.* 4 Pa. 519; *Black & White Smith's Soc. v. Vandyeke*, 2 Whart. 809; *Woolsey v. Independent O. of O. F. Lodge No. 23*, 61 Iowa, 492; *Rood v. Railway Pass. & Freight C. Mut. Ben. Assn.* 81 Fed. Rep. 62.

Judgment affirmed.

The other Justices concurred.

PENNSYLVANIA SUPREME COURT.

G. J. LILLIBRIDGE *et al.*, *Appts.*,
v.
LACKAWANNA COAL CO., Limited.

(.....Pa.....)

A grantor in fee of coal underlying his land with the right to mine and remove the

same cannot, at least before the vein has been exhausted, enjoin the grantee from using tunnels cut through the body of the coal for the removal of other coal from beneath lands adjoining those of the grantor

(*Sterrett, McCollum* and Mitchell, JJ., dissent.*)

(October 5, 1891.)

NOTE.—Conveyance of mineral beneath surface of land.

The minerals beneath the surface of land may be conveyed by deed, distinct from the right to the surface, and are a corporeal hereditament passing by deed. *Lee v. Bumgardner*, 86 Va. 315.

A demise of coal under the surface of a specified piece of land is a sale of the coal. *Fairchild v. Fairchild* (Pa.) 7 Cent. Rep. 873.

The grant of a right to mine coal in the land of the lessor and remove it therefrom is a grant of an interest in the land itself, and not a mere license to take the coal. *Hope's App.* (Pa.) 2 Cent. Rep. 43.

13 L. R. A.

Where grantee contracted to pay a specified price per ton, the instrument was a sale of the coal notwithstanding the parties contracted as "lessor and lessee." *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 1 Cent. Rep. 102.

Such interest of the lessee is property liable to sale on judgment and execution, as real estate. *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408, 28 L. ed. 1009.

A sale of coal to be mined with houses, shops, shutes, drums, etc., and other appurtenances, with no covenant to repair or return such appurtenances, carries title to such articles. *Montooth v. Gamble*, 123 Pa. 240.

APPEAL by complainants from a decree of the Court of Common Pleas for Lackawanna County in favor of defendant in a suit brought to enjoin the use of tunnels under complainants' land for the mining of coal underlying lands adjoining those of complainants. *Affirmed.*

The facts are stated in the opinion.

Messrs. John S. Harding and Garrick M. Harding, for appellants:

The great rule of interpretation, with respect to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the parties, if such intention be consistent with the principles of law.

Hollingsworth v. Fry, 4 U. S. 4 Dall. 845, 1 L. ed. 860; *Staver v. Staver*, 9 Serg. & R. 450; *Doe v. Burt*, 1 T. R. 701.

As the coal was mined out and removed, there resulted an "open way" a "space," or a "chamber," through, under and across the plaintiff's property. The roof above, the floor below, the "chamber" between, each and all were real estate. One may own a chamber even in a house as his separate real estate.

Doe v. Burt, *supra*; *Loring v. Bacon*, 4 Mass. 575; *South Cong. Meeting House Proprietors v. Lowell*, 1 Met. 541; *Cheeseborough v. Green*, 10 Conn. 818.

Plaintiffs were the owners of this real estate. It cannot be said that they conveyed it away when they executed the so-called lease.

If the plaintiffs were reversioners of the "chamber," they certainly could maintain an action for the violation of any of their rights in connection with it. The degree of damage was wholly immaterial.

Ripka v. Sergeant, 7 Watts & S. 9; *Pastorius v. Fisher*, 1 Rawle, 27; *Seneca R. Co. v. Auburn & Rochester R. Co.* 5 Hill, 170.

A grant of a part of an owner's premises, as of the coal under the surface, or a mine, will carry with it and create such easements as may

be necessary for the attainment of the subject matter of the grant; thus a grant of coal in a place creates an easement of entrance and mining and carrying away.

Evings v. Sandoval O. & Min. Co. 110 Ill. 290; *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538.

But an easement in, over, or through land, must be restricted to the purpose for which it was granted; and ownership of the easement will not justify the use of the land, in, or through which it exists, for other purposes.

Kaler v. Beaman, 49 Me. 207; *Noyes v. Hemphill*, 58 N. H. 536; *Valley Falls Co. v. Dolan*, 9 R. I. 489.

And the burden of a servient tenement must not be increased by new or extended methods of use not strictly deducible from the grant.

Washb. Real Prop. bk. 2, p. 280; *Chestnut Hill Spring House Turnp. Co. v. Piper*, 77 Pa. 482; *Richardson v. Clements*, 89 Pa. 503.

If one who has a way for one purpose makes use of it for another, he becomes a trespasser as much as though he had no easement at all in the land.

Couling v. Higginson, 4 Mees. & W. 245 *Ballard v. Dyson*, 1 Taunt. 279.

Where one who was the owner of a two-acre mowing lot, and had a right of way across another's land adjoining it, for the purpose of bringing away hay, purchased another lot adjoining the last, from which he carried hay over the land of the other also, though mixed with hay from his two-acre lot, he was held to be a trespasser.

Howell v. King, 1 Mod. 190; *Davenport v. Lamson*, 21 Pick. 72. See *Garritt v. Sharp*, 8 Ad. & El. 825.

Where Miller, by writing, sold all the coal under a tract of land, with privilege to the vendee to use the railroad, tenements and other improvements of Miller, McCloskey, the vendee, to remove the coal in forty years; at the

Under an absolute sale of coal for a gross sum, and to enable purchasers to mine and remove the coal and leasing a few acres till the coal is exhausted, grantees and their assigns have the whole term to mine and remove the coal. *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371.

Under a contract of sale of coal binding a purchaser to mine and remove a certain quantity yearly "or pay for the same as though mined after proving that a certain quantity was mined plaintiff must prove that it was shipped and not sold at the mines. *Bestwick v. Ormsby Coal Co.* 129 Pa. 592.

One having the exclusive right to mine coal upon a tract of land has the right of possession, even as against the owner of the soil, so far as is necessary to carry on his mining operations. *Benavides v. Hunt*, 79 Tex. 383.

A purchaser under a contract, who has delivered up a deed of release, is liable for the coal mined thereon according to the contract so long as he remains in possession. *Bestwick v. Ormsby Coal Co. supra*.

Rights of owner of surface and of mineral.

The owner of the surface has a right to actual support for his soil, and the owner of the coal has a right to take out the coal in any way he pleases, so that he supports the surface in its ancient condition. *Gumbert v. Kilgore (Pa.)* 6 Cent. Rep. 406.

A grantor of the fee of the surface of land may reserve an estate in fee in the minerals, and each

estate will be subject to the law of descent, devise, and conveyance. *Kincaid v. McGowan*, 38 Ky. 91.

The right to minerals, timber, and a mill-site, reserved to the grantor in conveyance of certain parcels of land, will not pass by his subsequent conveyance of the whole tract, expressly excepting the parcels previously conveyed. *Ibid.*

Liability of owner of surface land, and of the mineral.

Where the surface is owned by one person and the coal by another, the former is liable in trespass for mining without a license. *Ashman v. Wlton (Pa.)* 9 Cent. Rep. 629.

The lessors of coal lands are liable for taxes assessed on the unmined coal as well as on the surface lands, under a clause in the lease that they "shall pay all taxes on lands hereby leased." The lessees to pay taxes on the coal after it is mined. *Miles v. Delaware & H. Canal Co.* 140 Pa. 623.

Where the lessors engage to pay all the taxes imposed upon coal in the ground, this obligation is not affected by a subsequent deed of a part of the surface of the ground to the lessee, or by the fact that the courts subsequently held that the lease was in effect a sale of the coal. *Woodward v. Delaware, L. & W. R. Co. (Pa.)* 22 W. N. C. 292.

The owner of the coal is liable to the owner of the surface, if a spring is ruined through his failure to properly support the surface. *Gumbert v. Kilgore (Pa.)* 6 Cent. Rep. 406.

expiration of which time, or on the removal of the coal, "the rights or privileges hereby granted shall cease," it was held that the vendee had no right to use the improvements, etc., for removing, etc., other coal than that mentioned in the writing.

McCloskey v. Miller, 72 Pa. 151.

Messrs. Henry A. Knapp and Everett Warren, for appellee:

The instrument or contract between the parties is, under the laws of this Commonwealth, a sale of the subjacent stratum of coal.

Defendant having purchased from plaintiffs, and become the owner in fee of the subjacent stratum of coal, may put the same to any use, so long as the contract relations between plaintiffs and defendants are not violated.

Caldwell v. Fulton, 31 Pa. 475; *Caldwell v. Copeland*, 87 Pa. 427; *Barnes v. Mawson*, 1 Maule & S. 87; *Sanderson v. Scranton*, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 1 Cent. Rep. 102, 109 Pa. 583.

By the conveyance defendants took the fee-simple title as actual owners of the land, consisting of the veins of coal underlying the tract of surface land mentioned in the plaintiff's bill.

Dunbar Furnace Co. v. Fairchild (Pa.) Oct. 7, 1889.

Owning this land, defendants may use it as they like, so that there is no breach of contract rights of plaintiffs, and the injunction "*Sic utere tuo, ut alienum non laedas*," is not violated.

Broom, Legal Maxims, p. 264; Austin, Jurisp. § 515; Anderson, Law Dict. p. 741; MacSwinney, Mines, p. 67.

We are not using or in any manner interfering with plaintiff's property.

Hamilton v. Graham, L. R. 2 H. L. Sc. 166; *Bousser v. Maclean*, 2 DeG. F. & J. 415; *Hamilton v. Dunlop*, L. R. 10 App. Cas. 813; *Ballockish S. L. & C. Min. Co. v. Harrison*, L. R. 5 P. C. App. Cas. 49; *Eardley v. Granville*, L. R. 3 Ch. Div. 826.

Plaintiffs endeavor to distinguish *Proud v. Bates*, 34 L. J. Ch. 406, for the reason that the subject there arose under an exception. But there is no difference between the effect of words in a grant and words in an exception.

8 Washb. Real Prop. p. 432; Shep. Touch. 100; *Whitaker v. Brown*, 46 Pa. 199.

An instructive discussion of the subject "Horizontal Divisions of Land," appears in *American Law Register*, vol. 1, N. S. p. 577.

See also Erskine's *Institutes of the Law of Scotland*; *Armstrong v. Caldwell*, 53 Pa. 284.

Green, J., delivered the opinion of the court:

It is not at all questioned, but is expressly conceded, by the learned counsel for the appellants, that the agreement between these parties is an absolute sale to the defendant of all the merchantable coal underlying the tract of land in question, and that the surface of the land and the minerals beneath it may be dissevered in title and become separate tenements. This doctrine has been so frequently decided by this court, and in such varying circumstances, that a mere reference to some of the leading cases will be all that is necessary, for the present occasion. *Caldwell v. Fulton*, 31 Pa. 475; *Caldwell v. Copeland*, 87 Pa. 427; *Scranton v. Phillips*, 94 Pa. 15; 13 L. R. A.

Sanderson v. Scranton, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 1 Cent. Rep. 102.

In the opinions delivered in the foregoing and other cases, we have emphatically decided that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land. We have held the mineral to be a corporeal and not an incorporeal hereditament; that the surface may be held in fee by one person and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land, when owned by a different person; that possession of the mineral may be recovered by ejectment and title to it may be acquired by adverse possession under the Statute of Limitations, though not by prescription because it is not an incorporeal right. In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land to all intents and purposes. Said Strong, J., in *Caldwell v. Fulton*, *supra*: "Coal and minerals in place are land. It is no longer to be doubted they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man, and the mineral right in another. It is not denied in such a case that both are landowners, both holders of a corporeal hereditament." Woodward, J., in *Caldwell v. Copeland*, *supra*, said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land in its most ordinary significance may not be so held. In other words, mines are lands and subject to the same laws of possession and conveyance."

In the litigated causes the contentions have been rather upon the interpretation and legal effect of the instruments under which the questions have arisen, than upon the doctrine itself. No such contention arises here as counsel have very candidly conceded, what was indeed inevitable, that the instrument between the present parties came nearly within the adjudged cases and created an estate in fee simple in the defendant in the coal underlying the plaintiff's surface. It includes "all the merchantable coal" under the surface, "with the sole and exclusive right to mine and remove the same," and with this habendum: "To have and to hold the coal in and under said land unto the said party of the second part, its successors or assigns, until the exhaustion thereof under the terms of this indenture."

It is not possible that there can be any question that this is an absolute grant in fee simple of all the coal under the surface of the tract.

But it is contended with great earnestness and ability by the learned counsel for the appellants, that nothing more than the coal passed to the defendant under the agreement, and as to the chamber or space left by the removal of the coal under the mining operations of the defendant, the plaintiffs were still owners in fee, or reversioners, with a

right which could not be invaded by the defendant, except for the purpose of removing the coal that underlaid the surface. This brings us to consider the precise character of the present proceeding and the particular question that arises under it. The proceeding is a bill in equity to restrain the defendant from removing coal belonging to them on another tract adjoining this tract on the north, by moving the same through a tunnel or way made by the defendant through one of the underlying veins of coal across the tract to the other land of the defendant, two hundred feet below the surface, of considerable breadth, and twelve feet in height. It is alleged in the bill that this way was produced by the mining operations of the defendant in accordance with the contract, and that the defendant, having acquired the adjoining property after the agreement with the plaintiffs was made, has been and is taking out coal from the adjoining tract through and over this tunnel or way, and this is claimed to be an illegal use of the plaintiffs' property which they ask to have restrained. The argument is that it was not within the intention of the parties that such a right should be granted or exercised, and that, whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations that it cannot be used without their permission. There is nothing in the instrument, or in the circumstances surrounding it, which can give any force to the argument from intention. We cannot know what was the intention of the parties except from the terms of their contract. The defendant demurred to the bill for want of equity. No testimony of any kind has been taken. The bill makes no averment of any intention of either of the parties but simply sets out the contract, and the acts of the defendant in executing its terms. Of course there are no surrounding facts that we can consider. There are none in the bill except such as are subsequent to the contract, and these amount only to an allegation of the subsequently acquired interest of the defendant in the adjoining property, and the removal of coal therefrom through the way made by the removal of the coal under the tract.

The proposition that the plaintiffs have a fee in the chamber or space left by the removal of the coal antagonistic to the right of the defendant to use it, is a novel one. No authority is cited to support it, and it seems quite incongruous with the admitted ownership and estate of the defendant in the coal displaced. Under all the decisions, the coal in place was absolutely owned in fee simple by the defendant. In a state of nature the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell v. Fulton*, how can the law regard the space which the substance occupies as other than the substance itself?

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Of course such an idea is incapable of practical application except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellants' argument. It could not be otherwise. Certainly if such were the nature of the defendant's right, the argument and the authorities cited in support of it, would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil above. We said in *Caldwell v. Fulton*: "It is a common thing in the mineral districts of Pennsylvania for the surface to belong to one owner, and the coal which it covers to another. Both the surface and the coal are held by deeds executed and delivered and recorded in the same manner; and there is no more reason for considering the coal an incorporeal hereditament because it has not been opened, than there is for considering the soil such because it has not been ploughed. Still less reason is there for calling it an incorporeal hereditament if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal, instead of describing the coal without the customary circumlocution. In all these cases, where the right rather than the thing is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold. And when that is a coal bed, it is an abuse of language, and an unnecessary application of legal distinctions, to call it an incorporeal hereditament." If, then, the coal in place is a pure corporeal hereditament, the title in fee simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies, than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases. By the necessity of the case the appellants argue that the defendant's right in the chamber or way is only an easement, and then cite authorities that an easement can only be exercised to the extent of the grant. But as we have already seen this is in direct hostility to all the authorities on that subject. If the subject be further considered upon principle, it will be found difficult to understand that any property right of the appellants is invaded by the action of the defendant. According to the averments of the bill the tunnel or way is cut through a vein of coal, two hundred feet below the surface and is twelve feet high, and it extends in the vein all the way from the one side to the other of the tract. In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it, they cannot use it, they are in no manner obstructed or injured by

it. Nor can we understand how they are or can be injured in any other way. It is of no avail to say generally in the bill that they are injured. The injury must be stated specifically so that a court may know what it is. This is not done and we know not what the injury complained of is. How, then, can we enjoin the defendant? We are asked to enjoin against the removal of coal from the adjoining tract, but this is a matter with which the plaintiffs have no concern. They do not pretend to have any title or interest in that coal. They ask to enjoin removing that coal through the chamber or way made by the defendant through its own property, to wit the coal sold to them by the plaintiffs. Why or for what reason should we do this? The plaintiffs would gain nothing which they do not now have, if we did. No complaint is made in the plaintiffs' bill of either the deprivation or injury of any right growing out of the contract. The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant and that use is not, and cannot be, questioned by the plaintiffs. It is not alleged that the defendant has failed to perform any duty imposed upon it by the contract. We are bound to assume, therefore, that all the coal which the defendant agreed to take out or pay for each year has been taken out or paid for. In no circumstances would the case be a proper one for an injunction.

But upon the authorities the case is entirely with the defendant. The question has arisen in several cases in the British courts, and the right of the owner of the coal to use the tunnel or way to carry other coal through it than that underlying the land of the surface owner has always been affirmed. The subject is thus presented in MacSwiney on Mines, page 67: "The owner in fee simple or tail of lands containing mines or quarries has an absolute right to use them, and the chamber which encloses them, and the space or shell which the working of the minerals creates, and the subsoil generally, in any manner which he thinks proper. And where the owner in fee simple of lands grants them, excepting the underlying mines, he has, with respect to those mines, a similar right. And as by excepting the mines he *ipso facto* excepts the chamber which encloses them, he has a similar right with respect to that chamber, and with respect to the space or shell which the working of the minerals creates. The containing chamber is not purely and solely a species of property which can only be made profitable by the removal of the inclosed minerals, with the incidental rights of using all proper means for obtaining them. It is a species of property which is as free as other property from restrictions as to its mode of use. The grantor may therefore use the space or shell created by his previous working of the inclosed minerals as a thoroughfare for the carriage of minerals gotten out of his adjoining land. And if, instead of working the inclosed minerals and then utilizing the

space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and to accordingly use it as a thoroughfare for the carriage of other minerals, he is entitled to do so."

In *Hamilton v. Graham*, L. R. 2 H. L. Sc. 166, there was an exception in a free charter in favor of the Duke of Hamilton and his heirs of all the coal and limestone within the lands granted. He was the owner of three estates, Clydesmill, Cambuslang, and Morristown, and one Graham had become the owner of the surface of Cambuslang. The Duke leased the coal in Clydesmill and a portion of the coal under Mr. Graham's surface in Cambuslang, and his lessees at once made use of a passageway through the coal underlying Graham's surface, for the conveyance of other coal and limestone mined from the estates of Clydesmill and Morristown, and this coal and limestone the Duke owned by virtue of the reservation, or exception out of the grant of the surface. Mr. Graham brought an action to stop the further use of the passage but it was held on appeal to the house of lords that this was a rightful use of the passage. Lord Westbury, delivering his opinion, said: "You may approach it laterally from another estate, for the purpose of mining the minerals. You may use the strata which you have reserved to yourself, or rather declared to remain in yourself, in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or tunnel through it. And you may, through that road or tunnel, carry either the minerals or any other proceeds of an adjoining estate. You therefore have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the *dominium utile*, the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects." Lord Colonsay, in the same case, said: "It is a great mistake to say that the Duke has no right to use these minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. . . . There is no doubt that the Duke of Hamilton was not entitled to increase the burdens upon the servitude on the surface by bringing the minerals from the other property over the surface. The surface was the servient tenement and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But the principle does not apply in regard to the right of property, and to say that he is carrying the minerals through the property of the pursuer is another mistake. He is carrying them through his own property and not through the property of the pursuer at all. There is a want of keeping in view the distinction between the right of property and the right of servitude here, which seems to me to have led to an erroneous judgment in the case. I conceive that so long as there is any of the mineral property which the Duke of Hamilton has, he is entitled to use any of that property in the mode which is most beneficial to himself." The

Lord Chancellor also said, referring to his opinion in the case of *Proud v. Bates*, 34 L. J. Ch. 406: "As to the excepted mines, I held that the owner had an absolute right to do as he pleased with them, and that he therefore had a right to carry his coal through them."

In this last-mentioned case of *Proud v. Bates* a lease was made of the waste land of the manor with an exception of the mine and quarries with full power to win and work the same. A way available for the carriage of minerals lay exclusively within the excepted mines and the lord claimed the right to carry through this way minerals worked on other property than that embraced in the lease. The court held that he had an absolute right to do what he pleased with the excepted mine and therefore he had a right to carry through them minerals from wherever gotten. *Vice-Chancellor Wood*, in delivering his opinion, said: "Now whether the word 'mines' be used, as it often was, in the sense of minerals, the thing dug out of the mine or that which contains the minerals, that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing chamber which has the minerals is 'the mine', and so far as the mines are concerned there can be no question that they are altogether out of the demise; and as to them the representatives of the lessee are of course entitled to use them for any purpose whatsoever and at any period. *Lord Campbell's* decision in the case of *Bowser v. Maclean*, *supra* [2 DeG. F. & J. 415] in this court, completely explains what the right view is. He says, 'With regard to copyholds, the copyholder has the whole right in him but subject to the right of the lord to work the mines, and the lord cannot use an underground way for the purpose of passing through any portion of the copyhold premises. But as to that which is excepted out of a demise by contract, of course the owner can use whatever he excepts in any way he thinks fit.'"

In *Eardley v. Granville*, L. R. 3 Ch. Div. 820, *Jessel, M. R.*, says: "If a freeholder grants lands excepting mines he severs his estate vertically, *i. e.*, he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor." Referring to the case of *Hamilton v. Graham*, he said: "I decided that the same law applies to Scotland which applies to England. In a case like that the word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves."

The appellants reply to these cases by saying they were cases of exceptions out of grants, and the mines reserved or excepted were the property of the grantors and never were conveyed; hence they held everything not granted by their original title. But the distinction is without force. There is no substantial difference between a title by exception out of a grant, and a title by direct grant of the same subject. In the case of an

exception the grantor retains the whole title which he already holds and in the case of a direct grant the grantee holds the whole title granted, and the ownership is as absolute in the one case as in the other. We have held that a grant of all the coal underneath a tract of land is an absolute conveyance in fee simple of all the coal, and no greater title than that could be acquired by an exception to the same effect in a grant of the surface. The books make no distinction. Thus in *Washburn on Real Property*, vol. 3, p. 432, it is said: "As an exception is the taking of something out of the thing granted, which would otherwise pass by the deed, it may be said in general terms that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor were made the grantee by the exception."

In *Bowser v. Maclean*, 2 De G. F. & J. 415, the Lord Chancellor said: "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold leased land with a reservation of the minerals, or freehold land where the surface belongs to one owner and the subsoil containing minerals belongs to another, as separate tenements, divided from each other vertically instead of laterally. If this had been such freehold land the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil."

In *Whitaker v. Brown*, 46 Pa. 197, we held that where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in said piece or parcel of land together with free ingress and egress by wagon road to haul the coal therefrom as wanted" the saving clause operated as an exception of the coal, and therefore that the entire and perpetual property therein remained in the grantor. The whole reasoning of the opinion puts the case upon exactly the same footing as if the words of the exception had been contained in a specific grant of the coal, and *Fulton v. Caldwell* and kindred cases were cited as authorities for the ruling.

In *MacSwinney on Mines*, p. 68, the author says: "Similar principles apply where the owner grants it (the surface) by way of lease excepting the mines, or where he grants the mines in fee simple, and excepts the surface."

In *Bainbridge on Mines and Minerals*, *34, the author says: "The severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words,' and if the meaning is clear, either of the above expressions will operate for the purpose designated. They are also construed exactly in the same way

as actual grants. In either case the law favors their construction by giving them all proper and necessary incidents."

There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed rock underneath the vein; on the contrary it is alleged that the tunnel has been cut through the coal, by which we understand it is in the very body or substance of the coal which

was bought by the defendant. It follows, hence, that the tunnel or way is exclusively within the defendant's own property, and is subject to such use as any owner may desire of property belonging to himself. Upon the whole case we think the disposition of it made by the learned court below was correct.

Judgment affirmed.

Sterrett, McCollum and Mitchell, JJ., dissent.

MISSISSIPPI SUPREME COURT.

M. B. LEE, *Appt.*,

v.

A. E. HAWKS.

(.....*Miss.*.....)

A stipulation in a written lease giving the tenant the right to cut and use trees growing on the leased premises may be waived by parol.

(May 25, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for De Soto County in favor of defendant in an action brought to re-

cover damages for trespass in cutting timber. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Powell & Powell* for appellant.

Mr. A. M. Solomon, for appellee:

Under the Statute of Frauds a verbal agreement could not be shown to contradict the written contract of lease, which had more than two years to run.

1 Greenl. Ev. §§ 303, 305.

Defendant having, by a written contract, acquired a right to the timber which was not severed from the soil, the alleged sale or transfer of the trees to plaintiff under a verbal con-

NOTE.—*Parol evidence to show waiver.*

The proposition of the principal case that parol evidence is competent to show a waiver of a right secured under the recitals of the written contract is enunciated in both early and late decisions. *Erwin v. Saunders*, 1 Cow. 249; *Robinson v. Batchelder*, 4 N. H. 40; *Richardson v. Hooper*, 18 Pick. 446; *Porter v. Stewart*, 2 Aik. 417; *Cabe v. Jameson*, 32 N. C. 198; *Munroe v. Perkins*, 9 Pick. 288; *Goss v. Nugent*, 5 Barn. & Ad. 66; *Blood v. Enos*, 12 Vt. 625; *Grafton Bank v. Woodward*, 5 N. H. 90; *Ratcliff v. Pemberton*, 1 Esp. 35; *Reed v. McGrew*, 5 Ohio, 375; *Keating v. Price*, 1 Johns. Cas. 22; *Cummings v. Arnold*, 3 Met. 486.

This rule is laid down by Lord Denman in *Goss v. Nugent*, *supra*, as a well-established principle. In these terms: "After the agreement has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract" (*Harvey v. Graham*, 5 Ad. & El. 61), and this principle has been adopted in this country. See *Emerson v. Slater*, 68 U. S. 22 How. 41, 16 L. ed. 365; *Munroe v. Perkins*, 9 Pick. 288; *Snow v. Ware*, 13 Met. 42; *Vicary v. Moore*, 2 Watts, 451; *Cummings v. Arnold*, 3 Met. 489; *Fleming v. Gilbert*, 3 Johns. 528; 1 Phill. Ev. Cow. & H. ed. 563.

While it is generally true that all prior and contemporaneous negotiations are merged in the written agreement of the parties, and parol evidence could not be received of such negotiations, to vary, contradict, or alter the terms of the written agreement to ingraft a new condition, yet there is another rule equally important which allows a collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting the terms, to be given in evidence. *Brakine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Exch. 66; *Johnson v. Oppenheim*, 55 N. Y. 280.

It is quite necessary to remark that where on a consideration independent of a written instrument 13 L. R. A.

a certain thing is to be done or omitted, parol evidence of such contemporaneous or antecedent agreement is admissible. *Lewis v. Seabury*, 74 N. Y. 409; *Rice*, Ev. p. 313.

Fleming v. Gilbert, 3 Johns. 528, was an action on a bond conditioned that the defendant would procure for plaintiff a certain bond and mortgage, and discharge the same of record. The defendant did procure them, offering to do whatever was necessary to discharge them, but the plaintiff agreed by parol to waive a performance if the defendant would do another thing, which he afterwards did. It was held that evidence of the substituted performance constituted a defense. *Munroe v. Perkins*, 9 Pick. 288, and *Lattimore v. Harsen*, 14 Johns. 380, are similar in principle. These cases go upon the ground that he who prevents a thing from being done by saying he will accept something else for it, shall not, after such acceptance, avail himself of the nonperformance he has occasioned. *Long v. Hartwell*, 34 N. J. L. 116.

Batterman v. Pierce, 8 Hill, 171, sustains the defense to a note given upon the sale of a lot of wood on plaintiff's land, which was based upon the proof that the plaintiff had verbally agreed, prior to the sale, that if anything occurred to the wood he would be accountable, and would guarantee the purchasers against any damage in consequence of his acts. The principle of the decision was that there were mutual stipulations between the parties, all made at the same time and relating to the same subject matter, and the whole engagement was open to proof. The cases of *Chapin v. Dobson*, 78 N. Y. 74; *Van Brunt v. Day*, 81 N. Y. 251, and *Brigg v. Hilton*, 1 Cent. Rep. 307, 99 N. Y. 517, fully sustain the proposition that in such a case, where the agreement of the plaintiffs rested in parol, it is open to proof. The rule which rejects parol evidence, when offered with respect to a contract between parties and put into writing, has no application to a case where, of the original agreement which has been executed a part only is in writing. *Routledge v. Worthington Co.* 119 N. Y. 562.

That a party may waive a provision in a contract, see note to *Hathaway v. Lynn* (Wis.) 6 L. R. A. 552.

tract was within the Statute of Frauds. This was transferring an interest in land.

Harrell v. Miller, 35 Miss. 700; 1 Benjamin, Sales, p. 158, and *notes*.

The original written contract could not be varied by a subsequent parol agreement.

1 Benjamin, Sales, p. 227, and *notes*.

Woods, J., delivered the opinion of the court:

It may be admitted that a contract for the sale of growing timber is within the Statute of Frauds, and must be in writing, but this does only touch the point involved in the ruling of the court below by which the parol evidence offered was excluded. This suit is for the recovery of damages for trespass in cutting certain trees on lands belonging to plaintiff, and is not an action on a contract required to be in writing. The contract of lease, under which defendant went into possession of the premises for a term of three years, was read to the jury in the examination of the plaintiff, on the trial of the cause, by which it was shown that the defendant acquired the right to cut and use the trees in question. As this alone would have defeated a recovery by plaintiff, he then offered to prove a parol agreement, made subsequent to the execution of the lease, by which for a valid consideration, as was offered to be proven, the defendant waived his right to cut and use the timber, by way of meeting the defense made for the defendant by the contract of lease. In effect, the matter stands as if plaintiff had sued for the trespass, and defendant

had pleaded justification under the written contract, and plaintiff had then offered to prove the parol agreement by way of defense to the plea. The Statute of Frauds debars one of an action on a contract, in certain cases, unless the contract be in writing; but a parol agreement to annul or waive a particular stipulation in the written contract which has been mutually assented to and fully performed, may be offered in evidence in defense of an action for a breach of the original written contract. An action may not be maintained, in cases within the Statute, upon a contract not in writing; but a defense may be made by showing an executed parol agreement waiving or annulling a particular provision of the written contract. The subject is not free from difficulty, and the discussions by text-writers, and the opinions of courts in reported cases, are full of subtle distinctions and refinements, nor is the current of authority clearly bent in any direction. The views briefly advanced hereinbefore are supported by some excellent authorities, and are agreeable to reason and justice. Benjamin, in his admirable work on Sales (p. 229), states the rule with his usual clearness: "Parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performance of the original contract, when that performance is completed, is admissible." See *Stoain v. Seamens*, 78 U. S. 9 Wall. 255, 19 L. ed. 554; *Jackson v. Litch*, 63 Pa. 451; *Long v. Hartwell*, 84 N. J. L. 116; *Reed*, Stat. Fr. § 239.

Reversed and remanded.

GEORGIA SUPREME COURT.

CENTRAL RAILROAD & BANKING CO.
of Georgia, *Plff. in Err.*,

v.

Maud A. RYLEE, by Next Friend.

(.....Ga.....)

*1. A deed made in 1869 to the defendant company, or its predecessor, conveying the land on which the yard of the Company is located, was irrelevant. An exception in the warranty of title which that deed contained would be no evidence that the public or any individual had a right of way or used the premises as a pass-way at the time the accident occurred, the exception merely

*Head notes by SIMMONS, J.

excluding from the warranty, rights, if any, that may have grown up previous to the execution of the deed. Other evidence tending to show how the premises were used before they became the railroad yard of the Company was irrelevant, and therefore inadmissible.

2. Though the analogies of criminal law touching presumptions as to the age of discretion are properly regarded by a court in ruling upon a demurrer where contributory negligence by an infant is involved (as was decided by this court in *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320), it is doubtful whether these analogies have relevancy on the trial of the case before the jury. It would seem the better rule would be for the jury to deal with

NOTE.—*Negligence in passing between or under cars.*

To pass between cars while a train is temporarily stopping at a station is a risk which a person has no right to take, and which will prevent any right of action against the railroad company if he is caught and injured by so doing. *Lake Shore & M. E. R. Co. v. Pinchin*, 11 West. Rep. 247, 112 Ind. 522; *O'Mara v. Delaware & H. Canal Co.* 18 Hun, 192; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 378; *Stillson v. Hannibal & St. J. R. Co.* 87 Mo. 671; *Lewis v. Baltimore & O. R. Co.* 38 Md. 588.

In the case last cited this rule was applied where a child eight or nine years old was injured while attempting to pass through an opening not more than twenty inches wide several feet from the line of a street which was blocked by a train. But in a Pennsylvania case it was held that a recovery 18 L. R. A.

might be had against a railroad company for an injury to a child by the starting of a train without warning while he was trying to pass under it. *Philadelphia & W. B. R. Co. v. Layer*, 3 Cent. Rep. 361, 112 Pa. 414.

Implied license to go upon railroad track.

Long acquiescence in a custom of the public to pass over a railroad track amounts to a license by the railroad company, and makes it liable for the lack of ordinary care toward persons thus upon the track. *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645; *Bryne v. New York Cent. & H. R. R. Co.* 6 Cent. Rep. 302, 104 N. Y. 362; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 239; *Taylor v. Delaware & H. Canal Co.* 4 Cent. Rep. 623, 113 Pa. 162; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9

each case on its own facts; unhampered by presumptions of law either for or against the competency of the child. In the present case, however, the charge of the court on this subject, if erroneous, was harmless.

3. Only express consent would serve to license a thoroughfare under stationary cars. Mere knowledge by a railroad company or its servants that numerous persons, including children, without any public or private right of way, passed daily and hourly through its yard, situate in or near a populous part of the city, and crawled under stationary cars occupying its tracks, will not render it liable for an injury accruing to a child by a sudden and involuntary movement of a long line of such cars, resulting from the negligence of the company's servants in handling other cars several hundred yards distant from the scene of the accident, such other cars rolling against the standing cars and setting them in motion while the child was passing under one of them.

4. The other grounds of the motion are not cause for a new trial.

(July 13, 1891.)

ERROR to the City Court of Atlanta City to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Calhoun, King & Spalding and J. T. Pendleton, for plaintiff in error:

A railroad company owes no duty to persons who have no right to be upon its tracks, except not to intentionally injure them. This is true, although it may have permitted people to cross the tracks without objection, where there was no public crossing, thus giving an implied license to do so. The licensees who avail themselves of the license must take the risk of danger.

Wharton, Neg. § 388 a.; 1 Thomp. Neg. 158; *Sutton v. New York Cent. & H. R. Co.* 66 N. Y. 248; *Motze v. New York Cent. & H. R. Co.* 1 Hun, 417; *Illinois R. Co. v. Godfrey*, 71 Ill. 500; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Morrissey v. Eastern R. Co.* 126 Mass. 877; *Vanderbeck v. Hindry*, 84 N. J. L. 467; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 214; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Sweney v. Old Colony & N. R. Co.* 10 Allen, 872; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129; *Wright v. Boston & A. R. Co.* 2 New Eng. Rep. 725, 142 Mass. 296, 28 Am.

West. Rep. 438, 45 Ohio St. 11; *Palmer v. Chicago, St. L. & P. R. Co.* 11 West. Rep. 873, 112 Ind. 250; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 648; *Troy v. Cape Fear & Y. V. R. Co.* 99 N. C. 298.

An invitation to the public to use a railroad crossing as a highway may be established by use with permission of the company, even if the crossing leads only to private premises. *Hanks v. Boston & A. R. Co.* 147 Mass. 495.

So it was held that increased vigilance was required of railroad employes to prevent injury to members of a family who were in the habit of crossing the track from their dwelling to a well between which the railroad had been built. *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475.

Although there may be no statutory duty to 13 L. R. A.

& Eng. R. R. Cas. 652; *Hanks v. Boston & A. R. Co.* 147 Mass. 495, 35 Am. & Eng. R. R. Cas. 321; *Morgan v. Pennsylvania R. Co.* 7 Fed. Rep. 78; *Rome R. Co. v. Tolbert*, 85 Ga. 447; *Bulger v. Albany R. Co.* 42 N. Y. 459; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Burke v. Broadway & S. Ave. R. Co.* 49 Barb. 529; *McKenna v. New York Cent. & H. R. Co.* 8 Daly, 304; *Hearn v. St. Charles Street R. Co.* 84 La. Ann. 160.

Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover unless the engineer, conductor or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposure to danger.

Andrews v. Central R. & Bkg. Co. 10 L. R. A. 58, 86 Ga. 192.

There can be no license to crawl under cars. *Griswold v. Chicago & N. W. R. Co.* 64 Wis. 652, 28 Am. & Eng. R. R. Cas. 468.

The plaintiff must exercise ordinary care or be responsible for ordinary care, whether she knew what ordinary care was or not.

White v. Central R. & Bkg. Co. 83 Ga. 595. She lacked one month of being nine years old; she was a smart, sprightly girl and had lived for years within one hundred yards of of this place, and knew as well as anyone the danger of going under cars.

Moore v. Pennsylvania R. Co. 99 Pa. 801, 4 Am. & Eng. R. R. Cas. 572; *Caulley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 2 Am. & Eng. R. R. Cas. 4, 8.

A person who tries to use a track while the railroad is using it is a trespasser.

Central R. Co. v. Thompson, 76 Ga. 772; *Wilds v. Brunswick & W. R. Co.* 82 Ga. 669. A serious trespass which exposes the trespasser to danger will bar a recovery.

Central R. Co. v. Brinson, 70 Ga. 207; *Central R. Co. v. Thompson*, 76 Ga. 772; *Western & A. R. Co. v. Meigs*, 74 Ga. 857; *Boston v. Georgia R. Co.* 60 Ga. 839.

Due care is the rule, and not ordinary care. *Western & A. R. Co. v. Young*, 81 Ga. 397, 415, 83 Ga. 512, 518.

Messrs. Hoke Smith and Burton Smith for defendant in error.

Simmons, J., delivered the opinion of the court:

Maud Rylee, by her next friend, brought

signal the approach of a train to a path across the track which the public has been permitted to use, the failure of such signals may constitute negligence. *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 530.

A railroad company was also held liable for negligently backing a gravel train over a school girl six years old at a crossing which school children were in the habit of using, although not a public highway. *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

By a similar application of the principle as to license it is held that boys are not trespassers in riding on a freight train if they have been habitually allowed to do so. *Ecliff v. Wabash, St. L. & P. R. Co.* 7 West. Rep. 463, 64 Mich. 196. B. A. R.

her action against the defendant for damages. So far as specifically enumerated, the facts in the declaration (excluding certain mere conclusions therein stated, and which, in connection with the specific facts alleged, made the declaration good against a demurrer) were substantially proved, and were as follows: The defendant Company had a yard in which it left stationary cars. Two streets ended at this yard, but there was a pass-way from one of these streets to the shops of another railroad company; and this pass-way was used by men, women, and children at all hours of the day, and was so used with the knowledge of the defendant. The places at which the people were accustomed to pass were, at the time of the injury, occupied by stationary cars, and "the line of cars stretched as far as the eye could see." The plaintiff was under nine years of age, and was going to the shops of another railroad to carry a meal to one of the employes. When she reached the place where people usually crossed she found it occupied by these stationary cars. There was no way for her to cross except by passing under the cars. Children in the neighborhood were in the habit of passing beneath the cars while standing at the place. In attempting to pass under one of the stationary cars she was injured. Th injury was occasioned by the employes of the defendant "kicking" other cars from a quarter of a mile above where the child was, and out of sight, and these cars ran down and "kicked" the stationary cars, so as to cause them to move, and the one under which the child was ran over her leg. The plaintiff further proved that people were in the habit of crossing at this place before the Railroad Company established its yard. The plaintiff also introduced the deed by which the defendant Company obtained title to this property, dated in 1869, in which it was recited that the Company then claimed and had possession of the premises therein described, which were also claimed by the vendors, who had brought ejectment against the Company, which, to settle the action, and to obtain an undisputed warranty title to the premises in fee simple, had, by way of compromise, and without surrendering its former claim or conceding the invalidity thereof, agreed to pay the vendors \$2,000, for which consideration the vendors warranted the title to the premises against the claims of all persons whatsoever; but this warranty was not to extend to any right the Western & Atlantic Railroad and certain other named persons might have to remove the buildings, tracks, or other structures erected by them on the premises, "nor to any right of way the public may have acquired in streets, ways, or roads over, across, or upon said premises." The defendant objected to the admission of this deed in evidence, "because it showed no use by the public of a pass-way across its tracks, and because, if it did, it showed a right to use by the public, whereas this suit is to recover on the ground of permissive use by the defendant." The objection was overruled, and the defendant excepted. A witness for the plaintiff testified that he had lived on Mechanic Street since 1863; that it

was a common wagon-way until about 1870. From 1855 to 1860 there was no obstruction across the old Monroe track. "We passed on just as though it continued a street. We walked on it, and drove on it, and rode on it." The defendant moved to rule this out, because it did not show a permissive use by the defendant to pass over its tracks, but referred to a use at a time prior to the occupancy of the place by tracks, and before its ownership by the defendant. This objection was overruled, and the defendant assigns error thereon.

1. Counsel for the plaintiff insisted that the deed was admissible because the exception in the warranty showed that at the time the Railroad Company bought the land people were using the place as a pass-way, and thus brought home knowledge to the Company of this fact. The deed was clearly inadmissible and irrelevant. While the warranty in the deed was a limited one, it was not the purpose of the grantors in making the limitation to assert or to give notice to the grantee that the public had acquired the right to pass over the land. The grantors only intended to limit their liability in case it should subsequently appear that the public asserted a right to use the land as a pass-way. The limitation in the warranty does not give notice, nor was it intended to give notice, to the grantee that the public had acquired or were exercising the right of passage over the land. The other evidence tending to show how the premises were used before they became the railroad yard of the Company was also irrelevant and inadmissible. The Company could not be bound by the use made of the premises by the permission or acquiescence of its former owner. The Company purchased it for the purpose of laying tracks and running cars thereon, and for the purpose of keeping other cars standing on it when not in use,—a purpose totally inconsistent with the former use by the public. The purpose for which the Company purchased the land, to wit, to lay tracks, and keep standing cars thereon, destroyed the former use by the public. It was, in effect, a notice to the public that the land could not be used longer as a pass-way. It seems, therefore, it would be absurd to hold that the Company was bound to recognize the former use made of this land by the public.

2. The judge charged the jury that "the law declares that an infant under the age of ten years prima facie does not have sufficient capacity and discretion and knowledge of right and wrong to make her responsible for her conduct and acts, unless it is clearly shown that she had such capacity and discretion. The presumption is that she did not have sufficient capacity to be sensible of danger, and to have the power to avoid it, and this presumption continues until overcome by proof showing the contrary." This charge was excepted to by the defendant, and assigned as error in its motion for a new trial. Where a child under fourteen years of age is injured, and brings his action for the injury, and there is a demurrer to the declaration on the ground that the allegations therein

show that the child did not observe due care, or could have avoided the injury by the observance of such care, the court may overrule the demurrer on the ground that prima facie the child did not have sufficient knowledge or capacity to know what was due care, or sufficient capacity to have avoided the injury by its observance, and may invoke the analogy of the criminal law, and hold that the presumption is that the child did not know or did not have sufficient capacity, as was held in the case of *Rhodes v. Georgia & R. Bkg. Co.*, 84 Ga. 820. But where there is no demurrer, and the case is submitted to the jury, there is no presumption one way or the other, and the jury must find from the evidence whether the child had sufficient capacity at the time of the accident to know the danger, and to observe due care for its own protection. If it has such capacity, and voluntarily goes into danger or to a dangerous place, it cannot recover; otherwise it can. *Western & A. R. Co. v. Young*, 81 Ga. 397, 88 Ga. 512.

It depends altogether upon the capacity of the child at the time of the injury. The better rule would be for the jury to deal with each case upon its own facts, unhampered by presumptions of law either for or against the competency of the child. In the present case, however, the charge of the court on this subject, if erroneous, was harmless.

3. It was argued by counsel for the defendant in error that the fact that the people were allowed to use this place as a pass-way to go under these cars when they were stationed upon the track was a license by the Company for them to do so, and the Company was therefore bound, before it moved the stationary cars, to give the public notice; and, not having done so in this instance, it was guilty of such negligence as would authorize the plaintiff to recover. It is such gross negligence and want of care and so reckless an act for persons to attempt to pass under cars which are left standing upon the track and are liable to be moved at any moment, that we do not think a license can be implied from the fact that the Company had knowledge that people were in the habit of passing under the cars there. Where, under such circumstances, a person attempts to pass under the cars and is injured, before he can recover upon the theory that he had a license to pass under the

cars, he must prove to the satisfaction of the jury an express license from the Company. It would be unreasonable to hold the Company bound by an implied license or permission when the Act is of such a negligent character. It would be unreasonable to hold the Company bound by an implied license when it is occupying the track with its own cars. It would be unreasonable to hold that it had agreed that others might have a joint occupancy of the tracks at the time the Company was using them for its own purposes. The joint use by the Company and by the public of the tracks at the same time would be so inconsistent and so dangerous that the law will not imply a license from the Company to the public for such joint use. The placing of stationary cars in its yard on the tracks where people are accustomed to pass is notice to the public not to attempt to pass while the cars remain, and if a person undertakes to pass under the cars he does so at his peril. It is different where the public pass over a track which is occupied by a railroad company with its cars only a few times a day, and then when the track is not being used by the company. In a case of that kind, where the railroad company permits people to pass over its track when not in use by the company, the permission may amount to an implied license; but where the company is in continuous occupation of its tracks, either in running its cars or in keeping stationary cars thereon, a license will not be implied.

The facts of this case show that the cars constantly occupied these tracks; that this stationary train was more than a quarter of a mile long; and that at the upper end of the train the servants of the Company, negligently perhaps, kicked another train of cars against the stationary train and set it in motion, and thus injured the plaintiff. We do not think the mere knowledge by the Company or its servants that numerous persons passed daily and hourly through its yard, situated in a populous part of the city, and that they crawled under these stationary cars, will render the Company liable for an injury occurring to this child, under the facts above stated.

4. The other grounds of the motion are not cause for a new trial.

Judgment reversed.

VERMONT SUPREME COURT.

Joseph DURAN

v.

STANDARD LIFE & ACCIDENT INSURANCE CO.

(....Vt.....)

An injury received by slipping on the frozen ground while returning from a hunt-

NOTE.—*Accident insurance; conditions in policy.*

See notes to *Sheanon v. Pacific Mut. L. Ins. Co.* 18 L. R. A.

ing expedition or a visit of pleasure to one in an adjoining town on Sunday is within the provisions of an accident insurance policy exempting the insurer from liability where the violation of law is either the proximate or remote cause or condition of the injury, under statutes prohibiting hunting and traveling, except from necessity or charity, on Sunday.

(April 14, 1891.)

(Wis.) 9 L. R. A. 686; *Paul v. Travelers Ins. Co.* (N. Y.) 8 L. R. A. 443; *Union Mut. Acc. Assn. v. Frohard* (Ill.) 10 L. R. A. 883.

EXCEPTIONS by defendant to rulings of the Burlington City Court, made during the trial of an action brought to recover upon two policies of accident insurance which resulted in a judgment in favor of plaintiff. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Seneca Haselton and L. F. Englesby*, for defendant:

The insurance for which the plaintiff paid did not cover injuries resulting wholly or partly, directly or indirectly, from any violation of law on the part of the insured, whether such violation of law be regarded as a cause or a condition. Plaintiff's injury manifestly resulted from his gross violation of sections 4315 and 4316 of the Revised Laws with reference to the observance of Sunday.

In cases in which a wrong-doer has sought to escape responsibility for his tort to a Sunday traveler or laborer, some of the most eminent courts in this country, notwithstanding the resulting hardship, have held that the Sunday travel or labor was the direct and immediate cause of the injury.

Day v. Highland St. R. Co. 135 Mass. 113, and cases there cited; *Cratty v. Bangor*, 57 Me. 423. See also *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 223; *Johnson v. Irasburgh*, 47 Vt. 28; *Travelers Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 531, 22 L. ed. 155, should be decisive of this case.

Messrs. W. L. Burnap and J. J. Enright, for plaintiff:

The only inquiry is, Did the plaintiff's injury result from any violation of law?

If the provision in the policy is susceptible of more than one construction, that one is to be adopted which will support the validity of the contract, and it will be strictly construed against the insurer.

Darrow v. Family Fund Soc. 6 L. R. A. 495, 116 N. Y. 537.

Conceding that a violation of some law was in progress at the time of the hurt, a relation must exist between such violation and the injury, to make the defense available; the injury must have been caused by the violation of law.

Bradley v. Mutual Ben. L. Ins. Co. 45 N. Y. 422.

The policy is not to be avoided because the assured had, just previous to the accident, been violating some law, unless the natural or direct operation of such violation caused the accident.

The hunting expedition and the visit, if brought within the range of consideration at all, were the remote and not the proximate cause.

In *Louisville, N. A. & O. R. Co. v. Buck*, 2 L. R. A. 524, 116 Ind. 566, the court says: "It is quite true that a plaintiff will in no case be permitted to recover where it is necessary for him to prove his own illegal act as a part of his cause of action, or where an essential element of his cause of action is his own violation of law."

Holt v. Green, 73 Pa. 198; *Hall v. Coppell*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467.

But where he can prove his cause of action without proving he was violating the law, even 18 L. R. A.

though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, a recovery may be sustained nevertheless.

Cooley, Torts, 178.

No violation of law was in progress at the time. The plaintiff was not hunting when he was hurt; he was walking home after having been visiting.

It was not because he was walking on Sunday that he was hurt. Had he received his injury while fighting, or committing a breach of the peace, or a burglary, it would be different, and within the line of cases where this defense has been permitted, as in —

Travelers Ins. Co. v. Seaver, 86 U. S. 19 Wall. 531, 22 L. ed. 155. See *Goetzman v. Connecticut Mut. L. Ins. Co.* 3 Hun. 517; *Murray v. New York L. Ins. Co.* 96 N. Y. 614; *Cluff v. Mut. Ben. L. Ins. Co.* 13 Allen, 308.

The words "violation of law" mean "crime." *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 326.

In using the term "violation of law" the Company could not have contemplated any violation not in itself importing personal peril—involving the doing of something which human experience has shown to be fraught with peril to the person.

Murray v. New York L. Ins. Co. supra.

Thompson, J., delivered the opinion of the court:

This is an action of assumpsit on two policies issued by defendant to plaintiff insuring him against accidental injuries. If the plaintiff has any ground of recovery, it rests wholly on these contracts of indemnity. A contract of insurance is to be construed according to its terms and the evident intent of the parties as gathered from the language used. All conditions involving forfeitures, as well as all exemptions, are to be construed strictly against the insurer, and most favorably for the insured. Yet the language of the contract is to be construed as a whole, is to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy. *May, Ins.* 2d ed. §§ 172, 175; *Brink v. Merchants & M. Ins. Co.* 49 Vt. 442; *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495; *Mutual Assur. Soc. v. Scottish Union & N. Ins. Co.* 84 Va. 116.

Each policy contains the following clause: "This insurance does not cover . . . injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when effected by any such act, cause, or condition, or under its influence." Then follows an enumeration of such acts, causes, or conditions, among which is "violation of law" by the insured. The injury for which plaintiff seeks to recover is an injury to his knee sustained by him on Sunday, January 20, 1899. The plaintiff and a companion, about 9 o'clock in the forenoon of that day, took guns and ammunition, and set out from Burlington on foot for Colchester on a hunting expedition. They traveled on the highway six or seven miles, and then took dinner with a Mr. Choates. After dinner they engaged in

hunting with Choates, who went with them as far as a Mr. Thayer's, where they stopped a short time. Here Choates left them, and the plaintiff and his companion started for home through a field, and, while crossing frozen plowed ground in the field to get to the highway, the plaintiff's foot slipped upon the frozen plowed ground, and his knee was injured. At the time of slipping he was carrying his gun. The accident occurred between 2 and 3 o'clock in the afternoon.

The defendant contends that the facts of the case bring it within the provisions of the policy in respect to violations of law, and that, therefore, the plaintiff cannot recover. Rev. Laws, § 4815, prohibits traveling on Sunday, except from necessity or charity, or visiting from house to house except from motives of humanity or charity, or for moral or religious edification. Rev. Laws, § 4816, prohibits hunting, shooting, pursuing, taking, or killing wild game, or other birds or animals, on Sunday. A person violating the provisions of either of these sections is to be fined. At the time of the accident, the plaintiff was engaged in hunting. He had his gun with him, and was ready to shoot any game he might see, whether in the field or on the highway on his way home. He started out to secure game wherever he might find it, and it does not appear that at the time of the accident he had abandoned this purpose. In hunting he was violating the law of this State. The traveling of the plaintiff was as much a part of his act of hunting as carrying his gun and ammunition or shooting or capturing game when the opportunity occurred in the course of the hunt. Without walking, the plaintiff could not have engaged in his hunt. Thus the accident was caused directly by plaintiff's violation of the law in hunting. The effect of the violation of the Sunday Law upon a person's right to recover for injuries received in the course of such violation has generally arisen in cases in which the defendant sought to escape responsibility for his own tort to a traveler or laborer. On this question the decisions have not been uniform. Some courts have held that the immediate cause of the injury was the travel or labor on Sunday, and that the plaintiff could not recover. Of this class of cases are *Day v. Highland St. R. Co.* 185 Mass. 118; *Cratty v. Bangor*, 57 Me. 428. Other able courts have held that a Sunday traveler or laborer, injured by the wrongful act or neglect of another, might recover upon the ground that the violation of the Sunday Law by the injured party is in the nature of a condition, rather than an immediate cause of the injury. To this effect are *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 219; *Sutton v. Wauwatosa*, 29 Wis. 21.

In *Johnson v. Irasburgh*, 47 Vt. 28, the court avoided the line of reasoning adopted in each of these classes of cases, by holding that a town was not bound to maintain a safe and sufficient highway for unlawful travel on Sunday or any other day, and that a person using the highway in violation of the Sunday Law was there at his own risk, there being no duty

or liability on the part of the town in respect to the highway except that imposed by statute. The plaintiff's right of recovery rests in contract; and not in tort. No act or neglect of the defendant caused or contributed to the plaintiff's injury. Were the reasoning in *Baldwin v. Barney*, *supra*, to be adopted, it would not avail the plaintiff, for, if being engaged in the unlawful expedition was not the immediate cause of his injury, it was certainly the condition causing it. The provision quoted from the policy excluded liability from any injury of which a violation of the law was the cause or condition producing it. It also expressly provides exemption from liability where violation of law is either the proximate or remote cause or condition producing the injury. In short, it is so drawn as to exempt from liability under the reasoning and the holding of the courts in both classes of cases cited.

The plaintiff contends in argument that he was not engaged in hunting at the time he received the injury, but was walking home after he had been visiting. Were this claim conceded, we do not see how it gives plaintiff any better ground for recovery. He was not out simply for open air and gentle exercise, without any object of business or pleasure, as in *Hamilton v. Boston*, 14 Allen, 475, but was traveling several miles and from town to town, on this theory, to make a visit for pleasure.

In *Cratty v. Bangor*, *supra*, the plaintiff was traveling on foot on Sunday with other persons to make a visit of pleasure to a friend, and it was held that he was traveling in violation of a statute prohibiting traveling on Sunday, unless for charity or necessity. The court further says that "no distinction is made between those who travel within town and those who travel from town to town." In going from Burlington to Colchester, and back, a distance of twelve or fourteen miles, to visit Choates for pleasure, or to hunt, the plaintiff was clearly violating the provisions of Rev. Laws, § 4815, prohibiting traveling on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps he slipped and was injured. We think it would savor too strongly of hair-splitting refinement to hold that the injury was not directly caused by the violation of the law in traveling. But, in this view of the case, the exception in the policy exempts the defendant from liability, whether the traveling is held to be the cause or only a condition producing injury, or influencing it, directly or indirectly. The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant has a right to say that it would not assume such increased risk. The defendant not having contracted to indemnify the plaintiff for the injury which he received, he cannot recover.

Judgment reversed, and judgment for defendant.

Moses M. KELSEY, Admr., etc., of James Roberts, Deceased,

v.

John KELLEY *et al.*, Appts.

(.....Vt.....)

1. **The separate estate of a married woman** cannot, in favor of her deceased father's creditors, be charged with an amount which he was compelled to pay as surety for her husband.
2. **The cost of repairs gratuitously made by a father on his married daughter's house** while he was living with her, for his own benefit and without any expectation of payment or substantial benefit to the property, cannot after his death be charged against her separate estate for the benefit of his creditors.
3. **Where a father advanced his married daughter money** with the expectation that himself and his wife would live with her and be cared for in her family during their lives, and, after so living with her until, at a fair price for board, the amount would be exhausted, the parties entered into another agreement as to future support, the court will, after the mouth of the daughter has been closed by the death of the father and mother, consider the board as the full equivalent for the money furnished as the parties then treated it.
4. **Although a conveyance of property in consideration of future support is void** as against creditors, yet it will not be set aside at their instance after support has been furnished in reliance on it, which in value exceeds that of the property conveyed.

(March 23, 1891.)

A PPEAL by defendants from a decree of the Chancery Court for Orleans County in favor of complainant in a suit brought to charge the separate estate of defendant Malina Kelley with money received by her from her father during his lifetime. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. C. A. Prouty and Edwards & Burke*, for appellants:

To charge the separate estate of a married woman, it must affirmatively appear that credit was given her estate.

Priest v. Cone, 51 Vt. 495; *Dale v. Robinson*, 12 Vt. 384; *Sargeant v. French*, 54 Vt. 384.

Considering that the conveyance for future support would be voidable as to a prior debt when made, it was voidable at that time because no valuable consideration passed. Afterwards a valuable consideration did pass; and from the date of the passing of that consideration, the conveyance ceased to be voidable.

It is important to notice the distinction between this conveyance and one fraudulent in fact. In the latter case the transaction is void as to both prior and subsequent debts.

McLane v. Johnson, 43 Vt. 43.

In the former case it is only void as to existing debts.

Brackett v. Waite, 4 Vt. 389; *Rutland & B. R. Co. v. Powers*, 25 Vt. 15. See also *Foster v. Foster*, 56 Vt. 551; *Church v. Chapin*, 35 Vt. 223.

If a voluntary conveyance be made, which is voidable when made because voluntary, and subsequently a good consideration passes, the deed ceases to be voidable from the passing of such consideration.

Jones v. Bryant, 18 N. H. 59; *Rucker v. Abell*, 8 B. Mon. 556; *Wood v. Jackson*, 8 Wend. 25; *Verplank v. Sterry*, 12 Johns. 585; *Sterry v. Arden*, 1 Johns. Ch. 258, 1 L. ed. 182.

It has even been held that where the original conveyance is fraudulent in fact, the transaction may be purged of its taint by the passing of a subsequent valuable consideration, provided the consideration be paid before the bringing of the suit to set aside the conveyance.

Thomas v. Goodwin, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469.

This conveyance was not void. It was merely voidable.

Walt, Fraud. Conv. § 317. See *Allen v. Mower*, 17 Vt. 68.

Messrs. Dickerman & Young, for appellee:

Orator is entitled to a decree, as rendered below, for the amount of the Hopkinson note of \$600, delivered to defendant Malina by the deceased, March 23, 1884, in consideration of the bond for the future support of said Roberts and wife through life. Therefore the transaction was fraudulent and void in law as to creditors and gave defendants no right or title to the money received on the note as against them so long as their claims remained unpaid.

NOTE.—Voluntary conveyance; consideration.

A voluntary conveyance may become valid, and even a fraudulent grant may be purged of the fraud, by matter *ex post facto*, whereby the fraudulent intent is abandoned and the grant confirmed for a good and valuable consideration. *Oriental Bank v. Haskins*, 3 Met. 322; *Thomas v. Goodwin*, 12 Mass. 140; *Crowninshield v. Kittredge*, 7 Met. 324; *Harvey v. Varney*, 26 Mass. 120.

So a voluntary deed has been made good by a subsequent marriage. *Andrews v. Jones*, 10 Ala. 400; *Bunnell v. Witherow*, 29 Ind. 123; *Smith v. Allen*, 5 Allen, 454; *Armfield v. Armfield*, Freem. Ch. 311; *Jones' App.* 62 Pa. 324; *Herring v. Wickham*, 29 Gratt. 328; *Wood v. Jackson*, 8 Wend. 23.

A valuable or meritorious consideration is founded on something deemed valuable, as money, goods, services and marriage; and a voluntary or good consideration is founded upon natural love and affection between near relatives by blood. *Wickes v. Clarke*, 8 Paige, 161, 4 L. ed. 384; *Van Derveer v. Wright*, 6 Barb. 549.

Consideration of support and maintenance.

A grantee by accepting the deed and entering into possession under it is bound by the agreement providing for the support of the grantor. *Hutchinson v. Hutchinson*, 46 Me. 154; *Exum v. Canty*, 34 Miss. 522; *Spalding v. Hallenbeck*, 30 Barb. 292; *Shontz v. Brown*, 27 Pa. 123; the case of *Jackson v. Florence*, 16 Johns. 47, distinguished where the provision for support raised no obligation on the grantee. 2 Devlin, Deeds, § 407. See *Henderson v. Hunton*, 25 Gratt. 225.

Where, after executing a lease in consideration that lessees should occupy the premises and support the lessor during life, the lessor executes a deed to the lessees in fee, providing that if the latter conform strictly to the agreements in the lease the deed shall remain in full force and effect and take effect at the grantor's death, the grantees are entitled to retain the possession so long as they comply with the covenants to support and care for the grantor; and it is immaterial whether the legal title passed *in present* or not. *Stanton v. Allen*, 32 S. C. 587.

Crane v. Stickle, 15 Vt. 252-257; *Jones v. Spear*, 21 Vt. 426-431; *Worthington v. Jones*, 23 Vt. 549; *Church v. Chapin*, 35 Vt. 223; *McLane v. Johnson*, 43 Vt. 48.

The master finds that "Roberts . . . went to live with defendants," not with defendant Malina. Consequently it is presumed that Mr. Roberts and wife boarded with defendant John Kelley. Therefore Mr. Roberts had the right to have any debt, either or both defendants owed him applied in payment *pro tanto* of his board. Where there are mutual accounts and no application is made by the parties, the court will apply the first credit or payment in satisfaction of the first debit or charge.

Pierce v. Knight, 31 Vt. 701; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, 46 Vt. 512.

This rule would apply the claim for board in satisfaction of the amount paid upon the suretyship obligations.

See *Roberts v. Kelley*, 51 Vt. 97.

All transactions which precede the date of the bond for support stand as mutual debits and credits, and should be treated as an open book account. Interest should be allowed upon the account.

Langdon v. Castleton, 30 Vt. 285; *Spencer v. Woodbridge*, 33 Vt. 492; *Goodnow v. Parsons*, 36 Vt. 46; *Davis v. Smith*, 43 Vt. 52.

Ross, J., delivered the opinion of the court:

The original bill proceeds upon the ground that the defendant wife had, in the lifetime of the intestate, her father, received from him various sums of money or loans, which she had not fully repaid, and the orator, as administrator, brings the bill to have the balance due ascertained, and made a charge upon the wife's real and personal property, that it may be available to him in the payment of the debts proved against the estate. He brings the bill in the interest of the creditors. After the master's report was filed, showing that none of the claimed sums were received by the wife as loans, the orator was allowed to amend his bill, by setting forth that she received the various sums charged in the original bill, which were found established by the master, under such circumstances that it would be fraudulent in law to allow her to retain the sums so received against the creditors, who have proved their debts against the father's estate. When these transactions transpired, to lay the foundation for a charge in equity upon the wife's separate property, the money must have been advanced upon the credit of the separate property, and for its benefit, or for the personal benefit of the wife. *Dale v. Robinson*, 51 Vt. 20; *Priest v. Cone*, Id. 495.

1. Considering the scope of the bill, and the requisites necessary to constitute a charge in equity upon the wife's separate property, it is evident that the \$200 paid by the intestate as surety for the defendant husband cannot be considered. The scope of the bill, as amended, and the principles of equity law applicable to charging the wife's separate estate, do not permit a general accounting of all matters existing between the intestate and the defendants. They include such

matters only as the wife is interested in and as fall within the principles of the cases *supra*. It is not found that this sum was paid by the intestate upon the credit of the wife's property, or for its benefit, or for the wife's benefit; but it is found to have been paid by the intestate only as surety for the husband, and that it had no connection with the subsequent dealings between the intestate and the defendants, in which the wife or her property was interested.

2. The facts found by the master dispose of the \$468.25, which the intestate let the wife have in money, and which he expended in repairs upon the house, in 1874. During that year the intestate and his wife boarded with the defendants. He let them have \$200 in money, and laid out in repairs on the wife's house \$269.25. The master has found that the board of the intestate and his wife was more than enough to pay the \$200, which, he finds, the intestate expected would be taken up in board, and that the intestate made the repairs "to suit his own taste and convenience, consulting no one about them;" and that "it was not understood by either party that any money was to be paid the intestate for the repairs; and that what was not paid in board was done by the intestate and for his benefit." These facts fully sustain the disallowance of any part of this item by the master, especially when he has not found that the repairs materially enhanced the value of the premises or were necessary. The facts found show that at this time the property owned by the intestate was more in value than required to pay all the debts proved against the estate. These facts leave no ground for the contention of the orator that the balance of this item which remained unpaid by the board furnished the intestate and his wife should enter into the accounting in connection with the subsequent items. The law does not imply a promise to pay for repairs made as these were, without expectation of payment, and without it being found that they were of a substantial benefit to the property.

3. In the spring of 1879 the defendant wife purchased a farm; and the intestate paid \$1,000 towards it, with the expectation that he and his wife should live with and be cared for by the defendants. From that time to the time of the death of the intestate and his wife they did live with and were cared for by the defendants. At different times between the spring of 1879 and November, 1884, but at what times or in what sums is not found, the intestate furnished the defendant wife \$200, which was invested in personal property, for her benefit, to be used on the farm. The master has not found that any part of the \$200 was furnished subsequently to the arrangement made in March, 1884. He treats the \$200 in the same way he does the \$1,000, and has found no fact to show that it should be treated otherwise, except that he says that no evidence relating to interest upon any item was introduced; and that, as the particular times and amounts at and in which this item was furnished are not shown, he allows it as of November 4, 1884. From the manner in which the master has treated

the \$200, and from the facts he has found in regard to it, we do not think there is any just ground for the contention of the orator that this sum should be treated as furnished after the arrangement of March, 1884. If the master had so regarded it he would not have treated it in connection with and in the same way he has treated the \$1,000. Further than that, the intestate and his wife expected to live with and be cared for by the defendants. "All the transactions between the parties seem indefinite and without design. It was one of those frequent, unfortunate, and indefinite transactions which occur among relatives." He finds that at a fair price for boarding the intestate and his wife, in March, 1884, this \$1,200 had been more than overpaid; and the husband told the intestate that the money was all exhausted, and the intestate soon after entered into a further arrangement in regard to the future support of himself and wife. After the death of the intestate and his wife, and after the mouths of the defendants have become closed by the Statute, it would be hazardous for the master or court to attempt to treat the matter of the \$1,200 and board differently from what the parties then treated it, or the board as a full equivalent for the money furnished. We think they should be so considered.

In March, 1884, the intestate advanced to the defendant wife \$600 more by way of the Hopkinson note, which was used to make a further payment towards her farm, and took a bond from the defendants for the support of himself and wife during their natural lives. During the period covering all these transactions the defendant husband was insolvent. The defendants fully performed the condition of the bond, and, as found by the master, at an expense of more than the \$600 received therefor. The debts proved against the estate and represented by the orator were all contracted by the intestate before the transactions of 1879. By that transaction, and the transaction of 1884, the intestate disposed of substantially all his property for the support of himself and wife, without making any provision for the payment of these debts. The orator contends that this disposition of the property was in law fraudulent, as regards these creditors, although good between the parties, and although the defendants' agreement to support the intestate and his wife was, as between the parties, an ample and valid consideration for the money advanced. This contention is fully supported by the authorities cited. *Crane v. Stickles*, 15 Vt. 252; *Jones v. Spear*, 21 Vt. 426; *Worthington v. Jones*, 23 Vt. 549; *Church v. Chapin*, 35 Vt. 223. The other case cited (*McLane v. Johnson*, 43 Vt. 48) is one of fraud in fact, and not in law, and not applicable. The other cases proceed upon the ground that it is the legal duty of a debtor to pay his debts rather than provide for the future support of himself and family, and that existing creditors may avail themselves of property conveyed for future support for the payment of their debts. The creditor can avoid such conveyances only because the debtor has no other property out of which payment can be enforced. In none

of these cases, and in no case to which our attention has been called, has it been held that the creditor could wait until the support had been furnished, and the contract fully executed by both parties, and then recover enough of the value of the property conveyed for the support to pay his debt. In all the cases cited the identical property conveyed in consideration of future support, or some of it, was taken and appropriated by the creditor, except the case in 15 Vt.; and in that case it is said: "Perhaps the judgment of the county court would have been more technically correct if it had adjudged them trustees for the specific articles of personal property which they had received of the defendant, instead of adjudging them trustees generally," plainly indicating the course of proceeding which was followed in the other cases. This is a case in equity, in which the orator must do, as well as receive, equity. The master has not found that these transactions between the intestate and these defendants were tainted with fraud in fact, nor does the bill charge fraud in fact. If now, after the defendants have fully supported the intestate and his wife, at an expense greater than the money received, the orator can compel a return of the money received sufficient to pay the creditors represented by the orator, these defendants are left with a debt of an equal amount, also provable against the estate represented by the orator. Why should the creditors represented by the orator receive payment more than the defendants? The defendants have been guilty of no wrong in supporting their father and mother, nor was it any more of a wrong for them to receive payment for such support than for the creditors represented by the orator to receive payment for their debts. These creditors did not know of the existence of the property received by the defendants for the support, and did nothing on the strength of its existence. On the other hand, the defendants knew of it, and furnished the support for it. If they had furnished the support before receiving payment therefor, and then received the same property which they did receive, no one would claim that the orator could recover the property back, to pay the creditors represented by him. If the creditors represented by the orator had intervened before the defendants had furnished the support, they would have had the better right to the property, and the defendants have sustained no damage. Their intervention would have relieved the defendants from this contract to furnish further support. The consideration for this contract further to support would have been taken away. The defendants, until they had furnished the full support, were like a purchaser bona fide in every respect, except he had not fully paid the contract price of the property purchased. Where he must be a bona fide purchaser for value, to be protected in his purchase, if otherwise a bona fide purchaser, he is protected only to the extent he has paid value. But although he does not pay full value at the time of the purchase, if such payment is made in full before he is made aware of the infirmity of his purchase, he is fully pro-

tected. We think this principle applicable between the orator and these defendants, especially the wife, on the facts of this case. Conveyances of property to secure future support, until the support is furnished, have the infirmity of voluntary conveyances, or conveyances for which a full, valuable consideration is not paid at the time the conveyance is made. It is well settled that supineness of a creditor to attack and have such conveyances set aside may defeat his right. *Egleberger v. Kibler*, 1 Hill, Eq. 113, 26 Am. Dec. 192. Such conveyances may be validated by *ex post facto* acts. *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348.

While these cases are not analogous in

their facts to the facts in the case at bar, we think this case is controlled by the same equitable principles. When this suit was brought, in principle the defendants stood related to the money received for the support of the intestate and wife in equity, just as they would if they had first furnished the support, and then received the money in payment thereof. The intestate then might well prefer them, in making payment of his debts, to the creditors represented by the orator. We notice nothing in the testimony excepted to that was inadmissible in substance.

The decree of the Court of Chancery is reversed, and the cause remanded, with a mandate to dismiss the bill, with costs to the defendants.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles H. DILLABY

v.

Betsey A. WILCOX, *Appt.*

(....Conn.....)

A verbal promise by the administrator of an estate holding a mortgage against a third person to pay taxes assessed against the mortgagor if the collector will not levy on the mortgaged property, upon which he has no lien, is within the Statute of Frauds and not enforceable.

(January 19, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for New London County in favor of plaintiff in an action brought to recover certain taxes which it was alleged defendant had agreed to pay. *Reversed.*

The facts are stated in the opinion.

Mr. S. Lucas for appellant.

Messrs. J. Halsey and W. A. Briscoe, for appellee:

The promise of the defendant was an original undertaking and therefore not within the Statute of Frauds. While it is true that the taxes in question were not a specific lien upon the personal property, nevertheless the plaintiff had a right to levy upon the equity of redemption in said property and to sell it for the taxes. In consideration of his promise to relinquish such right, the defendant undertook to pay the taxes when the property should have been sold under foreclosure.

See *Browne*, Stat. Fr. § 204; *Burr v. Wilcox*, 18 Allen, 273.

Forbearance at the request of the defendant, or any act done at defendant's request and for her convenience or to the inconvenience of the plaintiff, is a sufficient consideration for the promise.

Burr v. Wilcox, supra.

Seymour, J., delivered the opinion of the court:

The plaintiff in this case was collector of

taxes for the town, city, and central school-district of Norwich, and had in his hands warrants for the collection of taxes assessed in favor of each of them upon property of one Gordon Wilcox. The defendant and her mother were the administrators of the estate of William Wilcox, deceased, and, as such, held a mortgage on certain personal property of Gordon Wilcox, consisting of printing presses and material in the possession of and used by him in Norwich. The plaintiff was unable to procure payment of the taxes from Gordon Wilcox, and applied to the defendant for the payment thereof, and threatened to levy upon said mortgaged property unless they were paid. The defendant promised the plaintiff that if he would forbear to levy upon the property she would pay the taxes as soon as the property should be sold under the judgment of foreclosure which she and her mother, as administrators aforesaid, had obtained upon the mortgage. The plaintiff, in consideration of this promise of the defendant, promised to forbear, and did forbear, to levy upon the property, and the same was sold under the judgment of foreclosure, and was bid in for the defendant. The defendant, after the sale, refused to pay the amount of the taxes to the plaintiff, and they have not been paid. The suit, it will be observed, is against Mrs. Wilcox personally. No pleadings subsequent to the complaint appear to have been filed, but the finding shows that the defendant denied that she made the promise upon which the action was brought. She also claimed that the promise declared on was within the Statute of Frauds, and, not being in writing, no recovery could be had upon it; and, further, that there was no consideration for the promise, and asked the court so to rule; but the court refused so to do, and rendered judgment for the plaintiff, from which the defendant appeals. Was the promise, which the court finds was made, within the Statute of Frauds? The Statute provides that "no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer damages out of his own estate, or against any person upon any special promise to answer for the debt, default, or miscarriage of another, . . . unless such agreement, or some memorandum thereof, be made in writing, and signed

NOTE.—Statute of Frauds; promise to answer for debt or default of another. See note to *Tighe v. Morrison* (N. Y.) 5 L. R. A. 617.

18 L. R. A.

by the party to be charged therewith or his agent." Gen. Stat. § 1866.

The first clause has reference to promises by an executor or administrator to answer out of his own estate for a claim against his decedent,—some liability resting upon the executor or administrator strictly in his representative character, and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate. To change the expression, this clause of the Statute covers a special promise made by the executor or administrator to pay, out of his own estate, what (being the legal representative of the party originally liable) he is already, in that representative capacity, under a liability to pay, to the extent of the property which has come into his hands. "The particular object of this provision," says a recent writer upon the Statute, "was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies, or distributive shares in consequence of a willful or mistaken perversion of expressions of encouragement which they may have used in conversation with claimants, and which were not justified by the ultimate result of administration of the assets in their hands." Throop, Verb. Agr. p. 87. However that may be, the suggestion illustrates the nature of the promise referred to in this section. The promise proved, in the case before us, was to answer for the debt or default of Gordon Wilcox, a third party, and is a promise to which that clause has no reference. The suggestion that the defendant, if compelled to pay the judgment, can repay herself out of the assets of the estate, does not tend to bring the promise within the clause. Most of the personal obligations of an executor contracted in the course of his administration, says the court in *Chambers v. Robbins*, 28 Conn. 550, are proper charges against the estate in the final settlement of his account, but they are none the less his private debts, for which he is alone liable in his private capacity. In *Pratt v. Humphrey*, 22 Conn. 317, a leading case upon this clause, the promise was to pay a debt due from the estate of which the defendants were administrators,—an entirely different case from the one at bar.

The second clause of the Statute relates to the special promise of any person to answer for the debt, default, or miscarriage of another. An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. Almost any theory of its scope and meaning can find some case to support it. The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered. It has even been stated that the law upon it is in a state of hopeless confusion. It is all the more satisfactory, therefore, that our own court seems, so far at least as the points involved in this case are concerned, to have found and adopted a rule which has proved satisfactory,—a rule which, we think, substantially settles the question before us. The promisor, to briefly restate the facts, was one of the administrators of William Wilcox's estate,—a fact, as we have seen, of no significance, unless to

show a motive for her promise, founded on a fancied advantage to the estate of her decedent. The promisee was the collector of taxes, threatening to levy on personal property upon which he had no lien, and on which William Wilcox's estate held a mortgage. The levy, if made, would of course have been subject to such mortgage. The party for whose debt or default the promise to answer was made was a delinquent tax-payer, who, after the promise, continued liable for the taxes until paid. The suit, then, is by a tax-collector against a defendant, who, in consideration of the plaintiff's forbearance to levy for a third person's tax on personal property on which an estate of which she was one of the administrators had a mortgage, promised to pay taxes due to Norwich town and city and a school-district of the town from said taxpayer, the mortgagor of the property. In *Packer v. Benton*, 35 Conn. 343, it was held that "where a person, not before liable, agrees to pay the debt of a third person, and, as a part of the arrangement, the original debtor is discharged from his indebtedness, the agreement is not within the Statute of Frauds. Otherwise, if the original debtor continues liable." We shall quote somewhat extensively from that case, as the rule therein established has subsequently been applied in *Pratt's App.*, 41 Conn. 191, and in *Gridley v. Sumner*, 43 Conn. 16, and is, as already suggested, decisive of the case now before us. Judge Butler writes the opinion, and after contrasting the facts then before the court with those in *Clapp v. Lawton*, 31 Conn. 95, he says (p. 349): "Here the contract was tripartite, between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation by the third party to the particular creditor. Such new obligation and indebtedness is not within the Statute of Frauds. In *Turner v. Hubbell*, 2 Day, 457, the distinguished counsel for the defendant in error deduced, from the cases which had then occurred under this branch of the Statute, the following definition of the promise intended by it, to wit, 'an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made is, at the same time, liable;' and it was adopted by the court. With a single modification, that definition furnishes as perfect a test as has ever been, or, we think, can be devised. . . . The foregoing definition may be modified, therefore, so as to read: 'An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable.' Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail. It was the purpose and effect of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to operate the defendant in consideration of that discharge. . . . As the original debtors did not continue liable, an essential element of the test was wanting, and the contract was not within the Statute."

In the case now before us all the essential elements of the test are present, and bring the

promise within the Statute. The case of *Packer v. Benton* does not discuss the questions which might arise in that class of cases, where the defendant, for his own use and advantage, procures from the plaintiff the surrender, release, or waiver of a lien or security which the latter holds for a debt due him, upon the promise to pay the debt. In such cases it has been held, in a large number of cases, that the promise is not within the Statute, though the original debt is not discharged, on the ground that the transaction amounts to a purchase from the creditor of such lien or security for a price which is the amount of the original debt, and that the relinquishment of the lien or security has inured to the defendant's benefit. In the leading case of *Fullam v. Adams*, 87 Vt. 391, it is held that "a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promisor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation or duty of his own." Poland, *Ch. J.*, who writes the opinion, says (p. 397) that the cases which decide that where a creditor holds a security and surrenders it to a third person, for his benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle.

It is stated in the text of the American and English Encyclopedia of Law, *in loco*, that, in a large and increasing number of the States of the Union, the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains; and a very large number of authorities are cited in support of the proposition. It is to be noticed, as illustrating the difference in construction already alluded to, that, in a recent case in New York (*White v. Rintoul*, 108 N. Y. 222, 10 Cent. Rep. 704) it is stated, though under a *semble*, that a promise to pay a debt of another, antecedently contracted, where the primary debt still subsists, is original, and so valid, within the Statutes of Frauds, although not in writing, when it is founded on a new consideration moving to the promisor, and beneficial to him, and when by the promise he comes under an independent duty of paying, irrespective of the liability of the principal debtor. Curiously enough, this intimation of an opinion—for it amounts to nothing more, as reported—is made in a case where the defendant was a creditor of a firm, and was secured by a chattel mortgage. The plaintiff was the holder of two notes of the firm, which were nearly matured. The defendant disclosed the fact that he held the mortgage, and promised to pay the notes if the plaintiff would forbear for a time. It was held that the promise was within the Statute. The court says: "The plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying that 'if the plaintiff pressed the collection of his notes, and did not wait till the then next summer, the defendant would

lose his money, which had been loaned to the firm.' But I do not discover a single fact in the case which tends to any such conclusion. . . . It was a fear without a foundation; a state of mind, and not a result of existing facts seen in their legal bearing. Delay on the part of the plaintiff is not shown to have been of the slightest consequence to the interest of the defendant." No more do we see in the case before us a single fact which shows that a levy by the collector, subject, as it must have been, to the mortgage, could have injured the defendant or the estate she represented. If she thought so, "it was a state of mind, and not a result of existing facts seen in their legal bearing;" and the decision of the case from which we are quoting seems to unmistakably favor her defense, though the *dictum* seem adverse. It is said in Browne on the Statute of Frauds, § 214e, that "the mere passing of a new and independent consideration between the plaintiff and defendant does not take the case out of the operation of the Statute; and, so far as some of the decisions depend upon the contrary, they cannot be regarded as law. Every contract of guaranty requires a consideration moving from the party to whom the guaranty is given. There can be no sensible distinction made between 'new and independent' considerations and any other considerations; and the general proposition that 'a new and independent consideration, moving between the parties to the contract of guaranty,' takes it out of the Statute, simply nullifies the Statute. The distinction is between a merely valid consideration for the defendant's promise of guaranty, and that transfer of value which creates an original obligation on the part of the defendant, the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt." It was suggested that the promise relied on was an original undertaking. We cannot look upon it as such, within the proper meaning of that word. It is a new promise to pay the already existing debt of a third party. The court says in *Mallory v. Gillett*, 21 N. Y. 412: "The words 'original' and 'collateral' are not in the Statute of Frauds, but they were used at an early day,—the one, to mark the obligation of a principal debtor; the other, that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented by these terms, the word 'original' has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called 'original' because they are new; and then, as original undertakings are agreed not to be within the Statute of Frauds, so these new promises, it is often argued, are not within it. If the terms of the Statute were adhered to, or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description."

Where the person undertaking to pay the debt of another receives property or funds of the debtor for the purpose, his promise is in no proper sense an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment. The undertaking becomes then an independent one,

and the continuing obligation of the debtor becomes in a sense collateral to it. Whenever the new promise is merely collateral to the original debt, it must be in writing, whatever the consideration, and it remains collateral so long as the original debt still subsists as the principal debt. The decision at which we have arrived makes any discussion of the other questions presented on the record superfluous.

There is error in the judgment appealed from, and it is reversed.

The other Judges concur.

George BROWN

v.

George THROOP, Appt

(..... Conn.)

A parol agreement made in March permitting one who was to take possession of a farm as tenant April 1st next, under a lease for one year, to use the ice in an ice-house thereon without charge, if he would refill it so as to leave it filled when he surrendered possession, is not void as not to be performed within a year from the making of it.

(January 7, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Litchfield County denying his right to charge plaintiff with the cost of filling an ice-house on defendant's land with ice which plaintiff used while in possession of such land as tenant. *Affirmed.*

The facts are stated in the opinion.

Mr. R. E. Hall, for appellant:

It appears from the nature of the agreement that the parties understood at the time it was made that its full performance, the "leaving the ice-house full when he went away," by the plaintiff, was not to be performed in one year from that time.

This is within the Statute of Frauds.

Gen. Stat. § 1866; 1 Swift, Dig. *263; *Herrin v. Butters*, 20 Me. 119; *Peters v. Westbrook*, 19 Pick. 364; Wood, Stat. Fr. 495.

If it appears to have been the understanding of the parties to a contract that it was not to be completed within a year, though it might be, and was in fact, part performed within that time, it is within the Statute and cannot be enforced.

Boydell v. Drummond, 11 East, 142.

The whole scope of the agreement shows that the parties did not contemplate a complete performance within one year from the time it was made.

Herrin v. Butters, *supra*.

That the written contract or parol agreement is defeasible within the year will not take the case out of the Statute.

Wood, Stat. Fr. 494, and cases cited; 3 Parsons, Cont. 36, and *note q*.

Mr. H. B. Graves for appellee.

NOTE.—Statute of Frauds; contracts not to be performed within a year. See *notes* to *Seddon v. Rosenbaum* (Va.) 3 L. R. A. 337; *Lowman v. Sheets* (Ind.) 7 L. R. A. 784; *Wooldridge v. Stern* (Mo.) 9 L. R. A. 129.

13 L. R. A.

Andrews, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment rendered by the court of Common Pleas in Litchfield County. Three reasons of appeal are given in the record. Only one is pursued in this court; the others may be disregarded. The one argued here is, "the court erred in admitting, against the objection of the defendant, the evidence of James E. Brown in relation to the agreement between the plaintiff and defendant in regard to leaving ice in the ice-house when the plaintiff went away, made in the month of March, 1887." The plaintiff had had possession of and carried on a farm belonging to the defendant under a contract in writing—being substantially a letting and hiring on shares—from April 1, 1887, to April 1, 1888, and by a renewal till April 1, 1889, when he left. The parties disagreed about their accounts, and this suit was brought. Each party filed a bill of particulars containing a great number of items. The defendant in his bill had charged the plaintiff, under the date of February 5, 1887, the sum of \$23.70 "for getting ice." It appeared that when the plaintiff took possession of the farm on the 1st day of April, 1887, the ice-house thereon was filled with ice. This the plaintiff used during his occupancy of the farm, and refilled the ice-house with other ice; and when he left the premises on the 1st day of April, 1889, the ice-house was left as full of ice as it was when he took possession. The charge of \$23.70 was for getting the ice that was in the ice-house at the time the plaintiff took possession of the farm. The written contract contained no reference to the ice then in the ice-house, nor to any refilling of it with ice. To show that the defendant was not entitled to make said charge or to recover said sum of money, the plaintiff called James E. Brown as a witness, who testified that he was present upon the defendant's premises before the execution of the written contract, some time in the month of March, 1887, with the plaintiff and defendant, and heard them agree that, as the defendant had then filled the ice-house upon the premises in question, the plaintiff should have the same without charge, provided he refilled the ice-house, and left as much ice in it when he went away as there was then in it. The defendant objected to the evidence on the ground that it offended against that clause of the Statute of Frauds which provides that no action shall be maintained upon any agreement that is not to be performed within one year from the making thereof, unless it be in writing, etc. The objection was not well taken, and was properly overruled. There was no attempt to show an agreement not to be performed within a year. The testimony of the witness was that the plaintiff was to refill the ice-house, and leave as much ice in it when he went away as there then was. The defendant, in his objection and in his argument, quotes only the latter part, as though the fact of leaving the ice-house filled at the end of the year was the whole of the agreement. On the contrary, it was not the whole of the agreement, nor was it the essential part of the agreement. The real thing agreed to be done was the refilling the ice-house with ice, so that at the end of the term it could be left filled. The

ice-house could not be left full of ice on the 1st day of April unless it had been previously filled. It could not be filled except during the season for ice, and that was within a year. In respect to the charge for getting the ice, Mr. Throop was the actor. He was the plaintiff and Mr. Brown was the defendant. Mr. Throop asserted that such a condition of things existed as entitled him to charge Mr. Brown for getting the ice which was in the ice-house when Mr. Brown came on to the farm. Mr. Brown denied that any such state of things existed.

He insisted that there was a totally different state of facts. If the evidence to show Mr. Throop's contention be admissible, then Mr. Brown's evidence must be equally admissible, for they both relate to the same transaction. It would be a strange use of the Statute framed to prevent frauds to hold that it permits one side of an agreement to be proved, but forbids the other side to be shown.

There is no error in the judgment appealed from.

The other Judges concur.

INDIANA SUPREME COURT.

William H. CROWDER *et al.*, *Appts.*,

v.

TOWN OF SULLIVAN *et al.*

(.....Ind.....)

1. **A debt for the aggregate amount** to become due on a contract by a city for electric lights to be furnished for a series of years at a certain sum per year is not incurred by the city at the time of making the contract. The debt for each year is incurred only when it has been earned.
2. **Notice inviting proposals for a contract** to furnish electric lights need not be given by a municipal corporation unless required by statute where payment is all to be made from the corporation treasury.
3. **A mere licensee** of the right to use streets does not obtain a monopoly or an exemption from subsequent reasonable police regulations.
4. **A special license may be given** for the use of streets by an electric light company although a general ordinance is necessary to make regulations as to the mode of using streets.

(June 13, 1891.)

A PPEAL by complainants from a judgment of the Circuit Court for Sullivan County in favor of defendants in an action brought to enjoin defendant from paying for electric light which had been furnished to the town. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Humphreys & Wolfe, Beasley & Williams, and J. H. Kelley for appellants.

Messrs. John T. Hays and Buff & Hays for appellees.

Elliott, J., delivered the opinion of the court:

The object of this suit is to enjoin the officers of the Town of Sullivan from paying to the Sullivan Electric Light & Power Co. compensation for furnishing the Town and its citizens with light. The theory upon which the complaint is constructed is that the contract with the company and the ordinance upon which it is founded, are void.

One of the grounds upon which the validity of the contract is assailed is that it creates an

indebtedness beyond the limits prescribed by the Statute. The law is against the appellants upon this point. They assume that the contract creates a debt for the aggregate of all the yearly payments provided for by the contract; and if this assumption is not valid, their position is untenable. That this assumption is not valid is clear. Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments; since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie; but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous; for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the Legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited; *New Albany v. McCullough*, 127 Ind. 500; *East St. Louis v. East St. Louis G. L. & C. Co.* 98 Ill. 415; *Erie's App.* 91 Pa. 398; *Grant v. Duvenport*, 36 Iowa, 396; 1 Dillon, Mun. Corp. 4th ed. § 185.

The Statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form. Elliott, Supp. § 794.

As the mode of making contracts is commit-

NOTE.—For authorities supporting the proposition that public contracts must be awarded to the lowest bidder and should comply with all statutory provisions relating to such awards, see note to *Fones Bros. Hardware Co. v. Erb* (Ark.) ante, 353.

provisions relating to such awards, see note to *Fones Bros. Hardware Co. v. Erb* (Ark.) ante, 353.

ted to the discretion of the municipal authorities and they are not required to give notice, a contract may be awarded without giving notice. *Aurora v. Fox*, 78 Ind. 1.

If the municipality were endeavoring to levy a specific assessment upon individuals or upon private property, then notice would be required upon general principles; but there is no such attempt here, for the entire compensation is to be paid from the corporate treasury. There is a clear and important difference between cases where a debt is created payable out of general corporate revenues and cases where special assessments are laid upon property. See authorities cited note 1, *Elliott, Roads & Streets*, 848.

The right of the electric company to exercise corporate functions cannot be collaterally attacked. Where there is a statute authorizing the creation of a corporation, an attempt to comply with the Statute and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding. *Baker v. Neff*, 78 Ind. 68; *Williamson v. Kokomo Bldg. & L. Fund Assn.* 89 Ind. 889.

It is unquestionably true that a municipal corporation cannot grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.* 127 Ind. 869, 8 L. R. A. 589; *Citizens Gas & M. Co. v. Elwood*, 114 Ind. 832, 14 West. Rep. 92. See authorities cited in 2 *Elliott, Roads & Streets*, 832.

If the ordinance before us is to be construed as granting an exclusive privilege, it must be adjudged void in so far, at least, as it attempts to make such a grant. We are, however, quite well satisfied that the ordinance does not attempt to grant an exclusive privilege. It does, it is true, grant a right to use the streets of the Town; but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It cannot be held that permission to one company to use the streets excludes others; on the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use public streets does not obtain a monopoly. The right to grant other licenses remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. This is the effect of the decision in *Citizens' Gas & M. Co. v. Elwood*, *supra*.

A private corporation that obtains license to use the streets of a municipality takes it sub-

ject to the power of the municipality to enact a general ordinance, such as that exercised in enacting police regulations; for a governmental power cannot be surrendered or bartered away even by express contract. But there is here no attempt to surrender or barter away this governmental power; for there is nothing more than a license to use the streets of the town. The decision in the case of *Citizens' Gas & M. Co. v. Elwood*, *supra*, was made upon an ordinance assuming to make a discrimination in favor of one company and thus exclude all others from using the streets of the town for supplying the citizens with fuel; and it cannot be regarded as denying the right to grant a license to a designated company, although it does deny the power to discriminate in favor of one company to the detriment of competing companies. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specifically license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like for where the municipal authorities assume to legislate upon the entire subject, a general ordinance is required; but where they simply grant a privilege to use the streets and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege in its nature monopolistic, and, as shown in the case of *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, *supra*, when this is so, the grant of the privilege is of necessity the grant of a monopolistic right; but in such a case the corporate grant does not create the monopoly. See authorities cited in notes 1, 2, and 3, *Elliott on Roads and Streets*, 567. In this instance, there is nothing more than the grant of a license; there is no attempt to create exclusive privileges nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality; for no licensee can acquire rights not subject to regulation under the police power delegated to local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective.

Judgment affirmed.

ILLINOIS SUPREME COURT.

Philip S. KINGSLAND *et al.*, Appls.,
v.

Herman KOEPPE *et al.*

(.....ILL.....)

1. **The Liability intended to be assumed by a stranger to a promissory note, who places his name on the back of it, may be shown by parol.**
2. **In an action on a joint contract judgment cannot be rendered against one defendant by default and in favor of the others.**

(March 3, 1891.)

APPPEAL by plaintiffs from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants, Koeppe, Klinge and Schwuchow, and against defendant Loring, in an action brought to recover the balance due on certain promissory notes executed by the Lake View Electric Light Company, which defendants were alleged to have guaranteed. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Tenney, Hawley & Coffeen*, for appellants:

The contract of an indorser of a note, as well as that of a guarantor, may with strict accuracy of language be termed a contract of guaranty; one being conditional, the other unconditional. It is almost universally the case that the name of the guarantor or indorser is signed in blank, with no words of contract over them. The law, however, supplies these words, and the written contract thus created is just as certain in the rights and liabilities arising under it, as any other written contract. When the blank indorsement of the payee appears on a note, the law implies the contract and consequent liability of an indorser, which is a guaranty of collection, or conditional guaranty. And parol evidence is not admissible to show that the contract, instead of being a conditional guaranty or guaranty of collection, is an absolute guaranty of payment.

Johnson v. Glover, 10 West. Rep. 125, 121 Ill. 233.

When a note in the hands of the payee has

NOTE.—*Parol evidence is admissible as between the immediate parties to a promissory note.*

An indorser may prove by parol, as against his immediate indorsee, that a blank indorsement was made for the purpose of collection. *Downer v. Cheesebrough*, 36 Conn. 39; *McWhirt v. McKee*, 6 Kan. 412.

Some of the authorities maintain that parol evidence is inadmissible to control the construction of an irregular indorsement as against bona fide purchasers for value, and that such evidence is only admissible as between immediate parties to the transaction. *Houston v. Bruner*, 39 Ind. 333; *Browning v. Merritt*, 61 Ind. 425; *Schneider v. Schiffman*, 20 Mo. 571.

In Missouri, it is also held to be admissible against an indorsee after maturity (*Seymour v. Farrell*, 51 Mo. 96); but the better opinion is that, in every case where the signature on the back is in an ambiguous position, and the meaning can only be definitely ascertained by parol evidence, then parol evidence is admissible to prove its true character, even against a purchaser for value, for he can reasonably be charged with notice of this ambiguity. *Greenough v. Smead*, 3 Ohio St. 415; *Thacher v. Stevens*, 46 Conn. 561; *Rey v. Simpson*, 63 U. S. 22 How. 341, 16 L. ed. 260; *Good v. Martin*, 36 U. S. 96, 24 L. ed. 343; *Cavazos v. Trevino*, 73 U. S. 6 Wall. 773, 18 L. ed. 813; *Frank v. Lillienfeld*, 38 Gratt. 392; *Denton v. Peters*, L. R. 5 Q. B. 475.

It is always competent to show by parol evidence that the indorsement was made without consideration, as, for example, that it was made for the accommodation of the indorsee. *Breneman v. Furniss*, 90 Pa. 136; *Hamburger v. Miller*, 48 Md. 525; *Morris v. Faurot*, 21 Ohio St. 155; *Cole v. Smith*, 29 La. Ann. 551; *Davis v. Morgan*, 64 N. C. 570; *Lovejoy v. Citizens Bank*, 23 Kan. 331; *Kirkham v. Boston*, 67 Ill. 599; *McCoon v. Biggs*, 2 Hill, 121; *Denniston v. Bacon*, 10 Johns. 198; *Foster v. Jolly*, 1 Crompt. M. & R. 703. See *Tiedeman*, Com. Paper, 274.

Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. *Smith v. Carter*, 25 Wis. 233.

Discord with early decisions.

Some confusion has been thrown around this subject from what has been finally settled to have been 18 L. R. A.

an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. This doctrine was advanced in *Herriek v. Carman*, 12 Johns. 160, and was adjudged in *Nelson v. Dubois*, 13 Johns. 175, and *Campbell v. Butler*, 14 Johns. 349.

It was attacked in *Dean v. Hall*, 17 Wend. 214, and in *Seabury v. Hungerford*, 2 Hill, 80, and was finally overthrown in *Hall v. Newcomb*, 3 Hill, 233, and the same case in error, 7 Hill, 416.

There are a few cases in the books which hold that a written contract of one kind may be turned into a contract of a different kind, by parol proof concerning the intention of the parties; that the indorser of a promissory note may, under certain circumstances, be charged as maker or guarantor; and that the guarantor of a promissory note may sometimes be charged as maker or indorser. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The court of errors was at first equally divided on the question, but after a second argument the court decided by a pretty strong vote to uphold contracts as they had been made by the parties, instead of making new contracts for them. *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 3 Hill, 233, 7 Hill, 416, in error, and *note*, p. 423; *Manrow v. Durham*, 3 Hill, 597.

Whether parol evidence will be received to vary the contract which arises from such indorsement when it is made in blank, is not entirely settled. In *Johnson v. Martinus*, 9 N. J. L. 182, it was held that parol evidence was competent to overcome the implied contract which resulted from a blank indorsement, on the ground that such indorsement is an inchoate and imperfect contract, and not a written instrument, nor entitled to its effect, protection, or immunity. This decision was made on the authority of *Herriek v. Carman*, 10 Johns. 224; *Hill v. Ely*, 5 Serg. & R. 333; *Barker v. Prentiss*, 6 Mass. 490.

"There was no error in receiving the evidence of the verbal agreement and understanding of the parties at the time of the making of the note. The object was to show a partial or total failure of the consideration for the note, and for that purpose the evidence was admissible." *Peterson v. Johnson*, 22 Wis. 21, was just such a case, and is decisive of the

the name of a third person indorsed on it in blank, the law presumes a contract of guaranty.

Upon principle there would seem to be no difference between a contract of guaranty and one of indorsement, which would exclude parol evidence in one case, and admit it in the other.

It was decided in a number of cases, all prior to *Johnson v. Glover*, *supra*, that one who is, apparently, by reason of his blank indorsement, liable as guarantor, might show by parol that, in fact, his contract was that of indorser.

Boynnton v. Pierce, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; *Eberhart v. Page*, 89 Ill. 550.

After these decisions came the case of *Wornden v. Satter*, 90 Ill. 160, in which the principle was applied to a case apparently of indorsement, and it was held proper to show, by parol, that a blank indorsement by the payee was, in fact, a guaranty.

Three of the judges dissent from the decision, and in *Johnson v. Glover* it was expressly overruled.

But it was perfectly consistent with, and indeed, the logical result of, the cases which held that a contract of guaranty could be varied by parol. And when it was overruled those decisions went with it, and the principle stated in *Johnson v. Glover* applies with equal force

to contracts of guaranty and indorsement, and that case overrules all prior contrary decisions.

When the payee of a note indorses it in blank, a contract is created which cannot be varied by parol. And yet his signature on the note is entirely consistent with an agreement that he should not be liable in case of dishonor. It is necessary for him to indorse the note, in order to pass title, and there would seem to be good reason for holding that he might show that he indorsed merely for that purpose, and that it was agreed that he should not be held liable. Yet that such evidence is not admissible is well settled.

Courtney v. Hogan, 93 Ill. 101.

If this is so in a case where his signature is perfectly consistent with an agreement that he should not be liable, the reasoning applies with much greater force to a case where he could have signed for no other purpose than to assume a liability. The law does not and cannot presume that his act in signing is a mere idle ceremony, and it therefore presumes a contract of guaranty, just as it presumes a contract of indorsement from the signature of the payee.

Underwood v. Hossack, 38 Ill. 208.

Mr. S. P. Douthart for appellees.

Craig, J., delivered the opinion of the court. This was an action brought by Kingsland

Point. Under the Wisconsin decisions (*Smith v. Carter*, 25 Wis. 283) and the same court has held that it is competent to show by parol evidence a contemporaneous agreement as to the manner in which a note is to be paid. *Jones v. Keyes*, 16 Wis. 562.

Whether parol evidence is allowed to determine the liability of the person signing before the payee is a matter upon which opinion is diverse. Many authorities take the ground that when it appears that the note was intended for the payee, or that the name was placed upon the back of the note before its delivery to the payee, that circumstance fixes the liability contracted as that of joint maker (*Good v. Martin*, 95 U. S. 94, 24 L. ed. 342; *Way v. Butterworth*, 108 Mass. 512), and excludes further inquiry. But this does not seem sufficient. See *Price v. Lavender*, 38 Ala. 390; *Hall v. Newcomb*, 7 Ill. 416; *Schneider v. Schiffman*, 20 Mo. 571; *Irish v. Cutter*, 31 Me. 536.

Others regard that circumstance as only determining that he cannot be regarded as an indorser, because he could not have had title to the note as indorsee, and as leaving it open for further inquiry whether he intended to be a joint maker or a guarantor. *Greenough v. Smead*, 3 Ohio St. 415.

In some cases it is held that he will be presumed to have signed for the payee's accommodation. *Barto v. Schenck*, 28 Pa. 447; *Schollenberger v. Nehr*, 28 Pa. 189; *Daniel*, Neg. Inst. § 715.

The doctrine of the principal case sustained.

While it is elementary law that parol evidence is incompetent to vary the terms of a written instrument, still it is equally well settled that, as between the original parties to commercial paper, such proof is admissible as will have a tendency to establish the character in which an indorser intended that he should be bound; and proof of this intention will counteract the prima facie presumptions which the law indulges with reference to the paper. *Riley v. Gerrish*, 9 Cush. 104; *Sylvester v. Downer*, 20 Vt. 365; *Owings v. Baker*, 54 Md. 82; *Nurre v. Chittenden*, 56 Ind. 465; *Pierce v. Irvine*, 1 Minn. 369; *Strong v. Riker*, 18 Vt. 555; *Quin v. 13 I. R. A.*

Sterne, 26 Ga. 224; *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343.

It has been held that a guaranty may be written by an indorsee over a blank indorsement, if such was the indorser's intention, and that such intention may be shown by parol. *Levi v. Mendell*, 1 Duvall, 77; *Ulen v. Kittredge*, 7 Mass. 238.

And it has been held that parol evidence is admissible to show that a blank indorsement was given by the indorser to the holder merely as a receipt or voucher on payment of the note by him as the maker's agent. *Davis v. Morgan*, 64 N. C. 570; *Andover v. Grafton*, 7 N. H. 238; 1 *Randolph*, Com. Paper, § 873.

Parol proof is admissible to show whether the indorsement was made before the indorsement of the payee, and before or after the instrument was delivered. If the indorsement was made before the payee became the holder of the note, then the party so indorsing the note may be charged as an original promisor. *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341.

So parol evidence that one of two joint makers of a promissory note signed as surety, in order to let in the defense that he was discharged by the holder giving time to the principal debtor, with knowledge of the suretyship is admissible. *Hubbard v. Gurney*, 84 N. Y. 457, overruling *Campbell v. Tate*, 7 Laus. 370, and *Benjamin v. Arnold*, 2 Hun, 447, 5 Thomp. & C. 54. See generally, on this subject, *Rice*, Ev. p. 1137.

In *Free v. Hawkins*, 8 Taunt. 92, it was held that evidence of a parol agreement between the holder and the indorser of a promissory note, at time of making and indorsing it, that payment should not be demanded of the maker of the note at the time when it became due, nor until after the sale of certain estates of the maker, was inadmissible, because it controlled and varied the legal obligations of the indorser.

The extent to which parol evidence is admitted to explain or qualify the indorsement of commercial paper is the subject of an extended note to *Baxter Nat. Bank v. Talbot* (Mass.) *ante*, 52.

Bros. & Co., the appellants, against Koeppe, Schwuchon, Klinge, and Loring, to recover a balance due, on certain promissory notes executed by the Lake View Electric Light Company, and payable to the plaintiffs. At the date of the execution of the notes by the corporation, the four defendants wrote their names across the back of the notes, and they were sued in this action as guarantors. On the trial in the circuit court, one of the defendants, Loring, withdrew his pleas, and judgment was rendered against him by default for the full amount claimed by the plaintiffs. Nothing need therefore be said as to him at present. The other defendants claimed that they were not guarantors of the notes, and offered parol evidence to show what the contract was between them and appellants at the time they placed their names on the backs of the notes. The court admitted the evidence, and, in the propositions of law submitted, held that it was competent to prove by parol evidence what the real contract between the parties was; and this ruling was affirmed in the appellate court. 35 Ill. App. 81.

Where the payee of a note indorses it by placing his name on the back of the instrument, a contract of indorsement is created; the liability assumed by the payee being established by the writing. Parol evidence to change or vary the terms or conditions of a contract is not admissible. *Mason v. Burton*, 54 Ill. 358; *Johnson v. Glover*, 121 Ill. 283, 10 West. Rep. 125; *Jones v. Albre*, 70 Ill. 34; *Woodward v. Foster*, 18 Gratt. 200.

But where a person who is not the payee of a promissory note, but a third party, places his name on the back thereof, a different question arises. In such case the rule long established in this State is that it may be shown by parol evidence what liability was intended to be assumed. In an early case (*Cushman v. Dement*, 4 Ill. 497), where a third party wrote his name across the back of a note, it was held that the indorsement was prima facie evidence of a liability in the capacity of a guarantor, but the legal presumption was liable to be rebutted by parol proof.

In *Boynnton v. Pierce*, 79 Ill. 145, where the obligation of a guarantor arose, it was expressly held that the presumption that a party, not the payee, who places his name on the back of a note is a guarantor, may be rebutted by parol evidence. In *Stowell v. Raymond*, 83 Ill. 120, where the question again arose, the same rule was declared. The question again arose in *Eberhart v. Page*, 89 Ill. 550, and in deciding the case it is said: "The indorsement of a note in blank by a third party raises a presumption only that it is intended thereby to assume the liability of guarantor, which may be rebutted by proof that the real agreement between the parties was different." From the cases cited it is apparent that this court is fully committed to the doctrine that, when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be introduced to prove what liability was in fact assumed. It is conceded in the argument of appellants that the cases cited fully establish the rule indicated; but it is insisted that these cases were virtually over-

ruled by *Johnson v. Glover*, 121 Ill. 283, 10 West. Rep. 125. This is a misapprehension of the force and effect of that decision. In that case, Johnson, who was the payee of a note, indorsed it in blank, and the note subsequently fell into the hands of Glover, who sued Johnson as a guarantor; and it was held that he was not a guarantor, but an indorser, and that parol evidence was not admissible to vary or change the character of the liability he had assumed. It is there said: "The general rule is that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of an indorser as fully as if the agreement was written out in words [citing authorities]. Parol evidence is no more admissible to contradict or vary this contract than any other written contract." What was decided in this case, and what was said, had reference solely to a payee of a promissory note who had indorsed the note in blank, and had no bearing whatever upon the rights or obligations of a third party who had placed his name on the back of a note. Moreover, it is manifest that there was no intention to overrule or modify the doctrine announced in *Boynnton v. Pierce*, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; and *Eberhart v. Page*, 89 Ill. 550,—from the ruling in *Dewitt County Bank v. Nixon*, 125 Ill. 618.

This case was heard and decided some time after *Johnson v. Glover* had been decided, and the doctrine of *Boynnton*, *Stowell*, and *Eberhart* Cases was approved, and those cases were cited as sustaining the rule announced. We think, therefore, that the ruling of the circuit court, in the admission of evidence, that the defendants might resort to parol evidence to prove what contract was made between the parties was correct. The signature of the defendants written on the back of the notes was prima facie evidence that the defendants assumed the liability of guarantors; but whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the trial court, who heard the cause without a jury, which does not arise here, and upon which we express no opinion. Whether the propositions of law held or refused by the court are technically accurate it will not be necessary to determine, as the judgment will have to be reversed on other grounds. What has already been said may be regarded as sufficient on another trial to obviate any supposed error in this regard.

As was said in the first part of this opinion, judgment was rendered against one of the defendants by default, and in the trial the court found in favor of the other defendants, and judgment was rendered in their favor against the plaintiffs. The plaintiffs now assign as error the rendition of judgment in their favor against one of the defendants. This error was well assigned. *Thayer v. Finley*, 36 Ill. 262.

The action was brought on a joint contract, and the general rule in such cases is that judgment must be rendered against all or none. *Davidson v. Bond*, 12 Ill. 84; *Clafin v. Dunne*, 129 Ill. 248.

The judgments of the Appellate and Circuit Courts will be reversed and the cause remanded to the Circuit Court.

NEW YORK COURT OF APPEALS (2d Div.).

Adolph TODE *et al.*, *Respts.*,Lena GROSS, *Appl.*

(.....N. Y.....)

1. A five years' restriction on the use of a secret process and trade-marks sold with a business is not an illegal restraint of trade, though it applies not only to the seller but to those employed by or associated with her in the business.

2. A covenant by one selling a business that she, her father, husband and brother-in-law will refrain from communicating a secret recipe used in the business to anyone but the buyer and from using trade-marks connected with the business under a penalty of \$5,000 named as stipulated damage in case of a violation of the covenant within five years does not limit her liability for such damages to her own personal violation of the covenant, but extends it to a violation by any of the persons named.

3. "The penalty of \$5,000 which is hereby named as stipulated damages" for violation of a covenant made on the sale of a business not to reveal a secret process or use trade-marks belonging to the business is to be regarded as stipulated damages notwithstanding the use of the word "penalty."

(October 6, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Orange County in favor of plaintiffs in an action brought to recover the alleged stipulated damages for breach by defendant of her covenant not to permit certain persons to sell certain brands of cheese. *Affirmed.*

Statement by *Vann, J.*:

Action for breach of covenant to recover the sum of \$5,000 as stipulated damages. On the

NOTE.—Property in secrets; processes; recipes.

A secret process of manufacture, whether it is a proper subject for a patent or not is so far the property of the inventor or discoverer that he will be protected by the court of chancery against one who in violation of contract or any breach of confidence attempts to apply it to his own use or to disclose it to third persons. *Peabody v. Norfolk*, 98 Mass. 482; *Morison v. Moat*, 9 Hare, 241; *Yorvatt v. Winyard*, 1 Jac. & W. 394.

The law is settled in accordance with these cases, although *Lord Eldon* in the early case of *Newberry v. James*, 2 Meriv. 446, inquired what means a court possessed of enforcing an injunction in such a case and a little later in the case of *Williams v. Williams*, 3 Meriv. 157, queried whether there was any right to such a remedy.

But a person has no right to the exclusive use of secret recipes further than to prevent them from being obtained or used by breach of trust or confidence. He cannot prevent their use by one who comes honestly to a knowledge of them and the latter may signify to the public that medicines which he makes are made according to such recipes. *Chadwick v. Covell*, 6 L. R. A. 639, 151 Mass. 190.

Thus a purchaser of recipes for medicines from the administrator of their deceased maker has a right to use them although they had been previously conveyed to a third person, and his own deed makes an exception of rights previously granted. *Ibid.*

Nor will the right of such a purchaser, if it is not exclusive, become so by the grant of the trade-name and trade-marks pertaining to medicines made according to the recipes. *Ibid.*

A person will be protected against disclosure of his own secret process in an action for account against him as a licensee of plaintiff's process where he sets up a plea of "secret process;" but he cannot refuse to give any discovery as to the extent of his use of plaintiff's process. *Ashworth v. Roberts*, L. R. 45 Ch. Div. 623.

A son to whom a secret recipe had been verbally communicated by his mother for the benefit of his brothers and sisters was held liable to account to them as trustee for the profits obtained from the recipe. *Green v. Folgham*, 1 Sim. & Stu. 396.

A clerk who stands by and sees another purchase of his employer a secret recipe without disclosing his own knowledge of its contents or claiming any right to use it may be enjoined by such purchaser. 13 L. R. A.

on the ground of estoppel from afterwards setting up any such right. *Champlin v. Stoddart*, 30 Hun, 300.

Secret code or catalogue.

The inventor of a secret code or system of letters, figures and characters showing the cost and selling price of his wares and merchandise which he furnishes to his traveling salesmen has a property therein which the law will protect; and if the law is inadequate he may have a temporary injunction and receiver. *Simmons Hardware Co. v. Waibel* (8. Dak.) 11 L. R. A. 267.

Where other parties have wrongfully or fraudulently obtained a knowledge of such code or system and the key thereto, and have copied it into a catalogue of their own, the court may take such marked catalogue into its possession through a receiver and retain it pending the action, and order it to be delivered up to the owner of the original catalogue, or at least that the secret marks shall be erased or canceled before returning it to its owner. *Ibid.*

Validity of contracts relating to secrets.

A contract to purchase the exclusive right to a secret art or process is not void as in restraint of trade. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Vickery v. Welch*, 19 Pick. 523; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Alcock v. Gibertson*, 5 Duer, 76; *Hard v. Sealey*, 47 Barb. 423.

But an injunction will not lie to restrain the seller from revealing the secret to others at the suit of a purchaser whose payments are in default. *New York Chemical Co. v. Halleck*, 15 N. Y. Supp. 517.

But a trade, although not generally known to the public, cannot be held secret so as to justify a contract which is otherwise void in restraint of trade to restrain a partner after dissolution from engaging afterwards in the trade anywhere within the State, where it is carried on in three different towns of the State by persons not connected with the contract. *Taylor v. Blanchard*, 13 Allen, 373.

A contract of an employé not to disclose a secret of the business is valid and its violation may be prevented by injunction. *Peabody v. Norfolk*, 98 Mass. 482.

And assumpsit will lie for breach of an agreement by the defendant not to take advantage of the communication of a secret invention not yet patented, where he obtained a patent for himself in violation of the agreement. *Smith v. Dickenson*, 3 Bos. & P. 630.

B. A. R.

15th of October, 1884, the defendant owned a cheese factory situate in the Town of Monroe, Orange County, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheese at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good will, custom, trade-marks, and names used in and belonging to the said business," for the sum of \$25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part [plaintiffs], and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part [defendant], or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said County of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part [plaintiffs], impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same." Both parties appear to have duly kept and performed the agreement, except that, as the trial court found "subsequently to the 1st day of May,

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1885, Conrad Gross, the husband of defendant, went to New York City, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, etc.,' . . . and while so engaged sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the City of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York City boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," as well as that kept for sale by August Gross marked "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of \$5,000 as stipulated damages.

Mr. John Fennel, for appellant:

The trial judge having found that the defendant did not know of the violations, and there being no proof that the defendant had violated the covenant, there was no such breach as entitled the plaintiff to recover the \$5,000.

Leggett v. New York Mut. L. Ins. Co. 53 N. Y. 397, 398. See also *Houg v. McGinnis*, 22 Wend. 168.

In every case in which a party was held to pay the stipulated sum, it was because of a personal breach, the courts holding that the payment of the sum could have been avoided by the compliance with the contract, and hence the party held could not complain.

Bagley v. Peddie, 16 N. Y. 471.

No damages have been proven except nominal damages.

The provision in the agreement "under the penalty of \$5,000, which sum is hereby named as 'stipulated damages,'" is a penalty. *Bagley v. Peddie*, *supra*; *Kemp v. Knickerbocker Ice Co.* 69 N. Y. 58.

If a bond is conditioned for the performance of a covenant, the penalty is not recoverable and *quantum damnificatus* is the true thing in issue.

Beers v. Shannon, 78 N. Y. 308.

Whether a sum named is a penalty or stipulated damages should be determined according to the justice and equity of the particular case.

1 Sedgw. Dam. p. 478, citing *Jaquith v. Hudson*, 5 Mich. 123.

It is unjust to compel defendant "to suffer an enormous loss, wholly disproportionate to the injury to the other party."

1 Sedgw. Dam. p. 480; *Basye v. Ambrose*, 28 Mo. 39; *Jaquith v. Hudson*, *supra*; *Beale v. Hayes*, 5 Sandf. 640; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 18, 5 L. ed. 384; *Remond v. Van Benschooten*, 12 Barb. 366; *Colwell v. Lawrence*, 38 N. Y. 75, citing *Hoag v. McGinnis*, 22 Wend. 165; *Spear v. Smith*, 1 Denio, 464; *Lampman v. Cochran*, 16 N. Y. 275; 1 Sedgw. Dam. p. 527.

Messrs. Bacon & Merritt, for respondents:

The covenant in question is not void as being in restraint of trade, because: (1) it was not limited as to time; (2) it was a covenant not affecting general trade at all, but affecting the use of trade-marks and secret recipes which were the very property sold by the defendant to the plaintiffs.

Ainsworth v. Bentley, 14 Week. Rep. 680; *Stiff v. Cassell*, 2 Jur. N. S. 348; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Leather Cloth Co. v. Loroont*, L. R. 9 Eq. Cas. 845; *Hitchcock v. Coker*, 6 Ad. & El. 488; *Roussillon v. Roussillon*, 42 L. T. N. S. 679; *Davies v. Davies*, 58 L. T. N. S. 209. 37 Alb. L. J. 408; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373; *Peabody v. Norfolk*, 98 Mass. 452; *Morse T. Drill & M. Co. v. Morse*, 103 Mass. 78; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Hard v. Seeley*, 47 Barb. 428; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 478; *Hodge v. Sloan*, 9 Cent. Rep. 870, 107 N. Y. 244; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 533; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; 2 Story, Eq. Jur. § 950.

The fact that this covenant not only provided against the acts of the defendant herself, but also as against the acts of her husband her father and brother-in-law, does not relieve her of liability. If a party enters into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract and either do the act or pay damages, his liability arising from his own direct and positive undertaking.

Shubrick v. Salmond, 3 Burr. 1687; *Hadley v. Clarke*, 8 T. R. 259; *Hand v. Baynes*, 4 Whart. 204; *Trenton School Trustees v. Bennett*, 27 N. J. L. 514; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; *Beebe v. Johnson*, 19 Wend. 500; *Parr v. Greenbush*, 42 Hun, 232; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272.

Plaintiff was entitled to recover \$5,000 as liquidated and stipulated damages. The use of the word "penalty" is not important if upon a construction of the whole covenant it is obvious that the parties intended that the amount provided should be stipulated damages.

Price v. Green, 16 Mees. & W. 846; *Dakin v. Williams*, 17 Wend. 447; *Knapp v. Maltby*, 13 Wend. 587; *Bagley v. Peddie*, 16 N. Y. 469; *Woster v. Kisch*, 26 Hun, 61.

Vann, J., delivered the opinion of the court:

The business carried on by the defendant was founded on a secret process known only to her-
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self and her agents. She had the right to continue the business, and by keeping her secret to enjoy the benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from everyone else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 9 Cent. Rep. 181; *Hodge v. Sloan*, 107 N. Y. 244, 9 Cent. Rep. 870; *Leslie v. Lorillard*, 110 N. Y. 519, 534, 1 L. R. A. 456; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if anyone, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore,

to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of \$5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary

to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person. The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. *Bagley v. Peattie*, 16 N. Y. 469; *Dakin v. Williams*, 17 Wend. 448, affirmed, 22 Wend. 201; *Wooster v. Kisch*, 26 Hun, 61.

As there is no other question that requires discussion, *the judgment should be affirmed, with costs.*

All concur, except **Brown, J.**, not sitting.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel ROTHHOLZ, *Plff. in Err.*,
v.

Oliver R. DUNKLE.

(.....N. J.....)

***A communication made by the cashier of a bank to a stockholder with reference to the solvency of the plaintiff, who was surety upon an official bond to the bank, is privileged; and it is not necessary, to justify the communication, that it be in response to an inquiry made by the stockholder.**

(June 16, 1891.)

ERROR to the Circuit Court for Atlantic County to review a judgment in favor of defendant in an action brought to recover damages for the publication of an alleged libel. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. August Stephany**, for plaintiff in error:

*Head note by VAN SYCKEL, J.

NOTE.—Libel; privileged communications. See notes to *John W. Lovell Co. v. Houghton* (N. Y.) 6 L. R. A. 333; *Missouri Pac. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280; *Moore v. Manufacturers Nat. Bank of Troy* (N. Y.) 11 L. R. A. 763. 13 L. R. A.

To in any way impute insolvency to any merchant or trader, or to write concerning him that he cannot pay his debts, is libelous, and therefore actionable.

Odgers, Libel & Slander, 22, 30.

Although the rest of defendant's letter was privileged, because written in answer to Mr. Ohnmeiss' questions, yet the libelous words, being volunteered, were not privileged under the circumstances. A letter may be privileged as to one part and not as to the rest.

Odgers, Libel & Slander, 199; *Warren v. Warren*, 1 Crompt. M. & R. 250; *Cole v. Wilson*, 18 B. Mon. 212; *Godson v. Home*, 1 Brod. & B. 7; *Lewis v. Chapman*, 16 N. Y. 369.

A communication, if volunteered, will be privileged when the party to whom it is made has an interest in it, and such party stands in such relation to the communicator as to make it a reasonable duty, or at least proper, that he should give the information.

King v. Patterson, 8 Cent. Rep. 357, 49 N. J. L. 417; *Marks v. Baker*, 28 Minn. 162; *Locke v. Bradstreet Co.* 22 Fed. Rep. 771; *Erber v. R. G. Dun & Co.* 12 Fed. Rep. 526; *Crane v. Waters*, 10 Fed. Rep. 619.

That anyone, in a transaction of business or employment with another, has a right to use language bona fide which is relevant to that business or employment, and which a due re-

gard for his own interest makes necessary, will not justify defamatory aspersions against character, or wanton and gratuitous charges.

Tuson v. Beane, 12 Ad. & El. 788; *Toogood v. Spyrring*, 1 Crompt. M. & R. 181; *Robertson v. McDougall*, 4 Bing. 670; *Addison, Torts*, § 1100; *Fahr v. Hayes*, 11 Cent. Rep. 558, 50 N. J. L. 275.

No charge should ever be made recklessly and wantonly, even in confidence, and the answer must be pertinent to the inquiry, and the defendant must not commence to disparage the plaintiff's credit.

Odgers, *Libel & Slander*, 199, 204, 205.

Officious gossip and meddlesome interference are not privileged.

Rumsey v. Webb, 1 Car. & M. 104; Odgers, *Libel & Slander*, 206.

If the bona fides of the defendant is in question, and when the occasion was made use of colorably as a pretext for wantonly injuring the plaintiff, a question arises which must be decided by the jury.

Odgers, *Libel & Slander*, 206, 218; Hageman, *Privileged Communications*, 197; *Palmer v. Concord*, 48 N. H. 217; *Elam v. Badger*, 28 Ill. 498; *Hamilton v. Eno*, 81 N. Y. 116; *Van Wyck v. Aspinwall*, 17 N. Y. 190.

If the defendant exceeded the just limits which were necessary and proper to accomplish a legitimate purpose, it will be evidence of malice proper to be weighed by the jury.

Andrew v. Deshler, 45 N. J. L. 171.

Mr. Howard Carrow, for defendant in error:

The question in every case is this: Were the circumstances such that an honest man might reasonably suppose it his duty to act as the defendant has done in this case?

Odgers, *Libel & Slander*, 157.

Where the occasion is privileged the burden of proving actual malice is upon the plaintiff; its existence must be made out, the presumption being that it does not exist.

Decker v. Gaylord, 35 Hun, 584; *Lewis v. Chapman*, 16 N. Y. 872; *Spill v. Maule*, L. R. 4 Exch. 282; *Briggs v. Garrett*, 2 Cent. Rep. 864, 111 Pa. 404; *Press Co. v. Stewart*, 12 Cent. Rep. 275, 119 Pa. 584; *State v. Balch*, 31 Kan. 472; *Guilford v. Windell*, 42 Phila. Leg. Int. 344; *Laughton v. Bishop of Soder & Marr*, L. R. 4 P. C. 504; *King v. Patterson*, 8 Cent. Rep. 875, 49 N. J. L. 419; *Toogood v. Spyrring*, 1 Crompt. M. & R. 181.

Van Syckel, J., delivered the opinion of the court:

This is an action for damages for an alleged libel contained in the following letter, written by Oliver R. Dunkle, the cashier of the Merchants' Bank of Atlantic City:

"Robert Ohnmeiss, Esq.: Inclosed please find one share of Merchants' stock received some time ago. Our board refuses to purchase at present, but hold under advisement. We have stricken your name from the bond of Mr. Carl Voelker by request; also Samuel Rothholz's, as the latter has no financial standing. Respectfully, O. R. Dunkle, Cashier."

Robert Ohnmeiss was a stockholder in the same bank, and he and Rothholz, the plaintiff, were sureties on the official bond of Carl Voelker, an employé of the bank. Previous to the

writing of this letter, Ohnmeiss had requested Dunkle to have his name stricken from the said bond, but did not make any inquiry with respect to the plaintiff, Rothholz. At the close of the plaintiff's case, the trial judge, regarding the communication a privileged one, ordered the plaintiff to be called. Whether, under the given circumstances, the nonsuit should have been ordered is the sole question in this court.

The statement that the plaintiff had no financial standing was libelous, and constituted a legal foundation for the recovery of damages, unless the occasion upon which it was uttered gave rise to the privilege of publishing what would otherwise be actionable. The term "privilege," as applied to a communication alleged to be libelous, means, simply, that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the falsity of the charge. This court, in *King v. Patterson*, 49 N. J. L. 419, 8 Cent. Rep. 875, declared "that a communication, made bona fide, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it may contain criminatory matter which, without this privilege, would be . . . actionable." In the case cited the learned judge who delivered the opinion of the court referred with approbation to *Lawless v. Anglo-Egyptian C. & Oil Co.* L. R. 4 Q. B. 262, and to *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 202, 16 L. ed. 73. The first of these cases was an action for libel against a corporation for publishing a report made to the company by auditors, in their audit of the manager's account, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and, under a resolution of the meeting, was printed and circulated among the shareholders. The court held that, inasmuch as it was the interest of all the shareholders to be informed of the report, the publication was privileged, on the ground, as Mellor, J., said, "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous." In the second case a report made to stockholders in writing, and printed, with respect to the capacity and skill of one of the company's employés, was held to be a privileged communication. These cases are referred to for the purpose of showing that a communication to a shareholder of a corporation touching matters which concern the corporate body are within the rule of privilege, which secures the immunity to the official who makes the publication. Ohnmeiss being not only a co-surety with Rothholz upon the official bond of Voelker, but also a shareholder in the bank, he had the right to receive the information imparted to him by Dunkle, the cashier. The fact that Rothholz's name had been taken from a bond held by the bank, and the reason for removing it, was a matter which concerned Ohnmeiss. As a stockholder he could justly have complained if a competent security had been improperly surrendered by those who conducted the affairs of

the bank. It was not necessary, to justify the communication, that it should have been in response to an inquiry made by Ohnmeiss.

In *Waller v. Lock*, 45 L. T. N. S. 248, Jessel, M. R., says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one." In my judgment, the circum-

stances under which the letter was written upon which this suit is based, repel the inference of an improper motive on the part of defendant, and cast upon the plaintiff the burden of proving malice.

No evidence having been produced in the trial court to show malice in the publication, the non-suit was properly ordered, and the judgment below should be affirmed.

TEXAS SUPREME COURT.

J. S. SELLERS, *Appt.*,

v.

TEXAS CENTRAL R. CO. *et al.*

(.....Tex.....)

No reservation of a right to flood lands, conveyed by a railroad company, with water of a river backed up by the faulty construction of the embankment on which its tracks are laid, will be implied from the mere fact that the conveyance was made after the embankment was finished.

NOTE.—Implied reservations.

It is now settled law in England that a reservation out of a grant will not be implied except in case of necessity. *Crossley v. Lightowler*, L. R. 2 Ch. App. 478.

The right to foul a stream from dye works cannot be reserved by implication. *Id.*

Neither will an easement of light and air for windows be so reserved on the sale of a vacant lot. *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 81; *White v. Bass*, 7 Hurlst. & N. 722; *Ellis v. Manchester Carriage Co.* L. R. 2 C. P. Div. 18; *Russell v. Watts*, L. R. 25 Ch. Div. 550.

Nor an easement for the projection of bowsprits of large vessels at a dock over a neighboring coal wharf on the sale of the latter. *Suffield v. Brown*, 4 De G. J. & S. 185.

Of right of way.

An implied reservation of a right of way over land sold will be made only in case of strict and absolute necessity (*Shoemaker v. Shoemaker*, 11 Abb. N.C. 80); and not of a way merely for convenience. *Mitchell v. Seipel*, 53 Md. 251.

But it may be upheld in case of an alley over premises sold with a house where it is the only means of access to another house. *Durel v. Boisblanc*, 1 La. Ann. 407.

And in Pennsylvania the use of an alley which was open and apparent, having a gate set up, was held to be reserved though not strictly a way of necessity. *Cannon v. Boyd*, 73 Pa. 179.

An express reservation of an archway on the sale of a house was held to imply a reservation of the use of a passageway under it to reach a stable in the rear. *Davies v. Sears*, L. R. 7 Eq. Cas. 427.

On the other hand, a right of way of necessity is not reserved where the grantor expressly releases an existing right of way although his land is thus left entirely shut in from the public road. *Richards v. Attleboro Branch R. Co.* 153 Mass. 120.

These two cases last referred to may perhaps be considered as turning on the construction of the contracts rather than on the question of implied reservation.

Of stairways and hallways.

An easement of evident necessity in stairways and hallways is reserved on the sale of part of a
13 L. R. A.

(June 19, 1891.)

APPEAL by plaintiff from a judgment of the District Court for Bosque County in favor of defendants in an action brought to recover damages for injuries caused to plaintiff's property by the backing up of the water of a river on account of the alleged faulty construction of defendant's railroad embankment. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Knight, Crane & Ramsey* for appellant.

Mr. L. C. Alexander for appellees.

building. Dillman v. Hoffman, 38 Wis. 559; *Thompson v. Miner*, 30 Iowa, 386.

The same rule applies where a lessee sublets the first floor of the building so arranged that the necessity of his own use of the stairway, hall, etc., is apparent. *Benedict v. Barling* (Wis.) May 5, 1891.

In Wisconsin a reasonable necessity as distinguished from an absolute necessity is sufficient to sustain an implied reservation of the use of stairways, etc. *Galloway v. Bonesteel*, 65 Wis. 80.

But such use of stairways is not reserved where other independent entrances exist. *Outerbridge v. Phelps*, 58 How. Pr. 77; *Schrymser v. Phelps*, 62 How. Pr. 1.

Of dam and race.

In Pennsylvania the use of a dam and race on land sold for supplying with water a mill retained by the grantor was held to be reserved by implication. *Seibert v. Levan*, 8 Pa. 383.

There are exactly contrary decisions in New York and Maine. *Burr v. Mills*, 21 Wend. 290; *Preble v. Reed*, 17 Me. 175.

In New Jersey a similar reservation of the use of a spring and an artificial conduit on land sold for the benefit of a paper mill on another tract was upheld; the court, like the courts of Pennsylvania, seeming to extend the doctrine of implied reservations beyond cases of strict necessity. *Seymour v. Lewis*, 13 N. J. Eq. 430.

Of use of drain.

No implied reservation of the use of a drain which is not apparent exists on the sale of premises over which it runs, at least where another could be made at reasonable expense, and therefore such use is not a necessity. *Randall v. McLaughlin*, 10 Allen, 386; *Carbrey v. Willis*, 7 Allen, 389; *Butterworth v. Crawford*, 46 N. Y. 349; *Scott v. Deutel*, 23 Gratt. 1. *Contra, Pyer v. Carter*, 1 Hurlst. & N. 916. But this last case has been completely overruled in the later English cases cited at the beginning of this note.

There is another class of cases, not considered in this note which relate to easements, where the premises affected are sold simultaneously to different purchasers.

R. A. R.

Gaines, J., delivered the opinion of the court:

Appellant brought this action to recover of the Texas Central Railway Company, and of Dillingham and Clark, as receivers of its property, operating its railroad, damages for the destruction of a stock of goods by an overflow of the Bosque River. The overflow was alleged to have resulted from the negligent construction of the bed of the railroad across the valley of the river. The defendant filed a special answer to the petition, in which it was averred, in substance, that at the time the railroad was constructed the Railroad Company owned the land along the river at the place of the embankment, including as a part thereof the lot upon which the plaintiff's goods were stored at the time of the overflow, and that the plaintiff held the lot "under a purchaser from said Company, who purchased the same after the erection of said railroad and embankment,

... whose title was governed by a conveyance from said Company, containing a clause warranting the title to the same against all persons claiming or to claim the same by, through, or under its assigns or successors." It was also alleged that the parcel of land so conveyed was a lot in a town which had been laid off by the company prior to the conveyance, and that at the time the Company sold this lot it also sold other lots in the town to other persons. The plaintiff demurred to this special answer, but the demurrer was overruled. The sufficiency of the answer is practically the only question presented by this appeal. The determination of the appeal resolves itself into the inquiry whether in the conveyance of the lot by the Company there was an implied reservation of the right to flood the granted premises in case of freshets by retaining the embankment as it then existed. The questions of grant of easements by implication, and of implied reservations of easements, have given rise to much conflict of opinion. A distinction is generally recognized between an implied grant and an implied reservation. It is conceded to be the settled law in England "that, when the owner of two adjoining lots sells one, he does not reserve impliedly for the benefit of the other any easements except those of a strict necessity; . . . but that he does impliedly grant to the grantee all continuous and apparent easements which are necessary for the reasonable use of the property granted, and which have been or are at the time of the grant used by the owner of the entirety for the benefit of the part granted." Washb. Easem. 4th ed. p. 105.

The reason for denying a reservation by implication is that to permit it would be to allow the grantor to derogate from the grant. Many of the American courts of the highest authority adhere to the English doctrine as to implied reservations, though there are others which lay down a rule more favorable to the grantor. The Supreme Court of Maine has decided that "where the owner of land flowed by a mill-dam sells the mill and dam, and retains the land, the right to flow the land to the extent it was then flowed without payment of damages passes by the grant; but where the owner sells the land flowed, and retains the mill and dam without reserving the right to

flow, he is not protected from the payment of damages." *Preble v. Reed*, 17 Me. 169; *Burr v. Mills*, 21 Wend. 289; *Goddard, Easem.* 124; Washb. Easem. 4th ed. 54; Gould, Waters, § 354.

Even those courts which hold that a reservation of an easement may be implied beyond strict necessity restrict the rule to such easements as are "apparent and continuous." An apparent easement is one which is obvious. Applying that rule to the facts of this case, can it be said that it obviously appeared to the purchaser that the lot which was sold was flooded by the embankment? The embankment itself was doubtless obvious enough. But it would seem to us that the purchaser might have reasonably presumed that the Company had availed itself of competent engineering skill, and had so constructed its works as not to impede the natural flow of the water. Under such circumstances, we think it should not be held that the company, by mere implication, reserved a right to flow the land without paying damages therefor. There is much that commends them to favorable consideration in the remarks upon the question of *Chief Justice Ryan*, of the Supreme Court of Wisconsin: "We may say, however, in passing, that it is always safest to let written contracts speak for themselves. This rule is often relaxed with doubtful expediency. Parties ought to make their own contracts complete. Alienations of land are, or ought to be, grave and deliberate transactions. Every conveyance should contain 'the certainty of the thing granted to the full extent of the grant.' What may be expressed enlarging or restricting the grant in particular cases should not be left to implication. It is often difficult, as the cases show, to determine what shall be implied in conveyances by way of grant or reservation of easement; what parties who might have spoken shall be held to intend by their silence; and, because 'a deed shall be construed most strongly against the grantor,' this view applies with great force against implied reservations in the servient estate conveyed by the owner of the dominant estate. Indeed, it is remarkable that the doctrine of implied grant of easement in the land of the grantor once rested very much on the principle that the grantor should not be heard to derogate from his grant (*Horton v. Frearson*, 8 T. R. 50); and yet the same doctrine has been extended to implied reservations to the grantor in what he conveys, in direct derogation of his grant. On principle, therefore, we should be disinclined to enlarge or limit estates granted by implication of law, further than a general current of decisions might oblige us." *Dillman v. Hoffman*, 38 Wis. 573. We think there was no implied reservation in this case, and that the demurrer to the answer should have been sustained. The defendant receivers put in a demurrer to the petition, which was overruled by the court. The appellees have filed no cross-assignments of error, and the question of their liability is not before the court. The counsel for appellees admit this.

For the error of the court in sustaining the demurrer to the special answer, *the judgment is reversed*, and the cause remanded.

ALABAMA SUPREME COURT.

A. H. ALSTON *et al.*, *Appts.*,
v.

STATE OF ALABAMA.

(92 Ala. 124.)

1. The addition to the name of the depositor in an account with a bank of the words "judge of probate, license money," is not alone sufficient to make deposits on such account special.
2. A judge of probate cannot relieve himself from the duty imposed upon him by law of turning over to the State all moneys received by him as license fees by showing that it had been lost by the failure of a bank in which he had deposited it in good faith at a time when it enjoyed the confidence of the business world, where the deposits made were general ones, since he had no right to make such deposit under the Code provision that he could not use the money himself or permit anyone else to use it.

(June 25, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Barbour County in favor of plaintiff in an action on the official bond of defendant, Alston, to recover the amount of license money which he had received and neglected to turn over to the State. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Lawrence H. Lee and Peach & Evans* for appellants.

Mr. William L. Martin, Atty.-Gen., for the State:

A credit given for the amount of a check by the bank upon which it is drawn is equivalent to and will be treated as a payment of the check. It is the same as if the money had been paid over the counter on the check and then immediately paid back to the account of the depositor.

Morse, Banks & Banking, §§ 451, 569; *City Nat. Bank of Selma v. Burns*, 68 Ala. 267; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160.

Whether the deposit here in question was general or special is immaterial. The bank is bound to exercise ordinary care and no more in keeping a special deposit.

Morse, Banks & Banking, §§ 188, 194.

A deposit is general unless expressly made special.

Morse, Banks & Banking, § 186.

A general deposit is in legal effect a loan by the depositor to the bank, the title to the money passing to the bank.

Morse, Banks & Banking, § 289.

The statutes of Alabama, construed on principles of public policy, exact of officers charged with collecting, keeping, and paying over the public revenue, the highest care, vigilance, and diligence known to the law, such as a very prudent and cautious man exercises in respect to the most important matters.

State v. Houston, 78 Ala. 576.

There is no statute in Alabama authorizing public officers to deposit public funds in bank; 13 L. R. A.

hence the deposit in this case was an unauthorized conversion of the State's money.

Code 1886, §§ 3803, 3805.

A public officer is not discharged from liability for public funds deposited by him in bank without legislative authority, and which are lost by reason of the failure of the bank.

State v. Powell, 87 Mo. 935, 29 Am. Rep. 512; *State v. Moore*, 74 Mo. 418, 41 Am. Rep. 322; *Lowery v. Polk County*, 51 Iowa, 50, 38 Am. Rep. 114; *Ward v. Colfax Co. School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477; *Inglis v. State*, 61 Ind. 212; *Wilson v. Wichita County*, 67 Tex. 647; *Havens v. Lathene*, 75 N. C. 505; *United States v. Freeman*, 1 Woodb. & M. 45; *Mechem*, Pub. Off. § 912; *Murphy*, Off. Bonds, § 200.

York County v. Watson, 15 S. C. 1, 40 Am. Rep. 675, which holds to the contrary view, seems to stand alone.

Walker, J., delivered the opinion of the court:

In such cases as the law prescribes a state or county license to engage in or carry on any business, or to do any act, the amount required for such license must be paid to the probate judge of the county in which it is proposed to engage in or carry on such business or to do such act. The money so paid for licenses being part of the revenue of the State or county, as the case may be, and received by the probate judge in his official capacity, he is prohibited, under criminal penalties, from knowingly converting or applying any of it to his own use, or to the use of any other person, or permitting another to use any of it; and he must, on the last day of each quarter, pay to the state treasurer the money received by him for such licenses belonging to the State, and to the county treasurer the money received by him for such licenses belonging to the county, less the amount of the commissions allowed to him by law. Code 1886, §§ 632, 633, 3803, 3805. The plain statutory requirements here referred to exert a controlling influence in the determination of the question presented in this case by the contention that the failure of the defendant Alston to pay to the State certain license money, which he collected, and with which he is chargeable as probate judge, should be excused on the ground that said license money has been lost by reason of the failure of a bank in which it had been deposited, at a time when said bank enjoyed the confidence and esteem of the business world, and of the embarrassment of which said Alston had no reason to know or suspect until after the failure was publicly announced. Can this excuse avail as a defense to the suit of the State to recover the amount of its license money so lost? This inquiry involves the question of right of the probate judge to make the deposit as he did. Alston, as probate judge, accepted payment of the license money in the check of the licensee, made payable "to county and State of Ala., or bearer." This check Alston presented to the bank, and had the amount thereof put to his credit on an account entered on the books of the bank with "A. H. Alston,

Judge of Probate, License Money." Deposits made with bankers are either general or special. In the case of a special deposit, the bank merely assumes the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor. *Boyd v. Bank of Cape Fear*, 65 N. C. 13; *Dawson v. Real Estate Bank*, 5 Ark. 297; *Lourey v. Polk County*, 51 Iowa, 50; 2 Am. & Eng. Encyclop. Law, 93; 1 Morse, Banks & Banking, § 188 *et seq.*

When a money deposit is made, it is to be regarded as a general deposit, unless there is evidence to show that it was the bank's duty, by agreement, express or clearly implied, to keep it separate and apart from its own funds, and to return that identical money to the depositor. Money received by a bank on general deposit becomes the property of the bank, and can be loaned or otherwise used by it, as other moneys belonging to it. The bank becomes the debtor of the depositor, and its obligation is satisfied by honoring the depositor's checks to the amount of his deposit. The depositor's claim is a mere chose in action for so much money. He becomes a creditor of the bank. *Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; 2 Am. & Eng. Encyclop. Law, 93, 94.

The words, "judge of probate, license money," annexed to the name of the depositor, served to distinguish that particular account, and to keep it separate from other dealings he might have with the bank. Moneys deposited on an account kept in that form would be more readily traced, and the bank, perhaps, would be chargeable with notice of the source from which the depositor derived funds which he directed to be credited to him in that way. But the addition of the words referred to would not operate to change the character of the deposit from a general to a special one. There is nothing to indicate that the amount charged against itself by the bank on this account was kept separate or unmingled with its own property. The contrary appears. Manifestly, the bank did not undertake to become the bailee of that license money. The effect of the transaction was simply to substitute one person to another's position, as a creditor of the bank, to the amount of the check deposited. The maker of the check had no property in the funds of the bank by virtue of his account therewith. The entry of the amount of the check on Alston's account was but a shifting of the bank's liability. So far as Alston was concerned, the bank, by accepting the deposit, merely became his debtor, and assumed the obligation to honor his checks to the amount so credited to him. *Havens v. Lathene*, 75 N. C. 505; *McLain v. Wallace*, 108 Ind. 562, 8 West. Rep. 359; 1 Morse, Banks & Banking, 3d ed. § 183; 2 Morse, Banks & Banking, 3d ed. § 604.

The money of the State was thus turned over to the bank on general deposit, and became a part of its funds, and subject to its use, as any other of its property. This use of the public money by the probate judge was without 13 L. R. A.

warrant of law. He had no right to convert it to his own use, or permit anyone else to use it. The deposit was of like effect as a loan of the money. It was an unauthorized use thereof. The probate judge by that act voluntarily relinquished his custody and control of this public fund, so that he could not reclaim it. When the State demands it, his answer is that he no longer has it, but has a claim for the amount thereof against an insolvent bank. In view of the statutory provisions above referred to, we think that this answer is wholly insufficient as a defense. The effect of the Statute is to make the probate judge the custodian of that money, and to prohibit him from permitting another to use it. Whether or not it would have been wise to authorize the deposit of the public funds in banks of reputed solvency was a matter for legislative determination. The Legislature has prohibited any such disposition of public moneys as is effected by a general deposit thereof in bank. The courts cannot recognize as legitimate and excusable that which the statutes have forbidden. They are without power to dispense with the requirements of the Statute, though it may be apparent that the defendant did not knowingly violate the law; that, in making the deposit, he was acting under a generally prevailing misapprehension that such disposition of public moneys was authorized; and that he may have honestly thought that it was the safest and most prudent thing to do, under the circumstances, until the arrival of the time when he was required to make payment to the State. The deposit itself having been unlawful, a violation of an official duty, and a breach of the condition of the bond, a defense which necessarily involves reliance upon that act as valid and authorized must unavoidably fail. *Lourey v. Polk County*, 51 Iowa, 50; *Ward v. Colfax Co. School Dist. No. 15*, 10 Neb. 294.

It would be outside of the issues in this case to undertake to specify what would be regarded as a discharge by an officer intrusted with public money of the duty to keep it safely until he is required to pay it over. In the case of *State v. Houston*, 78 Ala. 576, the defense that certain tax money which had not been paid over was taken from the collector's person by a robbery was set up in a suit on the tax collector's bond. The court there stated the elements essential to the validity of that defense. Clopton, J., delivering the opinion, said: "If, having observed the highest care, vigilance, and diligence to prevent loss, the collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money. We say, 'money belonging to the State;' for, if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes *eo instanti* a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case, subsequent robbery of money, substituted for the amount misused, is no defense. The robbery must be of money, the property of the State."

In the present case, as has been shown, the absolute liability, as for a debt, was fixed upon the probate judge and the sureties on his bond by the unauthorized deposit in bank; so that

no question is presented as to what the liability would have been if the probate judge had not voluntarily relinquished his custody of that license money. In the absence of any specific regulation as to the mode or place of keeping public funds, it would seem that the question as to whether or not the custody over them has been maintained with the highest degree of care, vigilance and diligence known to the law would depend, in a measure, upon the

particular situation of the officer charged with the preservation thereof, and upon the existence of means available to him of providing a place of safe keeping. This decision does not involve the assertion that the security afforded by bank vaults may not in any case be availed of by an officer intrusted with the custody of public moneys.

Affirmed.

PENNSYLVANIA SUPREME COURT.

H. W. PICKETT, Admr., etc., of John W. Moore, Deceased,
v.
PACIFIC MUTUAL LIFE INSURANCE
CO. of California, *Appt.*

(.....Pa.....)

1. **Death from asphyxia, occasioned by deadly gas** in a shallow well, into which one descends to fix a pump, is caused by external, violent and accidental means.
2. **"Inhalation of gas," causing death**, within the meaning of a clause exempting an insurer from liability, does not include the involuntary inhaling of deadly gas in a well where its presence is unsuspected.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Warren County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The material portions of the policy on which this suit was brought are as follows:

"The Pacific Mutual Life Insurance Company of California, in consideration of the warranties in the application for this insurance, and the stipulations herein contained, . . . does hereby insure John W. Moore, by occupation, profession or employment a contractor and driller, . . . in the principal sum of five thousand dollars, for the term of twelve months, ending on the fourth day of June, eighteen hundred and ninety, at twelve o'clock noon. The said sum to be paid to the legal representative of the insured, after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days of the date of such accident. . . . Except that if injured in any occupation or exposure classed by the company as more hazardous than here specified, then the insurance and weekly indemnity shall be for such amounts as the premium paid will purchase at the rates fixed by this company for such increased hazard."

On the back of the policy, and made a part

thereof by agreement, were the following conditions:

"The insured agrees to use due diligence for personal safety and protection. . . .

"This insurance shall not cover disappearances, nor injuries of which there is no visible external mark upon the body of the insured; nor death or injury resulting from or attributable partially or wholly to any of the following causes: . . . taking of poison, contact with poisonous substances, inhalation of gas. . . ."

Further facts appear in the opinion.

Messrs. D. I. Ball and C. C. Thompson, for appellant:

It cannot be contended that the clause "inhalation of gas" should be limited to a voluntary and conscious "inhalation of gas," because, (1) it is not so written in the policy, — if so intended, the word "involuntary" would have been expressed in this list of the classes of injuries to which the policy does not apply, instead of being left to be understood; (2) this court has adjudicated that these exceptions apply to the involuntary as well as voluntary acts of the insured.

Pollock v. United States Mut. Acc. Asso. 102 Pa. 230.

The policy provides that its amount shall be paid after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death. There is no pretense of any evidence of violent and accidental injuries externally visible upon the person of Mr. Moore; and therefore, under the foregoing provision of this policy, the plaintiff is not entitled to recover.

This distinguishes the case from *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Paul v. Travelers Ins. Co.* 3 L. R. A. 343, 112 N. Y. 477; and *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 251.

Messrs. Noyes & Hinkley and Brown, Stone & Rice, for appellee:

The contention of the defendant that in a case like this, or in those cases of accidental injury causing immediate death, resulting from drowning, suffocation, choking, all cases of asphyxia, lightning, electricity, or in any case of death from violent external means, it be-

NOTE.—*Insurance: death from inhaling gas.*

In exact conflict with the above case, and with the leading case of *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 472, which this case follows, is the 13 L. R. A.

case of *Richardson v. Travelers Ins. Co.*, 46 Fed. Rep. 843, which holds that death by inhaling illuminating gas in a sleeping room is within an exemption as to liability for death from "inhaling gas." B. A. R.

comes necessary to show more than the body of the deceased, is repugnant to common sense and unreasonable.

See *Mallory v. Travelers Ins. Co.* 47 N. Y. 52.

This provision of the policy as to external injuries has received; consideration and construction in a long line of cases, beginning in the highest English courts and followed in the United States and state courts of this country.

See *Trew v. Railway Pass. Assur. Co.* 5 Hurlst. & N. 211; *Wingspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 29 Moak, Eng. Rep. 488; *Accident Ins. Co. of North America v. Crandal*, 120 U. S. 582, 30 L. ed. 742; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 472, 45 Hun. 313; *Bacon v. United States Mut. Acc. Assn.* 9 L. R. A. 617, 123 N. Y. 304; *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 251; *Eggenberger v. Guarantee Mut. Acc. Assn.* 41 Fed. Rep. 172.

Sterrett, J., delivered the opinion of the court:

The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows: On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding house, same evening, he informed his landlady that he had no dinner, and requested that his supper be prepared. He then went to the well in the open yard for a drink and finding that the pump required priming with water, he remarked that he would fix it, so as to obviate that difficulty in the future. After procuring a hatchet, and removing planks from the opening at the top, he descended into the dug-out portion of the well, which was four or five feet wide and only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about midway down. A few minutes later his lifeless remains were found at the bottom of the well. He died from asphyxia, or suffocation, due to the accidental and unconscious inhalation of carbonic acid or other deadly gas that had unexpectedly accumulated in the dug-out portion of the shallow well. The well, with which deceased was familiar, and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top the earth around the iron pipe was dug out so as to form, as above stated, an open well, of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with plank. The deceased was a strong, healthy man. His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent, and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that he was wanting in reasonable care, or that he voluntarily exposed himself to danger. In describing

the condition in which he found the body of deceased the physician who made the *post mortem* examination testified: "The surface of the body was of a livid bluish color. The lips and tongue were blue, the right side of the head was partially distended with dark blood. The left side was nearly empty. The lungs contained more blood than they would under different circumstances. They were somewhat congested. The pulmonary arteries were distended with blood. The liver was slightly congested, and also the kidneys. There was, however, no disease of the kidneys, no disease of any of the internal organs. . . . His death was caused by asphyxia, due to the inhalation of gas." If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testimony as to the effect of the same noxious gas on those who went to the relief of the deceased, and assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death. The notice and proofs of death were full and complete. Their sufficiency was not even questioned.

In view of the undisputed facts, of which the above is an outline, the learned president of the common pleas refused to affirm defendant's points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover; and there was accordingly a verdict and judgment in his favor. This action of the court in refusing defendant's points and instructing the jury in plaintiff's favor are the subjects of complaint in the several specifications of error. The first and main point was as follows: "The clause in the policy of insurance sued on, to wit: 'This insurance shall not cover . . . death or injury resulting from or attributable partially or wholly to . . . inhalation of gas,'—applies to the case of death resulting from asphyxia caused by inhaling gas accumulated at the bottom of the well." This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts above referred to, the death of the insured was caused by external, violent, and accidental means, and without any conscious or voluntary act on his part. No one knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water, and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony, above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the *post mortem* examination. As was well said in *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 3 L. R. A. 443 (which in principle rules this case): "As to the point raised by appellant, that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the

gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas, within the meaning of the policy. The company relied upon the same narrow and technical defense that is made by the defendant in this case. In an able opinion, reported in 45 Hun, 313, the learned judge of the general term, whose judgment was afterwards affirmed by the court of appeals, said, *inter alia*: "Was the death of the intestate caused by or through 'external, violent, and accidental means,' within the language of the policy? . . . We should say the death was due to external and violent means as clearly as drowning. . . . The cause of death came from outside as surely as would a rifle ball, or water in the case of drowning. The escape of gas into the room was violent in the same sense that would be the flow of water into a wrecked vessel. In either case, the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases the result would be called a violent death. . . . We also think the words 'inhaling of gas' were used to designate those common uses of gas in dentistry, surgery, etc. . . . Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anesthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act." On this question, the court of appeals, in affirming the decision of the general term, said: "A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that appellant must fail in its contention. . . . In expressing its intention not to be liable for death from 'inhaling of gas' the company can only be understood to mean a voluntary and intelligent act of the insured, and not an involuntary and unconscious act. Read in that sense; and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included the dentist's work or a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen.

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. . . To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact. . . . If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and as in all contracts conditions are to be construed strictly against those for whose benefit they are reserved."

The principles, so well stated and enforced in the cases above cited, were afterwards approvingly considered in *Bacon v. United States Mut. Acc. Assn.* 123 N. Y. 804, 9 L. R. A. 617. In further support of same principles, reference might be made to other authorities,—among which are: *May, Ins.* 631, in which reference is made to *Trew v. Railway Pass. Assur. Co.* 5 Hurlst. & N. 211; *Winspear v. Accident Ins. Co.* 29 Moak, Eng. Rep. 488; *Accident Ins. Co. of North America v. Crandal*, 120 U. S. 532, 30 L. ed. 742; *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 New Eng. Rep. 450; *Eggenberger v. Guarantee Mut. Acc. Assn.* 41 Fed. Rep. 172; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52,—but further elaboration is unnecessary.

This case is not ruled by *Pollock v. United States Mut. Acc. Assn.*, 102 Pa. 230, on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts as well as in the principles applicable to them. In that case the injury did not result from external, violent and accidental means. The fatal drug was voluntarily and intentionally taken by the deceased. In deciding that case this court never could have intended to lay down the broad rule that in construing an accident policy there is no distinction between external, violent, and accidental causes of death, and those cases in which death results from voluntary acts. What was decided in that case was that, under the various clauses of the policy sued on, there could be no recovery, and it was unimportant whether the means arose from the designing act of the insured or otherwise.

Another ground of defense suggested in defendant's 5th, 6th, and 7th points was that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The Company, in disregard of the provisions of the Act of May 11, 1881 (P. L. 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The Act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant.

Without further referring to the specifica-

tions of error, it is sufficient to say that neither of them is sustained. The deceased was accidentally, violently, and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water, or molten metal, the result would have been substantially the same. Death, caused not so much by the inhalation of the fluid as by its ac-

tion in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the court below, that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the Company.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Charles F. HARRINGTON

v.
CITY OF PORT HURON, *Appt.*,

(..... Mich.)

Ejectment is not the proper remedy to procure the discontinuance of a sewer which was constructed by a city over lands of the United States government which was afterwards conveyed to plaintiff, where the only facts that appear are that the sewer was constructed and was thereafter continuously applied to its proper use without being fenced in or anything done to prevent plaintiff from taking possession of the land.

(*Morse, J., dissents.*)

(May 8, 1891.)

A PPEAL by defendant from the judgment of the Circuit Court for St. Clair County in favor of plaintiff in an action brought to recover the possession of certain land over which defendant had constructed a sewer. *Reversed.*

The facts are stated in the opinion.

Mr. A. E. Chadwick, with *Mr. Frank T. Wolcott*, for appellant:

The second count is wholly insufficient to admit of any evidence, or as the foundation of any judgment.

How. Stat. 7795; *White v. Hapeman*, 48 Mich. 267; *Troogood v. Hoyt*, 42 Mich. 609.

NOTE.—What disseisin will support ejectment.

Actual personal presence of the defendant on the land is not necessary; any subjection to his will and domain excluding the plaintiff is sufficient. *Bell v. Foxen*, 14 Sawy. 799, 42 Fed. Rep. 755.

Wrongful permanent possession, whether it arises from a dispute as to boundary or otherwise, is a sufficient disseisin. *Leprell v. Kleinschmidt*, 112 N. Y. 364.

A claim of title by a trespasser may be regarded as a disseisin. *Chilson v. Buttolph*, 12 Vt. 231.

So under 2 N. Y. Rev. Stat., § 304, § 4, may a verbal claim to unoccupied land. *Banyer v. Emple*, 5 Hill, 48.

But a mere claim of possession and title by one who has committed no actual trespass on the land is insufficient. *Grignon v. Black*, 76 Wis. 374.

A claim of an easement simply (here the use of a wharf) is not a sufficient disseisin to support ejectment. *Child v. Chappell*, 9 N. Y. 246.

The same rule was applied to a claim of an easement to flow land. *Wilklow v. Lane*, 37 Barb. 244.

So the flowing of land by a dam will not support ejectment in favor of one who has only a right to mines in the land. *Ezzard v. Findley Gold Min. Co.* 74 Ga. 520.

Wrongfully insisting on remaining in the house of plaintiff, who is occupying it, will not make a case for ejectment. *Buchanan v. Streper*, 12 Phila. 529.

Projection of eaves, walls, etc.

The projection of a roof over land makes a case for ejectment. *Murphy v. Bolger*, 1 L. R. A. 300, 60 Vt. 723; *Sherry v. Freckling*, 4 Duer, 452. *Contra*, *Alken v. Benedict*, 39 Barb. 409; *Vrooman v. Jackson*, 6 Hun, 326.

It will be noticed that the earlier of the three New York cases cited is overruled by the two later ones; but the question has not been passed upon by the court of last resort in that State which incidentally noticed the question but did not decide it in the case of *Leprell v. Kleinschmidt*, 112 N. Y. 364.

So the projection of some of the stones of a foundation wall will support the action. *McCourt v. Eckstein*, 22 Wis. 153.
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Disseisin of owner where lands are subject to highway or other easement.

The owner of the fee may maintain ejectment for land subject to a public way against one who claims as owner. *Goodtitle v. Alker*, 1 Burr. 133; *Jackson v. Hathaway*, 15 Johns. 447; *Etz v. Dally*, 20 Barb. 32; *Brown v. Galley, Hill & Denio*, Supp. 308; *Wright v. Carter*, 27 N. J. L. 77; *Gardiner v. Tisdale*, 2 Wis. 153. *Contra*, *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452.

It will lie also for premises subject to an easement where plaintiff's rights in the land are denied. *The Edmondson Island Case*, 42 Fed. Rep. 15.

A turnpike company may also maintain the action for an encroachment upon its road. *Borough of Chambersburg v. Manko*, 39 N. J. L. 496.

So it will lie against a railroad company which is in a street without any right as against the owner in fee. *Sharpe v. St. Louis & S. E. R. Co.* 49 Ind. 206; *Lozier v. New York Cent. R. Co.* 42 Barb. 465; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *Wager v. Troy Union R. Co.* 25 N. Y. 536, overruling *Redfield v. Utica & S. R. Co.* 25 Barb. 54.

It is also proper where defendants have entered and built a wharf and pier on lands of a city and are taking wharfage. *New York v. Law*, 125 N. Y. 380.

Public use as a disseisin.

Similar to the main case as involving the question of disseisin by the public are the following: Ejectment will lie against a city where land is taken without right for a highway denying the rights of the owner of the fee. *Armstrong v. St. Louis*, 69 Mo. 309; *Strong v. Brooklyn*, 68 N. Y. 1.

Also against a county for lands laid out as a public road by void proceedings. *McCarty v. Clark County*, 101 Mo. 179.

In an earlier New York case it was held that the action would not lie against a city where land was taken for a street, but it did not appear that the ownership of the fee was denied. *Cowenhoven v. Brooklyn*, 38 Barb. 9.

So the action lies for land occupied by a city as an approach and landing for a swing bridge. *Lowe v. Kaukauna*, 70 Wis. 306.
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A corporation cannot maintain ejectment for a mere easement.

Bay County v. Bradley, 39 Mich. 163; *Grand Rapids v. Whittlesey*, 33 Mich. 109; *Taylor v. Gladwin*, 40 Mich. 232.

Such an easement is but an incorporeal hereditament.

3 Kent, Com. 419, and cases cited; *Taylor v. Gladwin*, *supra*; 2 Washb. Real Prop. 375.

It must follow, as a corollary on this, that if a municipal corporation cannot maintain ejectment for an easement, because having no title or right to its exclusive possession, or of the land subject to it, the same reasons prohibit a like action against it.

The plaintiff is the undisputed legal owner and in possession of this whole tract so far as it is capable of possession, or he chooses to exercise it.

How. Stat. 8701.

He cannot maintain ejectment for the whole tract while himself in undisputed possession of a part.

Rea v. Rea, 5 West. Rep. 911, 63 Mich. 257, 262.

If he sought to recover a part only, he must describe that part from which he is evicted and excluded with certainty, and such certainty as without extraneous aid it can be ascertained and admeasured.

King v. Merritt, 11 West. Rep. 291; 67 Mich. 195, 210; *White v. Hapeman*, 43 Mich. 267.

Messrs. Avery Brothers, for appellee:

Our Statute allows ejectment against any "person exercising acts of ownership on the premises claimed or claiming title thereto, or some interest therein."

How. Stat. 7791.

The acts of ouster in this case are much more pronounced than were those of the defendant in *Cole v. Wells*, 49 Mich. 450.

One who records an invalid tax title can be made defendant in ejectment even though no step has been taken to assert possession.

Heinmiller v. Hatheway, 60 Mich. 391. See also *Anderson v. Courtwright*, 47 Mich. 161; *Hoyt v. Southard*, 58 Mich. 434.

On the principle that the owner of the fee owns all above and below the surface, ejectment has been sustained for space above land covered by an overhanging roof (*Tyler, Ejectment*, 37; *Aiken v. Benedict*, 39 Barb. 400; *Hoffman v. Armstrong*, 48 N. Y. 201; *McCourt v. Eckstein*, 22 Wis. 155), and for a coal mine. *Tyler, Ejectment*, 41; *Adams, Ejectment*, 20; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760.

If mines and minerals are thus recoverable, why not the land occupied by this sewer, even separate and distinct from the outlet structure?

And defendant in lawful possession of the surface is liable in trespass for removal of coal below surface without right.

Pennsylvania R. Co. v. Japes (Pa.) 11 Cent. Rep. 166.

And ejectment lies for veins and lodes beneath the surface (*Sedgw. & W. Title to Lands*, § 115-234; *Caldwell v. Fulton*, *supra*); and for entering upon the land below water. *Sterling v. Jackson*, 14 West. Rep. 229, 69 Mich. 468.

Ejectment lies in favor of the owner against 18 L. R. A.

one in possession and exercising acts in the nature of easement, as where a railroad company laid its track over one's land.

Carpenter v. Onwego & S. R. Co. 24 N. Y. 656.

And where a city claimed the right to swing a bridge crossing a canal, over the lands of plaintiff.

Lave v. Kaukauna, 70 Wis. 306.

The contention that mere prevention of beneficial use of premises is not enough to warrant ejectment is answered by *Judge Cooley's* reasoning in *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 320.

Champlin, Ch. J., delivered the opinion of the court:

The plaintiff brought an action of ejectment against defendant by filing a declaration as commencement of suit, which contains two counts. The first count described the premises as follows: "A tract of land bounded on the northwest by Pine Grove Park, on the northeast by St. Clair River, and on the south by Lincoln Avenue, excepting a strip of land across said premises seventy-five feet in width, occupied by the Port Huron & Northwestern Railway Company, being fifty feet in width on the westerly side of the center line of the roadway of said company, and twenty-five feet on the easterly side thereof," which premises the plaintiff claimed in fee. The second count described the premises as follows: "All that part of that piece of land bounded on the northwest by Pine Grove Park, on the northeast by St. Clair River, and on the south by Lincoln Avenue, which is occupied by Superior Street sewer and Ontario Street sewer, and the outlet thereof;" and then the same exception as in the first count,—which premises the plaintiff claims in fee. A trial was had before a jury, and it appeared that this land described in the first count of plaintiff's declaration was formerly a part of the Ft. Gratiot military reservation; that on the 20th day of July, 1868, the Congress of the United States authorized the secretary of war to sell portions of this reservation, including the tract in controversy, "at such times as he may deem most advantageous to the interests of the government." On March 18, 1879, before any sales had been made by the secretary, a portion of the tract was granted to the City of Port Huron for park purposes, to be known as "Pine Grove Park." Some time during the season of 1870 the secretary of war caused the remaining portion of the reservation to be platted, and public sale was made of a part thereof. The part unsold, which is in controversy here, was sold under authority of an Act of Congress passed June 16, 1880, to the Port Huron & Northwestern Railway Company, and this company conveyed to the plaintiff in this suit such land by deed dated April 3, 1884. In this deed there was an erroneous description, which was corrected by a deed dated January 8, 1886. In June, 1874, the City of Port Huron, by its common council, decided to construct a sewer from the St. Clair River westward, through and along Park Place, to Ontario Street, and during that year entered upon the premises and constructed the sewer. The authorities of the United States had prepared a map previously to that

time, on which was designated a street across the land described in the declaration as "Park Place," but before the same was recorded or the property sold the authorities of the United States had ignored such street, and retained the premises as property belonging to the government. In 1875 or 1876 the City caused a sewer to be built along Superior Street, which connected with the one through Park Place. These sewers have always been maintained by the City as public sewers, and continue so to be. They are used by the inhabitants of the City for sewage purposes, and, among others, by the plaintiff in this suit, who was, as appears, one of the petitioners for the construction of the sewer in Superior Street, which was built before he obtained title from the railway company. It further appears that at the outlet of the sewer, at its junction with the river, there is a structure of masonry several feet in height and twenty-two feet in width, extending outward from the bank into the stream, protected by a system of piling; and testimony was introduced tending to show that this structure prevents the land being used for any purposes requiring dockage, and that the land is so situated as to be valuable for a dock frontage. It was further shown upon the trial that the premises are uninclosed, and that there is nothing to prevent the plaintiff from taking possession peaceably of the lands described in his declaration. The sewer in question was built several years before the railway company made its purchase in 1880, and while the land belonged to the general government; and some effort was made on the part of the defendant to show that permission was given the City by the officer in charge of Ft. Gratiot for it to construct the sewer across these premises, but we think that such testimony wholly failed to show such permission. On the contrary, it was shown that, during the time they were excavating for the sewer, the officers in charge of the fort caused stakes to be set along the lines of this parcel of land to indicate that it belonged to the government.

It is a principle of law that where a person who, without the permission from the owner, knowingly enters upon his lands, and erects structures permanent in their character, annexed to the freehold, such structures belong to the owner of the soil to which they are annexed or upon which they are erected; and it follows that when the City erected this sewer across the lands of the government of the United States, without its consent or permission, such structure immediately belonged to the owner of the soil, and when the government conveyed such land to the railway company the whole of the premises passed to its grantee. The testimony does not show that the City is in possession of any of the premises described in plaintiff's declaration, or that it assumes to exercise any act of control or ownership over it; the facts appearing that in 1874 it constructed a sewer across it, which is the outlet of two sewers, and has done nothing since upon the lands. But if the City did claim to own the sewer, and have the right to discharge water through it, we do not think that the action of ejectment would lie, under the circumstances of this case. Ejectment will not lie in this State for anything that is not

tangible or capable of being delivered to the plaintiff by the sheriff under the writ of possession. Here the judgment was rendered upon the verdict of the jury for the premises described in the first count of the plaintiff's declaration, such verdict having been directed by the trial court. A writ of possession, under such judgment, would only put the plaintiff in possession of what he could at any time have had without the aid of the court, and, when he was so put in possession of the land described in the first count of his declaration, the sewer would still incumber the land, and the water continue to be discharged through this artificial conduit. Ejectment will not lie for a mere trespass, nor for a mere right of way or an easement. *Northern Turnp. Road Co. v. Smith*, 15 Barb. 355; *Judd v. Leonard*, 1 D. Chip. (Vt.) 204; *Clement v. Youngman*, 40 Pa. 341; *Caldwell v. Fulton*, 31 Pa. 483; *Child v. Chappell*, 9 N. Y. 251.

If the corporation had obtained the right to construct the sewer across these lands to discharge the water passing therein, it would have created an easement upon the land. If the City constructed the sewer without authority, thus discharging the water upon and across the land, the act would be a trespass, but not an ouster of the plaintiff from the lands described. Expressed in simplest language, the City has constructed an artificial aqueduct across the lands belonging to plaintiff's grantor, through which it discharges water and sewage from two of the sewers laid in the streets of the City. There is no doubt that the plaintiff's title, as riparian owner, extends to the boundary line in the St. Clair River, and gives him the right to erect docks and employ the land for any purpose not inconsistent with the rights of navigation; and if the defendant in this case is in possession, and sets up a claim of right to maintain the sewer in the St. Clair River in front of his land, and to drive and maintain piles there for the purpose of protecting such sewer, we think ejectment would lie for the land so appropriated; but the facts in this case do not warrant this court in finding that the City of Port Huron has laid any claim to the right to maintain the structure which they erected when they built the sewer, and we are of opinion that the court erred in directing a verdict for plaintiff under the first count of plaintiff's declaration. The learned judge instructed the jury that "the act of the City in entering upon and excavating the soil for this sewer, and constructing the same, was such an act as amounted to an assertion or claim of title on its part, and so the owner of the property may treat it as an act of disseisin or ouster; and, as the sewer has been used and maintained continuously to the present time, I think it a legal fact that the plaintiff has been kept out of possession of the premises by the City." We have already called attention to the fact that this sewer was constructed long before the plaintiff obtained his title from the railway company, and in fact before the railway company had obtained its title to the land in dispute, and if there was any ouster of the owner, or an act of disseisin, it occurred a long time prior to the conveyance to plaintiff's grantor. The government, in conveying to plaintiff's grantor, only conveyed all the right, title, and interest of the United States to the

land in question, without any covenants of warranty whatever. We shall not assume in this suit, at this time, to pass upon the question as to whether or not it was the intention of the government to recognize defendant's rights upon the premises; although it may be said that the government granted to the purchaser the full extent of its right, title, and interest in the premises. It is apparent, however, that whether the act of the City in constructing the sewer was a disseisin of the owner would depend very much upon the facts and circumstances under which the city entered upon the land and constructed the sewer. If at that time the City authorities supposed that there was a public street called "Park Place," in which they were constructing a sewer, it would not be such an assertion or claim of title on its part as would operate as a disseisin, if it afterwards turned out that the City was mistaken as to the claim under which it entered. Neither would it be a disseisin if the City entered by the consent, express or implied, of the owner. The mere fact that the sewer has been used continuously to the present time to discharge water into the St. Clair River, without any other acts or claims made by the defendant, would not amount in law to keeping the defendant out of possession of the premises. We think that the plaintiff has mistaken his remedy, and that the judgment must be reversed, and a new trial granted.

McGrath, Long, and Grant, JJ., concurred.

Morse, J., dissenting:

This judgment should be affirmed. The title of the premises in issue is indisputably in the plaintiff, and he is not in possession. The City of Port Huron is maintaining continuously from day to day and hour to hour a sewer upon his premises. The mouth of the sewer, where it empties into the St. Clair River, is constructed of stone, and protected by piles, constituting an obstruction to the erection of a dock, elevator, or building, and depriving plaintiff of all beneficial use of his water front. He has frequently applied to the municipal authorities in relation to this sewer, claiming it to be an obstruction to the exercise of his property rights in the land, and notified them that he was the owner of the premises; but they have always denied his title, and insisted on their right to maintain this sewer. It is true, under the authorities, that ejectment cannot be maintained for a mere trespass upon land, nor for a mere right of way or an easement; but that is not this case. This occupation of the city for the purpose of sewerage is not a mere temporary trespass, like one going onto the premises of another and doing damage and going away again, but it is a continuing trespass,—one that never ceases. The sewer remains there all the time, and is in use by the city night and day. It amounts substantially to a constant occupation of the plaintiff's premises, and a possession which is sufficient to justify the remedy of ejectment. Ejectment, under our Statute, will lie against any "person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein." How. Stat. § 7791.

In *Cole v. Wells*, 49 Mich. 450, the defendant 13 L. R. A.

fastened a boom-pole to piles driven in the Black River in front of plaintiff's land, and used the boom for the storage of logs, claiming the right to do so. It was held that ejectment could be maintained. There was nothing in that case to prevent the plaintiff from tearing away and removing this boom from his premises. He could have destroyed it, as he can destroy this sewer; but the law, in my opinion, does not force the plaintiff to destroy property to remove such an obstruction, or to get, as he probably would, into a war or conflict over the possession of the premises so occupied by another, in which conflict the superior force would prevail. He is entitled to the peaceful remedy of ejectment. Nor is he even compelled to resort to the inadequate and vexatious remedy of trespass,—a remedy which, in case of judgment in his favor, settles nothing as to his title to the land. *Keyser v. Sutherland*, 59 Mich. 455. But it is said that there has been and is nothing in the way of his taking peaceful possession of the land. But this is no valid reason why he cannot bring ejectment under our Statute. We have held repeatedly that the putting on the record of a tax deed to premises and claiming title thereunder would warrant an action of ejectment by the owner of the land out of possession against the holder of such tax title. *Heinmiller v. Hatheway*, 60 Mich. 391; *Anderson v. Courtright*, 47 Mich. 161; *Hoyt v. Southard*, 58 Mich. 434. Yet in such case there would be nothing to prevent the owner obtaining peaceable possession of the premises in most cases, but it has never been claimed that the fact that such possession could be taken had anything to do with the right to bring ejectment. Possession in the defendant is not a necessary element in ejectment in this State. The remedy is aimed against the assertion of ownership of or an interest in the land as well as against an unlawful possession. Nor are the cases cited by the chief justice in relation to easements or rights of way applicable here. The plaintiff is not bringing ejectment to recover a right of way or an easement, but to free his land of an unauthorized occupation under a claim of right by the city to so occupy it. As before shown, he is not obliged to invite trouble and conflict in an attempt to free his premises by removing the piles and tearing out the sewer. The action of trespass would not settle his title. He is not obliged to forbear his remedy in ejectment,—the only proper action to declare and fix his title permanently,—because the premises are not guarded against his peaceable entry upon them. In 24 N. Y. 656 (*Carpenter v. Oswego & S. R. Co.*), ejectment was brought against the defendant, and upheld, a majority of the court holding that the occupation was such that the action would lie. It was shown that the railway company had laid a track and affixed it to the soil, but had never used it or connected it with their operating road. They justified the laying of the track under permission of the municipal authorities, claiming the ground to be a public street; and also raised the point that ejectment would not lie because of the character of their occupancy. The court held that the fee of the soil, if it was a street, was in the plaintiff, and he had a right of action against any person using it for any other than legitimate street purposes, and

that the defendant had sufficient occupancy to justify bringing ejectment. The court said: "Ejectment will lie for anything attached to the soil of which the sheriff can deliver possession." But it is said that a writ of possession under a judgment in favor of the plaintiff will only put him in possession of what he could at any time have had without the aid of the court, and that the sewer would still incumber the land. So also a writ in the case of *Hoyt v. Southard*, 58 Mich. 484, would only have given the plaintiff, as far as the possession was concerned, what he could also have taken without suit. But something more is accomplished by the writ in both cases than the mere delivery of the possession. The possession is delivered

symbolically, but with it goes the establishment of plaintiff's title, freed from the adverse claim of title by the defendant. In the case at bar, also, the sewer with its stonework and piles is delivered to the plaintiff as his own, to do with them as he sees fit, without fear of further litigation, or any other conflict. In no other way except by an action of ejectment can the plaintiff determine and adjudicate at law his title to this land unless he shall do something which will authorize the City to bring ejectment against him; and it is very doubtful if he could do any act which would authorize the City to maintain ejectment against him under the authorities.

KENTUCKY COURT OF APPEALS.

F. ZABEL, *Appt.*,

v.

LOUISVILLE BAPTIST ORPHANS' HOME.

(.....Ky.....)

1. To plead a private statute under Civ. Code, § 119, subsec. 2, a party must at least state its title and the day on which it became a law.
2. A Baptist Orphans' Home is a charity, and as such renders a public service for which it may be lawfully exempted from taxation by the Legislature.
3. An exemption of a charitable institution from "all taxation" by state or local laws for any purpose whatever, does not extend to assessments for street improvements.
4. The power to fix the grade of a street cannot be delegated by a city council to a contractor.
5. A petition to enforce a lien for a street assessment is fatally defective if it fails to show that the city council and not the contractor fixed the grade of the street.

(October 6, 1891.)

APPEAL by plaintiff from a judgment of the Louisville Chancery Court in favor of defendant in a proceeding instituted to enforce an assessment for street improvements. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Newton G. Rogers, for appellant:

Defendant is not a public corporation; is not in fact capable of providing a general public service. It is limited strictly by the provisions of its charter, and strictly by the very title of its charter, to a limited class of people. Such being the case, it cannot claim an exception from the general public burdens on the ground that it has or does perform acts of a public nature.

Com. v. Masonic Temple Co. 87 Ky. 849; *Louisville v. Board of Trade* (Ky.) 12 L. R. A. 629.

Even if it had performed or did perform acts

NOTE.—For effect of exemption from taxation generally on local assessments, see *note to Atlanta v. First Presby. Church* (Ga.) 12 L. R. A. 852. 18 L. R. A.

of a public nature, so as to entitle it to be exempt from the payment of the ordinary taxes or revenue to the City of Louisville, or even to the State of Kentucky, it would not be exempt from the payment of a special tax or assessment like the one at bar.

Broadway Bapt. Church v. McAtee, 8 Bush, 508.

If the charter would exonerate it from the payment of taxes in general, then the act or the charter is invalid and unconstitutional.

Barbour v. Louisville Bd. of Trade, 82 Ky. 645.

McCasers. Oneal, Jackson & Phelps for appellee.

Holt, Ch. J., delivered the opinion of the court:

The appellant, F. Zabel, sues to enforce a lien against the property of the appellee, the Louisville Baptist Orphans' Home, for its proportion of the cost of constructing an alley abutting it, under a contract with the City of Louisville. The answer denies the averments of the petition, and in a second paragraph avers that it is a corporation conducted solely for charity, realizing no profit from its investments; and that its charter, which antedates the ordinance under which the improvement was made, in consideration of public services exempts its property from all taxation for any purpose. A demurrer to this paragraph was overruled, and, the plaintiff declining to plead further, the action was dismissed as to the appellee. The judgment, as copied into this record, does not expressly so order, but it overrules the demurrer, recites that the plaintiff declined to plead further, and, after excepting to the judgment, prayed an appeal to this court, which was granted, the case being retained for further proceedings against the other defendant, the City of Louisville.

With some hesitation we shall treat this as a final judgment as to the appellant, and therefore consider the appeal. The court evidently so intended it. The parties so regarded it, and have so treated it in argument in this court. Under the charter of the city, the proper averment in a petition of all the steps leading to the creation of such a lien, when supported by such exhibits as were filed in this instance,

creates, in the face of a mere denial, a *prima facie* case. Hence, if the petition was sufficient, and the defense set out in the second paragraph insufficient, the plaintiff was, in the absence of testimony, entitled to judgment. It is claimed, first, that if a good defense upon the score of exemption in fact existed, it was not sufficiently pleaded. The answer did not set forth the exemption statute *in hac verba*, nor did it refer to it by stating its title and the time when it became a law. It is a private statute, and section 119, subsec. 2, of the Civil Code provides: "In pleading a private statute it shall be sufficient to refer to it by stating its title and the day on which it became a law." A party relying upon such a statute must at least state this much; and the plea was defective in this respect.

As the case must go back for another hearing, it is not improper to consider other objections to the plea. To do so will doubtless expedite the case. It is urged that the appellee renders no public service, and that therefore the Legislature could not constitutionally exempt it from taxation. It is, however, a charity, and as such renders a public service. Its very name indicates its object, and entitles it to privilege and gratitude. It is the duty of the State to care for its indigent orphans; and, if done by another, he renders what is properly a public service, and the Legislature may therefore, without regard to the extent of it, exempt the property devoted to such use from taxation. Examination shows, however, that the provision of the Statute intended to be relied upon reads thus: "The property, money, and estate and rights of said corporation shall be exempt from all taxation by state or local laws for any purpose whatever." Acts 1868-70, vol. 1, p. 181. While the language is broad, yet it really amounts to no more than saying that the appellee shall be exempt from all taxation. The word "tax" does not embrace a local assessment. Something more is needed, showing that such was the legislative intention. Such a purpose, inasmuch as it imposes an additional burden upon others, should appear with reasonable certainty. Exemptions are of grace. They are to be strictly construed, and can embrace only what is clearly within their terms. While the right to levy a local assessment—as, for instance, to pay for a street improvement in a town or city—is derived from the taxing power, yet it is a distinct character of taxation, not ordinarily included within the meaning of that term. It proceeds upon the ground of equivalent benefits, and that it is no burden to pay for the improvement of a street in the ratio of benefits received. It is said in *Burroughs on Taxation* (page 461): "The word 'tax' or 'taxes' does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. The question frequently arises in the construction of statutes exempting persons or corporations from the payment of 'taxes,' and the almost unbroken current of authority is that such expressions do not include local assessments. In the case cited from 46 Cal. 553 (*Williams v. Corcoran*), the defendant was 'exempted from taxation of every kind;' yet this was construed not to include a local assessment for the improvement of a street on which its real estate

abutted. The language in the other cases cited is fully as strong. It is regarded as a distinct species of taxation, not included in the general term 'tax' and 'taxation.'" Another leading writer upon this subject says: "It has been shown in another place that, while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that consequently the usual exemptions from taxation will not preclude the property exempted being subjected to them." Cooley, *Taxn.* 2d ed. 650. The adjudged cases are in accord with these writers. *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255; *State v. Newark*, 27 N. J. L. 185; *Pater-son v. Society for Estab. U. Manuf.* 24 N. J. L. 385. We have in this State a general statute exempting church property from taxation, but in the case of *Broadway Baptist Church v. McAtee*, 8 Bush, 508, it was held that such property in the City of Louisville was liable for its proper proportion of the cost of construction and reconstruction of streets. In that case the Statute was a general one, applying to all church property, while here it is a private one, relating only to the appellee; but this does not render a different rule of construction applicable. The principle is the same; and whether the exemption be by a general statute or by a special one, relating only to the party claiming the exemption, it must, in the absence of language importing otherwise, be held to relate only to taxation for the general purpose of state, county and municipal government. To say of property that it is "exempt from all taxation by state or local laws for any purpose whatever," certainly gives no greater exemption than to say that it is "exempted from taxation of every kind;" and in enacting the Statute in question the Legislature must be presumed to have known of the almost uniform construction that has been given to the word "taxation." This being so, had it been intended to exempt the property of the appellee from being liable for its proper proportion of the cost of a benefit, which, as must be presumed, is directly conferred upon it by the construction of the street, the Statute would have provided in express terms that it should be exempt from local assessments. Such an intention cannot fairly be inferred from the language used, and it must be presumed that the word "taxation" was employed in its legal sense.

It is said, however, that the petition is defective, in that it fails to aver or show by any of the exhibits filed as a part of it that the city council fixed what should be the grade of the street. This objection is well taken. The copy of the city ordinance filed with the petition refers to another one, but no copy of it is filed, nor are its provisions set forth in the petition. It may or it may not fix the grade of the improvement. No presumption that it does is admissible. The council could not abdicate its legislative power in this respect, and leaving the matter to the judgment, or, perhaps, whim, of the city engineer or the contractor, subject the property of the abutting owner to whatever the improvement might cost. This would leave him largely at the mercy of an irresponsible, and, perhaps, interested party. The city, by its charter, has power to improve its streets as

may be prescribed by ordinance. The power is a legislative one, and the kind and character of the improvement must be fixed by the city council. *Hydes v. Joyes*, 4 Bush, 464.

While, therefore, the second paragraph of the answer was for the reasons indicated open

to demurrer, yet it should have been carried back and sustained to the petition; and *the judgment is reversed*, with leave to the parties to amend the pleadings, and for further proceedings in conformity to this opinion.

NEW HAMPSHIRE SUPREME COURT.

ATTORNEY-GENERAL

v.

Edward A. MARSTON.

(..... N. H.)

1. A tax collector is such while he retains his warrants and lists upon which are uncollected taxes, even after the expiration of his term, within the meaning of a statute prohibiting collectors of taxes from being members of the board of selectmen.

2. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office in the absence of a special statutory or constitutional provision giving it that effect.

3. One cannot divest himself of the office of tax collector by resignation unless his resignation is accepted by competent authority.

4. One acquires no title to an office by being elected to it when he was disqualified by statute to hold it by reason of his holding an incompatible office.

(July 31, 1891.)

PETITION for a writ of quo warranto to oust defendant from the office of selectman for the Town of Durham, heard in vacation before Doe, Ch. J., and adjourned by him to the law term. *Judgment of ouster.*

Defendant was elected to the office of tax collector for the years 1888, 1889, and 1890. He took the official oath and served for the designated terms. At the annual meeting in March, 1891, he was elected selectman and took the oath and assumed to exercise the duties of that office. This proceeding was instituted to try his title thereto.

Further facts appear in the opinion.

NOTE.—Tenure of public office; incompatibility of offices.

It is well settled that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office. *State v. Buttz*, 9 S. C. 156; *State v. Brown*, 5 R. I. 1; *People v. Carrique*, 2 Hill, 98; *Magie v. Stoddard*, 25 Conn. 566; *People v. Nostrand*, 46 N. Y. 375; *Stubbs v. Lee*, 64 Me. 195; *People v. Hanifan*, 98 Ill. 420.

In cases where the question of incompatibility of offices has arisen, independently of statutory or constitutional provision, two rules are generally recognized: (1) that incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time; (2) the character and relation of the offices. *State v. Goff*, 4 New Eng. Rep. 100, 15 R. I. 505.

In *People v. Green*, 5 Daly, 254, it was held that the office of member of the Legislature and clerk of the court of special sessions might be held by the same person, even though attendance upon one office prevented for the time being the performance of the duties of the other. This point was approved on appeal. *People v. Green*, 68 N. Y. 295.

In *Com. v. Kirby*, 2 Cush. 577, 680, the court says: "It has never been supposed that persons holding minor offices appertaining to the executive department of the government, such as deputy sheriffs, constables, or coroners, were thereby disqualified from holding seats in the Legislature. The same was formerly true of the judges of the court of common pleas, who frequently held the office of senator or representative while in commission as judges.

The test of incompatibility under the second rule is the character and relation of the officers; as where one is subordinate to the other, and subject in some degree to its revisory power; or where the functions of the two officers are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. *State v. Goff*, 4 New Eng. Rep. 100, 15 R. I. 505.

formly been held that the same person cannot hold both offices. *State v. Goff*, 4 New Eng. Rep. 100, 15 R. I. 505.

In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: "If the same person could hold both offices, he would in fact sit in judgment on his own acts."

Incompatibility arises where the functions of the two offices are inconsistent with their being exercised by the same person; such as being judge and clerk of the same court; the officer who presents his accounts for audit and the officer who passes upon it; judge and deputy sheriff (*People v. Green*, 68 N. Y. 295; *State v. Goff*, 4 New Eng. Rep. 100, 15 R. I. 505, 2 Am. St. Rep. 921); governor of a State and member of its Legislature; justice of the peace and judge of the appellate court (*Barnum v. Gilpin*, 27 Minn. 468, 38 Am. Rep. 304; *Mohan v. Jackson*, 52 Ind. 599; *Com. v. Bins*, 17 Serg. & R. 221; *State v. Feibleman*, 28 Ark. 424); sheriff and justice of the peace. *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Wilson v. King*, 3 Litt. 457, 14 Am. Dec. 84; *State Bank v. Curran*, 10 Ark. 142; *Lawson, Rights, Remedies & Practice*, § 3804.

When a person is selected for office who has not the qualifications required by law, the selection is not therefore void. The person selected is *de facto* an officer; his acts in the discharge of his duties are valid and binding. The peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the governor to the constable. *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 365.

Offices incompatible. See notes to *De Turk v. Com. (Pa.)* 5 L. R. A. 853.

De facto officers. See notes to *Worrel v. Peelle (Ind.)* 8 L. R. A. 228; *State v. Carr (Ind.) ante*, 177.

Messrs. J. G. Hall and John Kivel for plaintiff.

Messrs. Frink & Batchelder, for defendant:

There is no incompatibility between the office of collector of taxes and selectman, save the statutory one.

Pittsburg v. Danforth, 56 N. H. 274.

The Statute does not prohibit a collector, chosen or appointed for a prior year, but who has not collected all the taxes on his list, from being elected, and discharging the duties of selectman.

Gen. Laws, chap. 49, § 5, provides that neither the treasurer nor the collector of taxes shall be a member of the board of selectmen.

The Statute recognizes but one officer, existing at any one time, as the collector of taxes.

The reason of the law does not extend to ex-collectors. The law itself intends that the collector shall collect all his taxes within the year and settle his account.

Northumberland v. Cobleigh, 59 N. H. 254.

After that he is only a debtor to the town for the amount of the uncollected taxes. He cannot act upon their abatement if he is a selectman.

Pittsburg v. Danforth, *supra*.

By his acceptance of the office of selectman, defendant must be regarded as having resigned his office as collector of taxes.

Cotton v. Phillips, 56 N. H. 220.

Clark, J., delivered the opinion of the court:

"Neither the treasurer nor collector of taxes shall be a member of the board of selectmen." Gen. Laws, chap. 40, § 5. The duties of the offices of collector and selectmen are in some respects conflicting. The collector is required to give a bond to the acceptance of the town or selectmen. Id. chap. 42, § 4. The selectmen may remove a collector for certain causes (Id. chap. 42, § 9); and in certain cases they have power to issue an extent against him (Id.

chap. 66, § 5). And it is the duty of the selectmen, acting in behalf of the town, to see that the collector faithfully performs his official duties, and in default to take measures to protect the interests of the town. The defendant having been elected and having served as collector for the years 1888, 1889, and 1890 and still retaining his warrants and lists upon which are uncollected taxes, is still collector for those years. "Every collector, in the collection of taxes committed to him to collect, and in the service of his warrant, shall have the powers vested in constables in the service of civil process, which shall continue until all taxes in his list are collected." Id. chap. 58, § 1.

The defendant's acceptance of the office of selectman did not relieve him of the office of collector. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, unless it is made so by special statutory or constitutional provision. Const. pt. 2, arts. 94, 95. The defendant's resignation would not divest him of the office of collector unless it was accepted. Gen. Laws, chap. 42, § 1, provides that in case any officer who has given an official bond shall resign, he and his sureties shall continue liable upon his bond for all acts under color of his office until he shall resign and his resignation shall have been accepted by the town, selectmen, or others competent to accept the same.

The defendant being a collector of taxes for the Town of Durham when he was elected a selectman, was disqualified to hold the office, and his election gives him no title to it. *Cotton v. Phillips*, 56 N. H. 220, 223. Having assumed the office of selectman under color of an election, Marston is an officer *de facto*, and his official acts are valid as to third persons.

Judgment of ouster.

Doe, Ch. J., did not sit. The others concurred.

KANSAS SUPREME COURT.

C. M. CONDON, *Plff. in Err.*,

v.

L. H. KEMPER.

(....Kan.....)

***Kemper and Condon entered into a written contract** whereby Condon agreed to

*Head note by VALENTINE, J.

build a wall, etc., or else, at his election, to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall,

NOTE.—*Contract; liquidated damages and penalty distinguished.*

Whether an amount stated in a contract is to be regarded as a "penalty" or as "liquidated damages" is frequently a matter of great difficulty to determine, especially as the question is not controlled or indeed affected by the employment of either or both these terms. *Dwinel v. Brown*, 54 Me. 468; *Hoagland v. Segur*, 38 N. J. L. 236; *Foley v. McKeegan*, 4 Iowa, 1; *Bagley v. Peddie*, 16 N. Y. 469; *Shreve v. Brereton*, 51 Pa. 175; *Thoroughgood v. Walker*, 47 N. C. 15; *Watts v. Sheppard*, 2 Ala. 425; 13 L. R. A.

Grand Tower Min. Mfg. & Transp. Co. v. Phillips, 90 U. S. 23 Wall. 471, 23 L. ed. 71; *Burrage v. Crump*, 48 N. C. 830; *Davis v. Freeman*, 10 Mich. 188.

As illustrative of the difficulties experienced in this respect, see *Cotheal v. Talmage*, 9 N. Y. 551; *Clement v. Cash*, 21 N. Y. 253; *Spencer v. Tilden*, 5 Cow. 144; *Williams v. Dakin*, 22 Wend. 201; *Pierce v. Fuller*, 8 Mass. 223; *Hall v. Crowley*, 5 Allen, 304; *Knapp v. Maltby*, 13 Wend. 538; *Esmond v. Van Benschoten*, 12 Barb. 386; *Richards v. Edick*, 17 Barb. 260; *Colwell v. Lawrence*, 38 N. Y. 71; 3 Parsons, Cont. 158; *Noyes v. Phillips*, 60 N. Y. 408.

etc., and afterwards failed to remove the house. The cost of removing the house, and putting it in as good condition as it was before, would not have exceeded \$100. *Held*, that when the parties made the contract, and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual, compensatory damages; and therefore,—*Held*, that the sum of \$500 mentioned in such contract as liquidated and ascertained damages must be treated as a penalty, and not as liquidated damages.

(October 10, 1891.)

ERROR to the District Court for Labette County to review a judgment in favor of plaintiff in an action brought to recover the sum of \$500 as liquidated damages for the breach of a contract. *Reversed*.

Statement by **Valentine, J.:**

This was an action brought in the District Court of Labette County by L. H. Kemper against C. M. Condon to recover \$500 as liquidated damages for the alleged breach of the following written contract, to wit:

Even where the parties expressly stipulate in the recitals of the contract that the sum mentioned shall be regarded as liquidated and ascertained damages, and not as a "penalty," or where any other language equally conclusive had been used, the courts will still construe the recitals as in the nature of a contract, and restrict the measure of damages to such as the evidence shows have been actually received. *Kemble v. Farren*, 6 Bing. 141; *Dennis v. Cummins*, 3 Johns. Cas. 297; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Reindell v. Scheil*, 4 C. B. N. S. 97; *Curry v. Larer*, 7 Pa. 470; *Baird v. Tolliver*, 6 Humph. 186; *Moore v. Platte Co.* 8 Mo. 437; *Shreve v. Brereton*, 51 Pa. 175; *Re Newman*, L. R. 4 Ch. Div. 724; *Boys v. Ancell*, 5 Bing. N. C. 390; *Horne v. Flintoff*, 9 Mees. & W. 678; *Lawson, Rights, Remedies & Practice*, § 2643.

The question is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express such intent, and the peculiar circumstances of the subject matter of the agreement. *Dakin v. Williams*, 17 Wend. 447, affirmed, 22 Wend. 201; *Shute v. Hamilton*, 3 Daly, 462; *Perkins v. Lyman*, 11 Mass. 76; *Streep v. Williams*, 48 Pa. 450; *Chase v. Allen*, 13 Gray, 42.

The contractual agreement of the parties must control, and the true inquiry is, What was the undertaking? Whether it was advantageous or otherwise for the contracting parties to make this particular contract, is immaterial, if the intent is clear. *Bagley v. Peddie*, 16 N. Y. 466; *Hosmer v. True*, 19 Barb. 106; *Cushing v. Drew*, 97 Mass. 445.

So the use of the word "penalty," or the term "liquidated damages," does not conclusively show this intention, if the entire agreement indicates a different view. *Chamberlain v. Bagley*, 11 N. H. 234; *Dimech v. Corlett*, 12 Moore, P. C. 199; *Davis v. Penton*, 6 Barn. & C. 216; *Davis v. Freeman*, 10 Mich. 188.

The rule established by the principal case is further illustrated by the following decisions: *Baye v. Ambrose*, 28 Mo. 39; *Clark v. Kay*, 26 Ga. 403; *Daily v. Litchfield*, 10 Mich. 29; *Gower v. Saltmarsh*, 11 Mo. 271; *Nash v. Hermosilla*, 9 Cal. 584; *Halderman v. Jennings*, 14 Ark. 329; *Foley v. McKeegan*, 4 Iowa, 1; *Baird v. Tolliver*, 6 Humph. 186; *Wilson v. Graham*, 14 Tex. 222; *Lord v. Gaddis*, 9 Iowa, 266; *Hallock v. Slater*, Id. 599; *Abrams v. Kounts*, 4 Ohio, 214; *Ricketson v. Richardson*, 19 Cal. 390; *Lindsay v. Anesley*, 28 N. C. 186; *Hammer v. Breidenbach*, 31 Mo. 49; *Long v. Towl*, 42 Mo. 545.

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"This agreement between L. H. Kemper and C. M. Condon witnesseth, that whereas, the said Kemper has sold to said Condon lot 7, block 38, in Oswego, Kansas, said Condon, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said Kemper; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said Condon shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract. C. M. Condon, Oswego, Kansas, March 11, 1887." The defendant answered as follows: "Said defendant admits the execution and delivery of the writing marked 'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges

A sum named in an agreement containing disconnected stipulations of various degrees of importance, will be considered as a penalty, though it is called in the agreement liquidated damages, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. *Astley v. Weldon*, 2 Bos. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Boys v. Ancell*, 5 Bing. N. C. 390; *Horne v. Flintoff*, 9 Mees. & W. 678; *Cheddick v. Marsh*, 21 N. J. L. 463; *Whitfield v. Levy*, 35 N. J. L. 149.

If upon the face of the instrument it be doubtful whether the contracting parties intended that the sum specified in the agreement shall be a penalty or liquidated damages, the inclination of courts is to consider the contract as creating a penalty to cover the damages actually sustained by a breach of the contract, and not liquidated damages. *Crisdee v. Bolton*, 2 Carr. & P. 240; *Taylor v. Sandford*, 20 U. S. 7; *Wheat*, 13, 5 L. ed. 384; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Shute v. Taylor*, 5 Met. 61; *Dimech v. Corlett*, 12 Moore, P. C. 199; *Coles v. Sims*, 5 De G. M. & G. 1; *Hahn v. Horstman*, 12 Bush, 249; *Yenner v. Hammond*, 36 Wis. 277; *Streep v. Williams*, 48 Pa. 450; *Lynde v. Thompson*, 2 Allen, 456; *Wallis v. Carpenter*, 18 Allen, 19; *Green v. Price*, 13 Mees. & W. 701; *Pom. Eq. Jur.* § 440.

The tendency of late years has been to regard the statements of the contracting parties as to liquidated damages in the light of a penalty; and unless the contrary intention is unequivocally expressed, harsh provisions will be avoided, and compensation in the way of a penalty will be decreed. *Gammon v. Howe*, 14 Me. 250; *Richards v. Edick*, 17 Barb. 260; *Leggett v. New York Mut. L. Ins. Co.* 53 N. Y. 304; *Bright v. Rowland*, 3 How. (Miss.) 398; *Hamilton v. Overton*, 6 Blackf. 206; *Hoag v. McGinnis*, 22 Wend. 163; *Brown v. Bellows*, 4 Pick. 179; *Baird v. Tolliver*, 6 Humph. 186; *Wallace v. Carpenter, supra*; *Watts v. Sheppard*, 2 Ala. 425; *Hodges v. King*, 7 Met. 583; *Owens v. Hodges*, 1 McMull. L. 106; *Moore v. Platte Co.* 8 Mo. 467.

The tendency and preference of the law is to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages. Yet courts endeavor to learn, from the subject matter of the contract, the nature of the stipulations, and the surrounding circumstances, what was the real intent of the parties, and are governed by such intent. *Cushing v. Drew*, 97 Mass. 445.

the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the City of Oswego, Kansas. That the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6. That defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building. That at the time of purchasing said lot 7, and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7; the main part of it being, as said parties supposed, on lot 6, and about two or three feet in width of it standing on said lot 7. That to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north. That plaintiff sold, and defendant bought, said lot under such belief. That plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted, if he were put to such expense, he should be compensated therefor; and to this defendant assented, and agreed that he would, at his own expense, remove said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was, where it then stood; or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep, and give plaintiff the use of the north wall thereof as compensation for his moving and repairing said house as aforesaid. That it was to meet such contingency, and secure such end, that said writing was executed and delivered. That thereafter this defendant elected not to erect said stone or brick building on said lot 7, and not to furnish plaintiff the use of the north wall thereof. That, by agreement between said plaintiff and defendant, said block was afterwards surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7,—a part on 6 and a part on 7,—but that it all then stood on said lot 6, and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary, and would be of no advantage whatever to plaintiff. Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid.

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and that, had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was, where it then stood, at a cost and expense of not to exceed \$100. That said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was, in its then location, at a cost of not to exceed \$100. That in no event could plaintiff's damage, had he desired to have had said house removed, exceed one hundred dollars. That to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house, or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account, and denies any liability to him in any respect. Wherefore defendant asks that this cause be dismissed, and that he recover his costs herein." The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. When the case was called for trial, the plaintiff moved for judgment upon the pleadings; and the court sustained the motion, and rendered judgment accordingly in favor of the plaintiff and against the defendant for \$500, with interest and costs; and the defendant excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

Messrs. Case & Glasse, for plaintiff in error:

The tendency of courts is to hold a sum named as a penalty rather than liquidated damages, when such a construction is at all compatible with the language used and the conditions of the contract entered into. Notwithstanding the language used, they will not find the intention to have been to consider a sum named as liquidated damage when it is to secure the performance of several items of unequal value or importance, the value of which can be accurately determined; and especially will they so hold when the sum named is greatly disproportioned to the damage which may be sustained.

Kemble v. Farren, 6 Bing. 141; 8 Parsons, Cont. pp. 157-159; *Wood's Mayne*, Dam. p. 212, §§ 172, 173, p. 213, §§ 168, 169, pp. 209, 210; *Sedgw. Dam.* p. 339; *Spencer v. Tilden*, 5 Cow. 144; *Spear v. Smith*, 1 Denio, 464; *Hoag v. McGinnis*, 22 Wend. 163; *Wallis v. Carpenter*, 13 Allen, 19; *Shute v. Taylor*, 5 Met. 61; *Higginson v. Weld*, 14 Gray, 165; *Lampman v. Cochran*, 16 N. Y. 275; *Cohwell v. Lawrence*, 38 N. Y. 71; *Lyman v. Babcock*, 40 Wis. 503; *Carter v. Strom*, 41 Minn. 522; *Berry v. Wisdom*, 3 Ohio St. 241; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 384.

For a clear statement of the rule as to when a sum named is to be considered a penalty and when liquidated damages, see—

Clements v. Schuykill River E. S. R. Co. 132

Pa. 445. See also *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 85 Kan. 692.

Mr. J. H. Morrison for defendant in error.

Valentine, J., delivered the opinion of the court:

The substantial question involved in this controversy is whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of \$500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed \$100. The contract upon which Kemper seeks to recover contains the following among other stipulations: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." It will be seen that the parties themselves have used the words "liquidated and ascertained damages;" but nearly all the authorities agree that neither these words, nor any other words of similar import, are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing more than a penalty. Some of such authorities are the following: *Lampman v. Cochran*, 16 N. Y. 275; *Ayers v. Peas*, 12 Wend. 393; *Hoag v. McGinnis*, 22 Wend. 163; *Beale v. Hayes*, 5 Sandf. 640; *Gray v. Crosby*, 18 Johns. 219; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Shreve v. Brereton*, 51 Pa. 175; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 Allen, 19; *Ex parte Pollard*, 2 Low. 411; *Baye v. Ambrose*, 28 Mo. 89; *Carter v. Strom*, 41 Minn. 522; *Schrumpf v. Tennessee Mfg. Co.* 86 Tenn. 219; *Haldeman v. Jennings*, 14 Ark. 329; *Davis v. Freeman*, 10 Mich. 188; *Hahn v. Horstman*, 12 Bush, 249; *Low v. Nolte*, 16 Ill. 475; *Kemble v. Farren*, 6 Bing. 141; *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Newman v. Capper*, L. R. 4 Ch. Div. 724.

Of course the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received, or recovered, must be given due consideration, and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty; and this, even if the parties should name such amount "liquidated damages."

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The following text-books upon this subject may be examined with much profit: 1 Sedgw. Dam. 8th ed. chap. 12, §§ 389-427; 1 Sutherland, Dam. pp. 475-580, chap. 7, § 6; 13 Am. & Eng. Encyclop. Law, pp. 857-868; 1 Pom. Eq. Jur. §§ 440-447; 3 Parsons, Cont. pp. 156-163, § 2.

The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty, instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. 1 Sutherland, Dam. 490; 13 Am. & Eng. Encyclop. Law, pp. 853, 860. The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: *Kurte v. Sporable*, 6 Kan. 395; *Foote v. Sprague*, 13 Kan. 155; *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 85 Kan. 692.

We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: *Davis v. Gillett*, 52 N. H. 126; *Caswell v. Johnson*, 58 Me. 164; *Burrill v. Daggett*, 77 Me. 545.

In 1 Sedgwick on Damages, 8th ed., the following among other language is used: "From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Section 405. "And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system,—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." Section 406. "Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." Section 410. "Whenever an amount stipulated is to be

paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will generally be treated as a penalty." Section 411. "Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." Section 412. "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Section 413. "If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages, in case of a partial breach." Section 415.

In 1 Pomeroy on Equity Jurisprudence the following language is used: "Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or all of these provisions, such sum must be taken to be a penalty." Section 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." Section 444.

In Sutherland on Damages the following among other language is used: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Page 478. "To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement. But, when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist,

or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but, to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation. It is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid. It is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." Pages 480, 481. See also especially 3 Parsons, Cont. 6th ed. p. 156 *et seq.*

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained, then such amount must be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount, and calling it liquidated damages, make it such. In this connection the following language of Judge Christianity, who delivered the opinion of the court in the case of *Jaquith v. Hudson*, 5 Mich. 123, 136, 137, is instructive: "Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, a court of law would enforce it for the amount stipulated. Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole pen-

alty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must therefore, we think, be very obvious that the actual intention of the parties in this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and cannot be, made the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Flintoff*, 9 Mees. & W. 678, per Parke, *B.* May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean." And in the case of *Myer v. Hart*, 40 Mich. 517, 528, the Supreme Court of Michigan held as follows: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the text-

books and the reported cases, but we think the foregoing is sufficient; and from the foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of \$500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and had then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building, and to put it in as good condition as it was before, would not have cost to exceed \$100. But suppose that Condon had removed the building, and then have failed to put the same in as good condition as it was before: he would have committed a breach of the contract, but the actual damages might not have been \$25. Then, should the plaintiff, Kemper, recover the said sum of \$500? Or suppose that Condon had removed the house, and attempted to put it in as good condition as it was before, but had failed to repair a lock, or a small portion of the plastering, or a broken window, which repairing might not have cost \$1; then, should Kemper have the right to recover the said sum of \$500? All this shows that the parties did not have in contemplation the matter of actual compensatory damages when they stipulated that Kemper might recover \$500 from Condon as liquidated and ascertained damages, in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of \$500 as a penalty to cover all or any damages which might result from a breach of the contract.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concur.

VERMONT SUPREME COURT.

Asher BURDITT, Admr., etc., of Angeline W. Gorham, Deceased, *Appt.*,

v.

Charles S. COLBURN, Admr., etc., of Rollins S. Meacham, Deceased.

(.....Vt.....)

1. A mortgage by an administrator individually to himself as administrator to secure an indebtedness which he owes to the estate is invalid for want of contracting parties.

2. A mortgagor's placing the mortgage, which he has executed individually to himself as administrator, without recording it, in a receptacle used for keeping papers belonging to himself and the estate, where it is found after his death, is not a delivery; and its subsequent recordation, by his successor is ineffectual.

(August 31, 1891.)

A PPEAL by complainant from a decree of the Chancery Court for Rutland County

NOTE.—Deed, essentials to validity of.

A deed must be signed, sealed, and acknowledged, and it is still inoperative for any purpose until it is actually or constructively delivered by the grantor, and accepted by the grantee. This element of delivery is the inseparable accompaniment of every conveyance, and it cannot be omitted without fatal effect. *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Goddard's Case*, 2 Coke 4 b; *Stiles v. Brown*, 16 Vt. 563; *Fisher v. Beckworth*, 30 Wis. 55; *Hulick v. Scovill*, 9 Ill. 175; *Younge v. Gullbeau*, 70 U. S. 3 Wall. 641, 18 L. ed. 233; *Church v. Gilman*, 13 L. R. A.

16 Wend. 656; *Fairbanks v. Metcalf*, 8 Mass. 230; *Overman v. Kerr*, 17 Iowa, 486; *Johnson v. Farley*, 45 N. H. 510; *Cook v. Brown*, 34 N. H. 476; *Fisher v. Hall*, 41 N. Y. 421; *Fletcher v. Mansur*, 5 Ind. 267.

Delivery includes a surrender and acceptance, and both are necessary to its completion. This must be the result of a contract, the meeting of two minds, the accord of two wills. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this accord of wills must be evinced in some way to show the unequivocal intention of both parties that the

dismissing his bill filed to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Mr. George E. Lawrence, for complainant:

Meacham, as administrator, was an entirely separate person from Meacham individually.

While public policy does not permit him in his representative capacity to deal and contract with himself in his individual capacity, nevertheless such contracts are in the nature of voidable contracts rather than void. And whenever contracts so made result beneficially to the trust they may be enforced in favor of the trust—and the trustee himself cannot nullify them.

Boerum v. Schenck, 41 N. Y. 183; *Woerner, Law of Administration*, 700-702, 1086, 1087.

Delivery, appears to have been accomplished, since the deed was signed, sealed, and delivered in the presence of attesting witnesses, and placed among the papers of the estate he intended to be benefited thereby.

Souzerby v. Arden, 1 Johns. Ch. 240, 1 L. ed. 126.

An administration stands in the place of the deceased, and cannot defend against this mortgage, unless Meacham himself could, supposing the same had, by reason of his removal, passed to another administrator during his lifetime.

Martin v. Martin, 1 Vt. 91.

Mr. J. C. Baker, for defendant:

Every contract necessarily involves two parties: one bound to perform the contract, and the other entitled to have it performed.

A party cannot contract with himself.

2 Chitty, Contracts, 1339.

Without delivery there is no mortgage.

1 Jones, Mortgages, § 84.

Delivery is an incident necessary to give effect to a mortgage, even as between the parties to it.

1 Jones, Mortgages, § 539; 3 Washburn, Real Property, 282; *Stiles v. Brown*, 16 Vt. 563; *Dwinell v. Bliss*, 58 Vt. 353.

The grantor must part with the control and custody of the mortgage permanently, with the intention of having it take effect as a mortgage. So long as he retains the control of the deed he retains the title conveyed by it.

Elmore v. Marks, 39 Vt. 538. See *Orr v. Clark*, 62 Vt. 136; *McElroy v. Hiner*, 133 Ill. 156.

This deed being found among Mr. Meacham's papers in his safe after his death, and there having been no delivery in his lifetime, no record made after that time can have any effect.

Walsh v. Vermont Mut. F. Ins. Co. 54 Vt. 351.

Tyler, J., delivered the opinion of the court:

The following facts are reported: Rollins S. Meacham, in his life-time, was administrator with the will annexed of the estate of Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for \$1,550, payable to himself as administrator on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate, nor rendered any account to the probate court. He converted the assets into money, and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of \$7,000, and was insolvent. His debts, besides what he owed the estate, amounted to about \$9,000 and his assets to about \$4,000. The note and mortgage were retained by him, and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town clerk's office. The question is as to its validity.

The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who, on his part accepts such promise. One person cannot by his promise confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds, there is no contract; there is merely an offer which the promisor may at any time retract. Chitty, Cont. 9, quoting Pothier Obl.

It is essential to the validity of a deed that there be proper parties,—a person able to contract, and a person able to be contracted with. 3 Washb. Real Prop. 217.

To uphold this mortgage, we must say that there may be two distinct persons in one; for in law the mortgagor and mortgagee are identical. The addition of the words "executor of A. W. Gorham's estate" does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Washb. Real

instrument shall take effect according to its purport and tenor. *Fisher v. Hall*, 41 N. Y. 416; *Brackett v. Barney*, 28 N. Y. 333; *Best v. Brown*, 25, Hun, 223.

It is a legal presumption that where a conveyance is found in the possession of the grantee or mortgagee, a due delivery of the instrument was intended. *Green v. Yarnall*, 6 Mo. 326; *Clarke v. Ray*, 1 Harr. & J. 319; *Chandler v. Temple*, 4 Cush. 235; *Southern L. Ins. & T. Co. v. Cole*, 4 Fla. 359; *Ward v. Lewis*, 4 Pick. 518; *Canning v. Pinkham*, 1 N. H. 353; *Houston v. Stanton*, 11 Ala. 412; *Cutts v. York Mfg. Co.* 18 Me. 190; *Ward v. Ross*, 1 Stew. (Ala.) 136.

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But this presumption may be rebutted by evidentiary facts calculated to prove the reverse of the conclusions established by the presumption. *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501; *Johnson v. Baker*, 4 Barn. & Ald. 440; *Wolverton v. Collins*, 34 Iowa. 238; *Adams v. Frye*, 3 Met. 109; *Ford v. James*, 2 Abb. App. Dec. 162; *Little v. Gibson*, 30 N. M. 506; *Roberts v. Jackson*, 1 Wend. 478; *Black v. Shreve*, 13 N. J. Eq. 457; *Black v. Lamb*, 12 N. J. Eq. 116; *Den v. Farlee*, 21 N. J. L. 279. See notes to *Standiford v. Standiford* (Mo.) 3 L. R. A. 299; *Stokes v. Anderson* (Ind.) 4 L. R. A. 313; *Taylor v. Street* (Ga.) 5 L. R. A. 121.

Prop. 279, it is said that a grant to A., B., and C., trustees of a society named, their heirs, etc., is a grant to them individually; and *Austin v. Shaw*, 10 Allen, 552; *Tovar v. Hale*, 46 Barb. 361; *Brown v. Combs*, 29 N. J. L. 36,—are cited. In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default.

2. The mortgage was not delivered. An actual manual delivery of a deed or mortgage is not necessary. If it had been so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance, it is a sufficient delivery. *Orr v. Clark*, 32 Vt. 136. Whether it has been so disposed of or not depends upon the facts of a given case.

In *Elmore v. Marks*, 39 Vt. 538, the orator was indebted to Marks, and for the purpose of security made and executed to him a deed of certain land, and carried it to the town clerk's office to be filed, but not recorded, and to be returned to him when his indebtedness to Marks should be paid. Through inadvertence, the deed was recorded, and the orator took it into his possession. It was never delivered to Marks, and he had no knowledge of it until several months after it was recorded, when the orator told him that it had been recorded by mistake. It was held that there was no delivery. Pierpoint, *Ch. J.*, said: "All the authorities seem to agree that, to constitute a delivery, the grantor must part with the custody and control of the instrument permanently, with the intention of having it take effect as a transfer of the title, and must part with his right to the instrument, as well as with the possession. So long as he retains the control of the deed, he retains the title." Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed should presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a delivery. *Byars v. Spencer*, 101 Ill. 429.

In *Stone v. French*, 37 Kan. 145, it appeared that Francis B. French formed an intention of giving a certain piece of land to his brother, unless he should dispose of it during his lifetime. Accordingly, he wrote a letter to his brother in which he stated that in case of his decease his brother should have the land, and do with it as he pleased; that he would make a deed of it, inclose it in an envelope, and direct it to him to be mailed in event of the grantor's death. The grantor afterwards made a deed which contained the usual words, "Signed, sealed, and delivered in the presence of," etc. It was in all respects properly executed, and was placed in an envelope in the grantor's table drawer, with directions indorsed upon the envelope to have the deed recorded, but it was in fact never delivered. It was held that there was no delivery of the deed, and that the title to the land did not pass to the grantee; that, the deed being void, the recording of it after the grantor's death gave it no validity. A mere intention to convey a title is not sufficient. 18 L. R. A.

The intention and the act of delivery of the deed are both essential. To constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke. Phill. Ev. (2 Cow. & H. notes, 5th ed.) 660, and authorities collated.

In *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 262, it is said that "the delivery of a deed is essential to the transfer of a title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed or the right to retain it."

In *Fisher v. Hall*, 41 N. Y. 416, the court of appeals said: "A rule of law by which a voluntary deed executed by the grantor, afterwards retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to anyone for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity." Without a delivery and acceptance, there is no mortgage, but only an attempt at one, or a proposition to make one. 1 Jones, Mort. § 104; *Jewett v. Preston*, 27 Me. 400; *Foster v. Perkins*, 42 Me. 168; 3 Washb. Real Prop. 299.

The fact that the note and mortgage, duly executed by Meacham, were found after his decease among his papers and papers of the estate, shows no delivery of them in any legal sense; on the contrary, the facts that he omitted to have the mortgage recorded, that he retained it in his possession and under his control so long a time, and that it ran to him and his heirs and assigns, indicate that he never decided to give it legal effect. He did not make it operative in his lifetime, or direct that it should take effect at his death, which was necessary to give it a testamentary character. The act of recording it after that event could not give it validity.

Decree affirmed, and cause remanded.

Elizabeth H. CROSSMAN

v.

Frank W. JOHNSON.

(....Vt....)

Representations privately made in regard to property which has been ad-

NOTE.—Warranty, before or after sale.

Before sale.

A warranty shortly before the time of a sale, if relied upon, is binding. *Wilnot v. Hurd*, 11 Wend. 584; *Lisney v. Selby*, 2 Ld. Raym. 1120.

Statements made in negotiations at any interview before a sale may be warranties. *Way v. Martin*, 140 Pa. 499.

A verbal warranty of horses on a day when the price was fixed but prior to the actual purchase, when a written bill of sale was made, may be binding on the seller. *Hobart v. Young*, 12 L. R. A. 686, 68 Vt. —.

But evidence of representations a month before

advertised for sale at public auction may become the foundation of an action for breach of warranty in favor of one who, in reliance on them, bids in the property.

(September 4, 1891.)

EXCEPTIONS by defendant to rulings of the County Court for Rutland County, made during the trial of an action brought to recover damages for alleged breach of warranty of a horse. *Judgment affirmed.*

The facts are stated in the opinion.

Mr. Joel C. Baker, for defendant:

If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus, in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty."

2 Addison, Torts, 1014; *Hopkins v. Tunqueray*, 15 C. B. 180; 2 Benjamin, Sales, pp. 808, 809; *Bartlett v. Purnell*, 4 Ad. & El. 792; 1 Wait, Act. & Def. 477.

The claimed representations after the sale but before payment were wholly without consideration and are void.

2 Benjamin, Sales, 809.

Mr. D. E. Nicholson for plaintiff.

Start, J., delivered the opinion of the court:

The defendant and one Wiley were co-administrators of the estate of William Wiley, and as such administrators had advertised the property of the estate to be sold at public auction on March 14, 1889. On the 21st day of February, 1889, and after the horse in question had been advertised for sale at public auction, the plaintiff went to see the defendant about purchasing him. Her evidence tended to show that the defendant then told her the horse was only twelve years old and sound; that he would not sell him at private sale; that he must be sold at public auction, and she could bid for him there; that she bid off the horse at the auction sale relying upon these representations, which were known to the defendant. After the sale, and before delivery or payment, the defendant repeated these representations. The plaintiff's evidence also tended to show that the horse was twenty years old, and unsound, and that this was known to the defendant at the time he made the representations. The plaintiff claimed to recover upon a warranty and on account of fraud. The defendant requested the court to charge the jury as follows: "No claim of

damages for breach of warranty can be predicated upon a sale at auction, unless the representations upon which the claim is made are made at the auction, or in such a manner as to operate as a representation or warranty to any bidder who should become a purchaser at the sale." The court refused to so instruct the jury, to which the defendant excepted. It appears from the exceptions that the charge in other respects was such as the case called for, and that the rules with reference to both branches of it were fully stated, to which no exceptions were taken. By the charge, the jury were left at liberty to find the defendant liable on account of a warranty. In this respect the defendant's counsel claims there was error, and insists that the jury should have been instructed as requested, and contends the plaintiff was not entitled to recover on account of a warranty, because the representations constituting the warranty were made to the plaintiff privately, and to permit such recovery would be to encourage a fraud upon all others attending the sale. We think the defendant is not in a situation to take advantage of his own wrong. To excuse the defendant from liability, under the circumstances of the case, would be a greater fraud upon the plaintiff. The defendant, in effect, said to the plaintiff, when she called to buy the horse: "I am going to sell him through the auctioneer as my agent at such a time and place. He is only twelve years old, and sound. I decline to make the sale myself now, or to fix a price, as I have advertised him for sale at public auction. You can attend the sale, and the price is to be fixed there by the highest bidder." She attends the sale, and makes the purchase, relying, as she had a right to, upon his representations in regard to the age and soundness of the horse.

We are unable to find that the rule contended for by the defendant's counsel has ever been adopted in this State, and we see no good reason for making this case an exception to the general rule applicable to warranties. This general rule is well stated by Rowell, J., in the case of *Hobart v. Young*, 68 Vt. —, 12 L. R. A. 698: "Any affirmation as to the kind or quality of the thing sold, not uttered as a matter of commendation, opinion, or belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation, and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty."

Judgment affirmed.

a sale, offered to establish a warranty, was excluded as too remote. *Bryant v. Crosby*, 40 Me. 9.

And antecedent representations forming no part of the contract as concluded cannot be regarded as warranties. *James v. Bodge*, 45 Ark. 284; *Zimmerman v. Morrow*, 28 Minn. 367.

Representations in a catalogue of articles for sale at auction do not constitute a warranty when the auctioneer at the beginning of the sale publicly announces that the seller warrants nothing. *Craig v. Miller*, 22 U. C. C. P. 348.

After sale.

A written warranty after the sale, based on a prior oral warranty, is good. *Collette v. Weed*, 68 Wis. 423.

A warranty written into a bill of sale before payment or delivery, where a question arose after 18 L. R. A.

bidding for a horse at auction, is valid, but it is otherwise if it was done after payment and delivery. *McGaughey v. Richardson*, 148 Mass. 608.

A warranty after the sale is complete is not valid without a new consideration. *Bloss v. Kitttridge*, 5 Vt. 28; *Summers v. Vaughan*, 35 Ind. 323; *Towell v. Gatewood*, 3 Ill. 24; *Hogins v. Plympton*, 11 Pick. 97; *Cady v. Walker*, 62 Mich. 157; *Morehouse v. Comstock*, 42 Wis. 626; *Roscorla v. Thomas*, 2 Gale & D. 506, 3 Q. B. 284; *Grant v. Cadwell*, 8 U. C. Q. B. 161.

But if there is a new consideration it may be valid. *Congar v. Chamberlain*, 14 Wis. 258.

A warranty renewed by the original vendor to a subsequent purchaser from the vendee and relied upon by him in making the purchase is binding. *Porter v. Pool*, 62 Ga. 238.

B. A. R.

CALIFORNIA SUPREME COURT.

I. S. MILLER, *Appt.*,
v.W. J. WADDINGHAM *et al.*, *Respts.*

(.....Cal.)

1. **Whether or not in any case buildings that are placed upon land become fixtures**, is a question of fact to be determined upon the evidence of that particular case.
2. **A vendor of land, who retains the legal title as security for the fulfillment of the contract of purchase**, cannot prevent the removal of buildings voluntarily placed on the land by the vendee after taking possession, where a large amount of the purchase money has been paid, and there is nothing to indicate that he will fail to complete his contract, or to show that the land is less valuable than when the contract was made; or that the sufficiency of the security will be, in any way, impaired by such removal.

(September 25, 1891.)

A PPEAL by complainant from a judgment of the Superior Court for San Bernardino County, in favor of defendants in an action to enjoin the removal of buildings from certain real estate. *Affirmed.*

A decision was reached and an opinion handed down in this case on January 19, 1891, reversing the judgment of the court below. 11 L. R. A. 510. A rehearing was subsequently granted and the present opinion handed down, affirming such judgment.

The facts sufficiently appear in the opinion.

Messrs. Waters & Gird, for appellant:

Plaintiff being the owner of the title can maintain injunction to restrain removal of fixtures.

Civil Code, §§ 826, 3222, subsec. 2; *More v. Massini*, 32 Cal. 595; *Waterman*, *Trespas*, § 927, and *notes*.

The houses being constructed under an ordinary building contract, for residence purposes, till about one eighth finished, became, from their commencement to said time, fixtures and a part of the realty.

Waterman, *Trespas*, § 415; Civil Code, § 660, and *note*.

Messrs. Harris & Gregg, for respondents:

The buildings were put upon the land under an agreement that they should be the property of the builder until paid for. This agreement fixed the status of the buildings. Section 660 of the Civil Code only fixes the status of buildings in the absence of agreements.

Pratt v. Whittier, 58 Cal. 126.

Ownership of buildings, apart from the ownership of the soil, involves the conclusion that the buildings can be moved by the owner.

2 Smith, *Lead. Cas.* p. 223.

The houses can be moved from the premises, even though when they were placed upon the premises it was supposed they would remain there permanently.

NOTE.—Upon the question of fixtures between vendor and purchaser or mortgagor and mortgagee, see annotation under *Overman v. Sasser*, 10 L. R. A. 724.
13 L. R. A.

Tift v. Horton, 53 N. Y. 377; *Hendy v. Dinkerhoff*, 57 Cal. 7; *Ford v. Cobb*, 20 N. Y. 344.

Agreements making personality of what would, were it not for the agreement, be realty, are valid as against prior mortgagees and subsequent mortgagees or purchasers, who are not innocent purchasers. Such personality can be removed when the severance does not involve serious physical injury to the premises.

Tift v. Horton, *Ford v. Cobb* and *Hendy v. Dinkerhoff*, *supra*.

A grocery and dwelling-house can be made personality by agreement between the parties.

Smith v. Benson, 1 Hill, 176.

The right to remove dwelling-houses, etc., can be transferred.

Ham v. Kendall, 111 Mass. 297.

A house built by one man upon the land of another by his consent is removed by the builder.

1 Washb. *Real Prop.* pp. 4, 6, 8.

Clubine was the equitable owner of the lots upon which the buildings were erected and in possession. Any agreement therefore made between Clubine and Newman as to the status of the buildings can be enforced against Miller.

Hendy v. Dinkerhoff, 57 Cal. 7, and cases therein cited; *Willis v. Wozencraft*, 22 Cal. 608.

Although the vendor may upon breach by the vendee disaffirm the contract, until such disaffirmance he cannot maintain an action for injury to the freehold.

Ives v. Cress, 5 Pa. 118, 47 Am. Dec. 403; *Reed v. Lukens*, 44 Pa. 202; *Lombard v. Chicago Sinai Cong.* 64 Ill. 482; *Brewer v. Herbert*, 30 Md. 801; *Oldham v. Kennedy*, 3 Humph. 260.

Harrison, J., delivered the opinion of the court:

In March, 1887, the plaintiff entered into an agreement in writing with one Clubine, for the sale and conveyance to him of two blocks of land in Ontario, in this State, receiving from him the sum of \$9,000 on account of the purchase price of the property, and placed his vendee in possession of the land. Clubine subdivided the land into lots suitable for residence and business purposes, and employed the defendant Newman to construct certain dwelling-houses upon the land, and to furnish the materials therefor, for the sum of \$4,100, payable in weekly installments as the work progressed. Shortly after Newman began the construction of the houses, Clubine, failing to make such payments, agreed with him that the houses should belong to said Newman until paid for, and thereupon Newman proceeded with his work, and finished the houses, having received from Clubine only the sum of \$725 upon account thereof. Prior to the commencement of this action, Newman sold the houses to the defendants Waddingham and Gargan, and they very soon thereafter commenced to remove them from the land, and had partly completed such removal when the plaintiff commenced this action. The houses were built on redwood mud-sills of two-inch by six-

inch timber, resting upon the soil, and the soil was not disturbed in building or removing the houses. The plaintiff brought this action for the purpose of perpetually restraining the defendants from removing the houses from the land, and also to recover from them the sum of \$3,000 damages alleged to have been done to his property by the attempted removal. At the commencement of the action a restraining order was issued by the court, and upon the trial of the cause the court rendered judgment in favor of the defendants, and dissolved the restraining order. From this judgment the plaintiff has appealed upon the judgment roll alone.

Although the principal ground urged by the appellant for the reversal of the judgment is that upon the construction of the houses they became fixtures attached to the land, and that by their removal the defendants were committing waste, we think that the respective rights of the parties are to be determined upon principles other than those applicable to the subjects of waste and fixtures. The court below did not find that the buildings in question were fixtures, and, in absence of a finding by it upon that subject, we cannot say upon the facts that were found that they did become fixtures. Whether, in any case, buildings that are placed upon land become fixtures, is a question of fact to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture (*Pennybecker v. McDougal*, 48 Cal. 160); and in order to determine whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land. *Lavenson v. Standard Soap Co.* 80 Cal. 250.

The rules applicable to fixtures have been created by a series of judicial decisions, and these decisions are not always capable of being reconciled. The attempt in the Civil Code to give a definition of a "fixture" only in part removes the difficulty. Section 660 declares that "a thing is deemed to be affixed to land when it is . . . permanently resting upon it, as in the case of buildings;" but it still requires evidence to determine what is "permanently resting" upon the land. The finding in the present case that "said houses were built on redwood mud-sills of two-inch by six-inch timber, said mud-sills resting upon the soil," and that "the soil was not disturbed in building or removing said houses," is consistent with a determination of the court below that the buildings in question were not fixtures, and, for the purpose of upholding its decision, it may be assumed that such determination was made by it. But, without determining whether or not the buildings were fixtures, we are of the opinion that upon other principles applicable to the case the plaintiff is not entitled to the relief sought by him.

The plaintiff has invoked the aid of a court of equity to protect him against threatened injury, and, in order that he may have such protection, it is incumbent upon him to show that he has rights which need and can receive it, and also that the acts charged upon the defendants are an invasion of such rights, and demand such assistance. In his complaint he alleged that he was the owner of certain land

upon which certain buildings exist, and that the defendants had committed certain acts of trespass upon the same, causing a damage thereto of \$3,000. Upon the trial the court, instead of finding that he was the "owner" of the land upon which the alleged trespass was committed, found that he had made a contract of sale thereof with the grantor of the defendants, and placed his vendee in possession of the land, and that the buildings had been thereafter placed upon the land at the instance of the vendee, and were being removed under authority derived from him. Upon the execution of this contract of sale, the vendee of the plaintiff became vested with the equitable title to said land, and the plaintiff retained in himself the legal title as a security for the performance of the contract by the vendee. By placing his vendee in possession of the land, he thereby conferred upon him the right to its use and enjoyment, so long as he should continue to comply with the obligations of his contract. It may be conceded that, if the buildings had been upon the land at the date of the purchase and had formed a part of the subject matter of the sale, the plaintiff might have had the right to have them remain upon the land as a part of his security until the whole purchase price was paid. In this case, however, the buildings formed no part of the consideration for the purchase of the land, nor were they placed upon the land in pursuance of any terms of the contract of sale. The fact that the plaintiff was under no obligation to give to his vendee possession before a conveyance of the land is immaterial. He did give him possession, and while such possession did not authorize the vendee to do any act which would diminish the value of the property of which he had received the possession, he had the right under his equitable ownership to any use and enjoyment thereof consistent with such obligation. For such use and enjoyment he could not be chargeable with waste. After the execution of a contract of sale the relation of the vendor and vendee to the land is likened to that of mortgagor and mortgagee. The vendor retains the legal title as security for the performance by the vendee of the contract on his part, and by placing the vendee in possession of the land gives to him the right to use and enjoy it as his own, so long as he does not impair its condition, or diminish its value as it existed when received by him. So long as the vendee complies with the terms of his contract he is entitled to retain possession of the land (*Willis v. Wozencraft*, 22 Cal. 607), and the vendor can at no time enforce payment of more than the agreed price therefor, however much the land may have appreciated in value, or been improved by the vendee. The fact that the vendor holds the legal title as security for such payment does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money or than are held in land by a mortgagee, who takes for his security a conveyance absolute in form, instead of a formal mortgage. It is a well-recognized principle in equity that a mortgagee cannot maintain an action to restrain waste without showing that thereby his security will be impaired (*Robinson v. Russell*,

24 Cal. 467; *Buckout v. Swift*, 27 Cal. 438. See also *Perrine v. Marsden*, 34 Cal. 14; and, by parity of reasoning, the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land. Such use and enjoyment by the vendee, is a use of his own property, and unless he thereby impairs the security, or diminishes the estate which he received from the vendor, or the value of the land as he received it, he should not be restrained. In view of these principles, the plaintiff has failed to show any right to the equitable interposition of the court, and the action of the court in dismissing his complaint was correct. It is not alleged in his complaint, nor is it found by the court, that the vendee has in any respect failed to comply with the terms of his contract, or that he is unwilling or unable to do so. The record does not dis-

close the terms of the contract of sale,—either the amount of the purchase price remaining unpaid, or the time when it will become payable. Nor is it alleged or found that the land is less valuable than it was at the date of the contract of sale, or how great is the obligation for which the plaintiff holds it as security. In the absence of any allegation or finding to the contrary, it must be assumed that the land is fully as valuable as at the date of the contract, and that the vendee is not only able to comply with his obligations, but that he will fully and promptly meet them as they mature. Inasmuch, then, as the plaintiff has received \$9,000 towards the payment of the purchase price of the land, he does not show any impairment of his security or injury to himself by the fact that the defendants are threatening to remove from the land buildings placed thereon by themselves, and which are shown to be of the value of only \$4,100.

The judgment of the court below is affirmed.

We concur: **Beatty, Ch. J.; De Haven, J.; Garoutte, J.; Sharpstein, J.**

MISSISSIPPI SUPREME COURT.

Sallie A. HEWLETT, *Appt.*,
v.

W. W. GEORGE, *Exr.*, etc., of Sarah A. Ragsdale, Deceased.

(....Miss....)

1. The privilege extended by Code, § 1608, to a female plaintiff in an action to testify by deposition taken before trial does not, in view of the Statute forbidding one to testify as a witness to establish his claim against a decedent's estate, extend to having the deposition read in case defendant dies before trial, and the action is revived against her executor notwithstanding defendant is also a female and might have had her deposition taken to meet plaintiff's and so prevented plaintiff from securing any undue advantage over her.

2. Punitive damages for a personal wrong cannot, under the Mississippi statutes, be recovered against the personal representative of the wrong-doer.

3. Compensatory damages recoverable by one wrongfully confined in an insane asylum may include an award for mental anguish, shame, and mortification, and injury to character.

4. A minor cannot maintain an action against its parent for wrongful confinement in an insane asylum where the relation of parent and child with its reciprocal duties has not been dissolved between them.

(May 18, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lauderdale County in favor of defendant in an action brought to

recover damages for the wrongful confinement of plaintiff in an insane asylum by defendant's testatrix. *Reversed.*

The facts are stated in the opinion.

Messrs. Witherspoon & Witherspoon, for appellant:

It was error to exclude plaintiff's deposition. At the time it was taken, May 31, 1888, Mrs. Ragsdale was living. She was notified of the taking of the deposition, and her counsel were present. She afterwards had more than six months in which to take her own deposition, which she, being a woman, was entitled to have taken under § 1608 of the Code. Under such circumstances, it cannot be said that plaintiff, by her deposition, is testifying against the estate of the deceased person.

Strickland v. Hudson, 55 Miss. 235.

The competency of a witness is to be determined by the facts existing at the time the testimony is given. The deposition was given while the defendant was living.

2 Woerner, Am. Law of Administration, § 398; *Comins v. Hetfield*, 80 N. Y. 261.

The testimony was competent when taken, and became then a part of the evidence in the case.

Evans v. Reed, 78 Pa. 415.

All statutes which provide for the perpetuation of evidence are in furtherance of justice and should receive a liberal construction.

Pratt v. Patterson, 81 Pa. 114.

The test of present admissibility is the competency of the testimony at the time it was given.

Galbraith v. Zimmerman, 100 Pa. 374; *Rees v. Livingston*, 41 Pa. 119.

NOTE.—Punitive damages.

As regards the rule that prohibits an action to recover punitive damages against the representative of a deceased wrong-doer, the doctrine of the principal case is vindicated by the following authorities: *Ripley v. Miller*, 33 N. C. 217; *Edwards v. Ricks*, 30 Ia. Ann. 923; *Sheik v. Hobson*, 64 Iowa. 143; *Wright v. Donnell*, 34 Tex. 291. See *Sedgw. Dam.* § 362; 2 *Walt. Act. & Def.* 451; and see *note* to *Quinn v. South Carolina R. Co.* (S. C.) 1 L. R. A. 682.

The court erred in refusing to instruct that mental suffering, shame and humiliation, and injury to reputation are not proper elements of compensatory damages.

8 Lawson, Rights & Remedies, §§ 1104, 1218, 1302, 1970; *Ross v. Leggett*, 61 Mich. 445; *West v. Western U. Teleg. Co.* 39 Kan. 93.

Messrs. Walker & Hall, for appellee:

The deposition was properly suppressed under Rev. Code 1880, § 1602, because its effect was to establish her own claim against the estate of a deceased person.

Jacks v. Bridewell, 51 Miss. 881; *Wood v. Stafford*, 50 Miss. 370; *Rushing v. Rushing*, 52 Miss. 329; *Buie v. Buie*, 67 Miss. 456.

In trespass against executors and administrators, Rev. Code 1880, § 2060, provides "that in assessing damages, the jury shall only render a verdict for the amount the plaintiff may prove that he or she actually sustained, and vindictive damages shall not be given."

See 1 *Suth. Dam. p.* 758; 5 *Am. & Eng. Encyclop. Law*, 42, *note*.

The only injury shown by the testimony to have been suffered by appellant is the pecuniary loss of \$200 paid her attorney for services in having her released from the asylum.

Plaintiff is not entitled to recover any amount for the reason that she was a minor, and though previously married had separated from her husband and was living at the time with her mother, Mrs. Sallie A. Ragsdale.

7 *Am. & Eng. Encyclop. Law*, p. 665.

Woods, J., delivered the opinion of the court:

The deposition of plaintiff, taken in a pending suit, in a court of law, during the lifetime of defendant's testatrix, on the final trial of this cause, and after the death of the original defendant and the revivor against the executor of the deceased, was offered in evidence on behalf of plaintiff, and on motion of defendant was excluded by the trial court, and this action of the court is assigned for error. Relying upon the proposition that the competency of a witness is determinable by the facts existing at the time the testimony of such witness is given, counsel for appellant, with much vigor and ingenuity, contend that the appellant's deposition was competent evidence, even under our Statute which forbids any person testifying as a witness to establish his claim against the estate of a deceased person which originated during the lifetime of such deceased person. Code 1880, § 1602. Reported cases from New York, Pennsylvania and Maryland are cited and relied upon by counsel as directly supporting this contention. If these decisions had been made in cases similar to the one at bar, and upon statutes identical with ours, we should feel constrained, nevertheless, to decline to follow them. But we are unable to say they were made in cases involving the same or similar facts as those shown in the record before us, or upon statutes identical with ours. They may be perfectly correct expositions of the laws existing in the States where rendered, and yet be not at all persuasive as authority in this State. The argument of counsel is that under section 1608, Code 1880, the plaintiff had the right to have her own deposition taken in this cause; that the original defendant was

then alive, and, by her counsel, attended the taking of such deposition, and was made acquainted with its contents and their significance; that, thus advised and warned, it was the right of defendant then to have procured the taking of her own deposition, with a view to meeting, if she could, the case made against her by plaintiff's evidence contained in her deposition; and that, having failed or neglected to have her own deposition taken when she might have done so, her executor cannot now be heard to say that the lips of the plaintiff are sealed by law because the defendant's have been sealed by death. The argument is plausible, but fallacious, we think. Let us assume that the deposition of the plaintiff was taken because she was a female,—a class of cases covered by the fifth paragraph of section 1608. In this particular case, the original defendant being likewise a female, it is contended she might have enjoyed the same right accorded the gentler sex by our law, and have procured her own deposition to be taken, and have it used, and her executor might also have used her deposition on this trial; and no advantage could have, in such case, accrued to plaintiff, nor possible harm or injustice to defendant or to the executor of her will on final trial. If all citizens of the State were females, or if all suitors in the law courts were females, the construction of our statutes, necessarily involved in appellant's contentions, would be greatly strengthened. But, beside the favored class to whom the Statute extends the personal privilege of testifying by deposition, there exists that large and litigious and unfavored class, the male citizen, upon whom no such privilege has been conferred. Now, let us suppose the original defendant in this suit to have been a male—one of the unprivileged class,—upon whom the right to testify by deposition had not been conferred; and let us further suppose such male defendant had been alive at the time of taking plaintiff's deposition, without the power or privilege of preparing to meet it by having his own deposition taken, and that he had subsequently died before trial,—could it be reasonably insisted that the plaintiff's deposition could have been properly introduced in evidence on the trial of the suit revived against the dead man's executor? If not, the argument of counsel is specious, in this: that by the same statute we have two rules for recovery of claims against the estates of decedents prescribed,—one working no advantage to the plaintiff, nor hardship to the defendant, where both parties are females; but the other working unconscionable advantage to the plaintiff, and gross inequality and injustice to the defendant, where the plaintiff is a female and the defendant is a male. This incongruous construction is not to be tolerated. The general laws of the State touching property, none the less than life and liberty, must bear uniformly on male and female alike, and the mere deference shown woman by our laws, in permitting her, in certain states of cases, to withdraw from a public examination as a witness in open court, and to testify by deposition, must not be extended beyond the obvious purpose of the Legislature. Moreover, under the Statute we are considering (sec. 1608), it seems certain from an examination of the sixth par-

agraph of said section that in cases such as we have presented in this record the competency of a witness does not depend absolutely upon the facts existing at the time the deposition was taken; for, notwithstanding the fact that the deposition of a female, or of any witness residing in this State, but more than sixty miles from the place of trial, may have been taken, yet, on proper showing, the female or other witness residing more than sixty miles away may be compelled to appear and testify in open court. In these classes of cases the competency of the evidence offered does not depend absolutely upon the facts existing at the time the deposition was taken, but upon the conditions existing at the time of trial. We see no error in the rulings of the court on this point.

The action of the court, in its instructions, in excluding from the consideration of the jury the question of punitive damages, is also assigned for error. On this point it will be sufficient to say that at common law the action would have been abated upon the death of the defendant, and no recovery could have been had against her representative. The doctrine was that for a personal wrong the offender could not be followed into the grave, and the dead be visited with punishment. Our Statutes have modified the common law to the extent of permitting a recovery against the representative of the deceased wrong-doer to an amount sufficient to compensate for the actual damage sustained by the injured party; but the realm of the dead is not invaded, and punishment visited upon the dead.

This brings us next to the instructions of the court touching compensatory damages. By the second instruction asked by plaintiff and refused by the court, and by the instruction given for the defendant, the jury were shut up to return damages, if they found for the plaintiff, not exceeding the actual amount in dollars and cents shown to have been expended by the plaintiff in procuring her release from the insane asylum. It is true that in the instruction given for defendant the jury was told that a recovery might be had for actual damages, but by the second refused instruction of the plaintiff actual damages were held not to include compensation for mental suffering and pain, the sense of humiliation, shame, and disgrace, and injury to reputation, inflicted upon and endured by plaintiff. Here was actual damage to the extent of \$200, and actual damage for eleven days of time lost during confinement in the asylum, and to these should

have been added damages for mental pain and suffering, shame and mortification, and injury to character. Surely these injuries were real ones, and compensation for these would have been an award of actual damages. Compensatory and actual damages are one; and compensation for wrongs done to one's character is in no sense punitive. We cannot consent that actual damages, in this case, must be confined to the few dollars and cents shown to have been expended by plaintiff to secure her release from the asylum, and that no compensatory damages were awardable for shame and anguish and hurt to character. On this point we are of opinion the action of the trial court was erroneous, and that its judgment must be reversed. We decline, however, to reinstate the verdict of the jury on the first trial, because we are not satisfied as to plaintiff's right to a recovery absolutely. The evidence shows that the plaintiff was the minor daughter of the defendant, who had been married, but who, at the time of the alleged injuries, was separated and living away from her husband. Whether she had resumed her former place in her mother's house, and the relationship, with its reciprocal rights and duties, of a minor child to her parent, does not sufficiently appear. If by her marriage the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries. But so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The State, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand. On this very delicate and difficult point in the case the evidence is most unsatisfactory, and for this reason, if for no other, we decline to reinstate the first verdict.

Reversed and remanded.

MICHIGAN SUPREME COURT.

William H. OLNEY *et al.*, *Appts.*,
v.

GERMAN INSURANCE CO. of Freeport,
Illinois.

(... Mich.)

A chattel mortgage given by one partner on firm property for his individual

NOTE.—For mortgage as affecting insurance on property, see note to Russell v. Cedar Rapids Ins. Co. (Iowa) 4 L. R. A. 538.

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benefit makes a change of "interest," if not of title or possession within the meaning of an insurance policy providing against incumbrances by chattel mortgage and changes in interest, title or possession.

(October 30, 1891.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action upon a policy of fire insurance. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. George W. Bates**, for appellants:

The incumbrance was not valid and conveyed no specific interest in the property.

It is not in the power of either partner to dispose of the firm property in payment of his private debts.

The interest of a partner is not separable, and cannot be seized, nor any part of the partnership property taken on process against either partner and that only which may be determined to exist on a settlement of the partnership.

Sirrinc v. Briggs, 31 Mich. 443; *Haynes v. Knowles*, 86 Mich. 407; *Hutchinson v. Dubois*, 45 Mich. 148.

Such a mortgage passes no title to nor creates any lien upon the firm property, and does not affect the right or title of his co-partner, and is absolutely void as against the partnership or its creditors.

Jones, Chat. Mort. § 45; *Deeter v. Sellers*, 102 Ind. 458; *Smith v. Andrews*, 49 Ill. 28; *Caldwell v. Scott*, 54 N. H. 414; *Viles v. Bange*, 36 Wis. 135; *Nichol v. Stewart*, 36 Ark. 612; *Kingsberry v. Tharp*, 61 Mich. 216; *Walker v. White*, 60 Mich. 427; *Osborne v. Barge*, 29 Fed. Rep. 725.

Such a disposition of the firm property does not divert the title of the partnership in favor of the private creditor.

Rogers v. Batchelor, 37 U. S. 12 Pet. 221, 9 L. ed. 1068; *Hotchin v. Kent*, 8 Mich. 526; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Towle v. Dunham*, 76 Mich. 251.

No fraudulent act of one partner as to the partnership property would affect the partnership.

Edwards v. Hughes, 20 Mich. 289.

Such a mortgage is a void mortgage, and is not enforceable as against the partnership or McMurdie, the co-partner, who can ignore it; and as such would not vitiate the policy under the clause against incumbrances. A mortgage to affect an insurance must be valid and enforceable.

Pitney v. Glens Falls Ins. Co. 65 N. Y. 26; *School Dist. No. 6 in Dreden v. Aetna Ins. Co.* 62 Me. 330; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Scammon v. Commercial U. Assur. Co.* 6 Ill. App. 551; *Wood, Fire Ins.* § 312; 1 May. Ins. 3d ed. § 269; *Watertown F. Ins. Co. v. Grover & B. S. Mach. Co.* 41 Mich. 187; *Milner v. Germania F. Ins. Co.* 13 Phila. 551.

The same principle is applied to subsequent insurance under a clause against additional insurance, without the consent of the company, and it is held that such insurance will not affect the prior insurance unless the latter is valid and effectual.

Clark v. New England Mut. F. Ins. Co. 6 Cush. 347; *Philbrook v. New England Mut. F. Ins. Co.* 87 Me. 187; *Jackson v. Massachusetts Mut. F. Ins. Co.* 23 Pick. 418; *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325.

It does not effect a "change" of interest. A mortgage makes no "change" in the title, interest, or possession.

Lucking v. Wesson, 25 Mich. 443; *Kohl v. Lynn*, 84 Mich. 360; *People v. Bristol*, 35 Mich. 28; *Gardner v. Matteson*, 38 Mich. 200; *Haynes v. Leppig*, 40 Mich. 602; *Wilson v. Montague*, 57 Mich. 638.

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Such a conveyance will not vitiate the insurance under a condition of the policy, which provided that if "the property be sold or transferred, or any change takes place in the title or possession, the same is void."

Shepherd v. Union Mut. F. Ins. Co. 38 N. H. 282; *McLaren v. Hartford F. Ins. Co.* 5 N. Y. 151; *Van Deusen v. Charter Oak F. & M. Ins. Co.* 1 Robt. 55; *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 221; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *Hennessey v. Manhattan F. Ins. Co.* 28 Hun, 98; *Hanover F. Ins. Co. v. Conner*, 20 Ill. App. 297; *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 333; *Wood, F. Ins.* § 324. **Messrs. Howard & Ross** for appellee.

Long, J., delivered the opinion of the court:

The plaintiffs were partners, carrying on a grocery business in the City of Detroit. On the 1st day of May, 1890, they procured a policy of insurance of \$400 in the defendant Company on a stock of flour, feed, and other goods, and \$150 on hay, etc. The policy was for one year. After the insurance was procured, it appears one of the plaintiffs gave a chattel mortgage upon the property described to secure an individual debt of his. On July 12, 1890, the goods caught fire, and were destroyed and injured to the extent of \$319.87. The defendant Company had no knowledge of the chattel mortgage until after the fire. They refused to pay the loss, and on the trial in the circuit court the jury was instructed to find a verdict for the defendant. Plaintiffs bring error.

The policy sued upon is what is known as a "Michigan Standard Policy," and contains this clause: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or if any change other than by death of the insured takes place in the interest, title, or possession, whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

The defense of the action is based upon the proposition that the placing of the chattel mortgage by one partner upon the partnership property for his individual benefit works a change in the interest of the insured, so that the policy becomes void under the stipulation above quoted, contained in the policy. This stipulation in the policy in regard to giving chattel mortgages is valid and reasonable, and we think the court below not in error in directing verdict for defendant. The placing of the chattel mortgage by one partner for his individual benefit upon the partnership chattels works a change of interest therein.

In *Hicks v. Farmers Ins. Co.*, 71 Iowa, 119, it was held: "A condition in a fire insurance policy issued to a firm, that property should not afterwards be in any manner incumbered, was violated by the execution of a mortgage by one of the partners on his undivided one-third interest in the property, and by a judgment against him, which became a lien upon his said interest."

We think the Company discharged from liability on the policy by such an incumbrance without its knowledge, or any notice to it, and

its assent thereto. The placing of the chattel mortgage there by one partner may not have changed the title or possession, but there was a change of interest, which was provided against by the policy. The court was not in

error in directing verdict and judgment for defendant.

The judgment of the court below will be affirmed, with costs.

The other Justices concur.

MAINE SUPREME JUDICIAL COURT.

CITY OF BANGOR

v.

Melbourne P. SMITH *et al.*

(.....Me.....)

A state statute requiring a carrier, who brings into the State a person not having a settlement therein, to remove him from the State upon request of the proper officers if he falls into distress within a year, or to be liable for his support, is an unconstitutional regulation of commerce.

(April 16, 1891.)

REPORT by the Supreme Judicial Court for Penobscot County (Libbey, J.,) for the opinion of the full court, of an action brought to recover from defendants the cost of maintaining certain Italians whom defendants had brought into the State and who subsequently became a public charge. *Judgment for defendants.*

The facts are stated in the opinion.

Mr. Henry L. Mitchell, City Solicitor, for plaintiff:

Each of the several States in the Union has the right to pass necessary and reasonable laws to protect the people of such States from the introduction of criminals, paupers, and diseased persons into their community.

A law is not unconstitutional, because it may prohibit what one conscientiously thinks right, or require what he may conscientiously think wrong.

Donahue v. Richards, 38 Me. 379.

Whether an enactment is reasonable, or for the benefit of the people, is for the Legislature alone to decide.

Moor v. Veazie, 32 Me. 348.

All Acts of the Legislature are presumed to be constitutional; and the court will never pronounce a Statute to be otherwise, unless in a case where the point is free from all doubt.

State v. Lunt, 6 Me. 412.

The object of the Legislature was to prevent

NOTE.—*State laws imposing taxes or penalties upon immigration are unconstitutional.*

State legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress. *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

Any attempt on the part of the State to regulate commerce of a national or interstate character is an interference with that federal power which, under the Constitution of the United States, is vested solely in Congress. *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 499, 24 L. ed. 539; *Moran v. New Orleans*, 112 U. S. 69, 23 L. ed. 553; *Brown v. Houston*, 114 U. S. 632, 29 L. ed. 290; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; "The Passenger Cases," 48 U. S. 7 How. 319, 12 L. ed. 717; *Brown v. Maryland*, 25 U. S. 12 Wheat. 438, 446, 6 L. ed. 685, 688; *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Sherlock v. Alling*, 98 U. S. 99, 23 L. ed. 819; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 193, 29 L. ed. 158; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648; *Groves v. Slaughter*, 40 U. S. 15 Pet. 511, 10 L. ed. 823; *Cooley v. Port Wardens of Philadelphia*, 53 U. S. 12 How. 319, 13 L. ed. 1004; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35-49, 13 L. ed. 745-746; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710.

A tax levied under N. Y. Stat. of May 31, 1881, on every passenger from a foreign country in the port of New York, who is not a citizen of the United States, has been repeatedly decided by the United States Supreme Court to be a regulation of commerce with foreign nations, a subject confided by the Constitution to the exclusive control of Congress. *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 13 L. R. A.

550; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 382.

Result of the decisions in "The Passenger Cases."

The result of "The Passenger Cases," 48 U. S. 7 How. 233, 12 L. ed. 702, was to hold that a tax demanded of the master or owner of the vessel for every passenger was a regulation of commerce by the State in conflict with the Constitution and the laws of the United States, and therefore void. Hence, a statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each of them, is a tax on the ship-owner for the right to land such passengers, and, in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare. *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543.

What commerce includes.

Commerce includes navigation. It means intercourse and includes all the instruments by which intercourse is carried on. It includes, also, all the subjects of such intercourse, and the transportation of persons as much as that of property. *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 189, 215, 6 L. ed. 68-74; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 13 L. ed. 745; "The Passenger Cases," 48 U. S. 7 How. 405, 413, 12 L. ed. 753-756; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 452, 22 L. ed. 673.

Commerce includes an intercourse of persons, as well as the importation of merchandise. "The Passenger Cases," 48 U. S. 7 How. 233, 12 L. ed. 702.

The immigration of foreigners to this country their transportation to and admission at the port of one State for the purpose of passing through that State to another State for residence in the latter, and the whole subject of passengers from foreign ports to and through the various States of the Union, is palpably a subject which is national in

the tax-payers of the State of Maine from being burdened by an influx of pauper element brought here by transportation companies either from foreign countries or from any other of the States and prevent them from being public charges as paupers; this being the case and the object of the Statute, it is a valid Statute and should be upheld as such.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 490, 81 L. ed. 708; *United States License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *Cooley v. Port Wardens of Phila.* 53 U. S. 12 How. 299, 13 L. ed. 996.

The Statute cannot be construed as intending to regulate commerce, but relates to the police internal government of the State, and this right is reserved by States, and the Statute of Maine under consideration is a valid Statute.

New York v. Miln, 36 U. S. 11 Pet. 182, 9 L. ed. 659; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 80 L. ed. 694. See also *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585.

Messrs. Wilson & Woodard, for defendants:

The provisions of the Statute in question constitute a regulation of commerce with foreign countries and among the States, and are

therefore beyond the power of any State to make.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 288; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

Interstate transportation of passengers is beyond the reach of a state legislature.

State Freight Tax Case, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 485, 81 L. ed. 700.

It cannot be fairly said that if these statutory provisions do relate to interstate commerce, or to commerce with foreign countries, they do not assume to regulate such commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158.

Regulating commerce is prescribing the rules by which it shall be governed, that is prescribing the conditions upon which it shall be conducted, determining when it shall be free and when subject to duties or other exactions.

If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547.

Although the penalty imposed by these provisions is laid upon the carriers, ultimately it must fall upon the passengers carried, and if, under these provisions, burdens are laid upon the carriers, the cost of sustaining the burdens

the broadest sense. The interests of the nation require one uniform system of regulation of that branch of commerce. *State Tax on Ry. Gross Receipts*, 82 U. S. 15 Wall. 297, 21 L. ed. 109; *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Cooley v. Port Wardens of Philadelphia*, 53 U. S. 12 How. 299, 13 L. ed. 996-1004; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 472, 22 L. ed. 684.

It was said in *United States v. Holliday*, 70 U. S. 3 Wall. 417, 18 L. ed. 185, that commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade and commercial intercourse between nations, and parts of nations in all its branches. It includes navigation as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great chief justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;" and he might have added, with equal force, which prescribes no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 190, 6 L. ed. 68; *Henderson v. Wickham*, 82 U. S. 259, 271, 28 L. ed. 542, 548.

Landing passengers is an incident to their transportation.

The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone can deal with such transportation, and its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Receiving and landing passengers and freight is incident to their transportation. All re-
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straints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion are invasions of the exclusive power of Congress. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations. *Henderson v. Wickham*, 82 U. S. 259, 271, 28 L. ed. 549-548.

A statute that imposes a burdensome and almost impossible condition on the ship-master, as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each, is a regulation of commerce, and void. *Ibid.*

The only state interference with the landing and receiving of passengers and freight which is permissible is confined to such measures as will prevent confusion among the vessels and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight. *Gloucester Ferry Co. v. Pennsylvania*, *supra*.

If a law passed by a State comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme. Where the federal government has acted, its Act is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 210, 6 L. ed. 73.

See notes to *State v. Indiana & O. Oil G. & Min. Co. (Ind.)* 6 L. R. A. 579; *People v. Budd (N. Y.)* 5 L. R. A. 559.

must be obtained by the carrier by increasing its charges for carriage. In this respect the cost of carrying the burden imposed by these provisions is like the tax under consideration in—

The Passenger Cases, 48 U. S. 7 How. 283, 12 L. ed. 702. See *Crandall v. Nevada*, 78 U. S. 6 Wall. 35, 18 L. ed. 745.

Nor can these provisions be sustained as a legitimate exercise of the police power of the State, because, under the authorities hereinbefore referred to, it is a plain regulation of interstate commerce, or of commerce with foreign nations.

Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 548; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Booman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

Libbey, J., delivered the opinion of the court:

The defendants were the owners of the steamer *Caroline Miller*, in December, 1887, and January, 1888, which they used as common carriers for passengers and merchandise between the City of New York, in the State of New York, and Bangor, in this State; and by said steamer brought from New York into Bangor, on the 9th of December, 1887, 56 Italians, who came into this State to work as laborers on the Canadian Pacific Railroad. But for some reason they ceased to work on said road, and on the 14th of December, 1887, returned to the City of Bangor, and it is alleged by the plaintiff were destitute, and in need of relief; and the overseers of the poor of said City, on application therefor, took charge of them, and furnished them with relief as paupers. And on the 19th day of said December, it is claimed by the plaintiff that the City through its officers tendered to the defendants at their wharf, and at their steamer in Bangor, the alleged paupers, and requested that the defendants should receive them and carry them back to New York. This the defendants declined to do, and thereupon the City paid their passage on board said steamer from Bangor to New York.

This action is brought to recover for the necessary supplies furnished said alleged paupers after they were tendered to the defendants, and to recover the money paid for their fare for transportation to New York. The plaintiff claims to recover by virtue of section 50 of chapter 24 of the Revised Statutes of this State, which reads as follows: "Any common carrier who brings into the State a person not having a settlement therein shall remove him beyond the State if he falls into distress within a year: provided, that such person is delivered on board a boat or at a station of such carrier by the overseers or municipal officers requesting such removal; and, in default thereof, such

carrier is liable in assumpsit for the expense of such person's support after such default."

The defendant's claim that this Statute is unconstitutional and void, and furnishes the plaintiff no ground for the maintenance of this action; and this is the question for our determination.

Congress has power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." Const. U. S. art. 1, § 8, cl. 8. That the carrying of persons from a foreign country into the United States or from State to State, is commerce within the meaning of this clause of the Constitution is too well settled to justify the citation of authorities. The bringing of persons by common carriers, then, from another State into this State is commerce between the States. Is the state statute which we have quoted a regulation of commerce? We think it is. In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, the court says: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority is a regulation." It is imposing an additional duty upon the carrier. It makes the commerce more burdensome to the carrier; for, after a person is landed in this State, it imposes upon the carrier the responsibility for his pecuniary condition for a year.

But it is claimed that this is the exercise of the police power of the State. That the State, in the exercise of its police power, may indirectly to some extent affect commerce between foreign countries and the United States or between States, may be conceded. Just what the police power of the State embraces, and how far it extends, does not appear to have been definitely determined. It may exercise it to require quarantine or inspection before landing, of persons brought from abroad. It may exercise it to prevent the landing of passengers infected with contagious disease. It may exercise it over the landing of convicted felons from abroad. It may exercise it over persons who have been subject to contagious disease, so as to be liable to be infected by it, and communicate it to others, and thereby endanger the health of the community. But it cannot exercise it to prevent commerce, nor can it exercise it over the carrying and landing of persons who are not at the time they are brought into the State in a condition to be dangerous to the public. *Hannibal & St. J. R. Co. v. Husen*, *supra*; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 548; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550. It cannot exercise it over persons who are free from contagion, who have not been subject to any danger of contagious disease, on the ground that they may become dangerous in that respect within a year or any other fixed period of time after landing. It has been said that it may exercise it to prevent the bringing into the State of paupers,—persons who have no means of support, who are destitute, and dependent upon public charity. But it cannot exercise it over a person who is not a pauper when landed, on the ground that he may become a pauper within some fixed period of time. While we do not undertake to determine just where the police

power of the State in regard to these matters terminates, it is safe to say that it does not embrace the subjects that we have last pointed out.

This Statute is broad and general in its terms. It embraces all persons brought into the State, having no settlement in the State; and as it is found in the Pauper Statute, the term "settlement" must be held to mean a pauper settlement, without regard to the fact whether the person is poor at the time when he is brought into the State or wealthy. He may be worth thousands and hundreds of thousands of dollars when he is landed in the State, and, from the various vicissitudes that men are subject to, within a year from that time may not have a dollar, may be destitute, and in need of support as a pauper. He may, when brought into the State, be a citizen of the State, having no settlement in it; and still, under the terms of the Statute, if he becomes a pauper within a year, it is the duty of the carrier who brings him here to take him and carry him out of the State. By what authority may it be done? A citizen of the State has the legal right to come into it, either with the aid of a common carrier or without such aid. Every citizen of the United States has the right to enter every other State for temporary purposes or to become a citizen of such State. Suppose the carrier who brings him in undertakes to seize him and carry him out of the State because he has lost

his property within a year, and become needy. Would not the courts interfere at once on application therefor, and discharge him from such unlawful restraint? We think it is clearly so. Then, again, what right would the carrier have, if he is a pauper, and the police power of the State extends to the extent to prevent the landing of paupers within it to carry him out of this State, and land him in another State?

But it is unnecessary to discuss the effect of this Statute further. Its provisions are too broad and sweeping to be considered within the power of the State. It is the exercise of a power granted solely to the United States, which the State cannot exercise. It is so general that, as we have said, it applies to all persons brought into the State by a carrier, without regard to wealth or poverty when brought in; but undertakes to impose upon the carrier the burden of removing or supporting him if he shall within the time named become destitute.

It is said by counsel that it is aimed against pauperism, and may be sustained as valid as to persons who are paupers when brought into the State. Its terms are general. It cannot be divided, and held to be valid as to one class of persons and invalid as to others.

Judgment for defendants.

Peters, Ch. J., and Virgin, Emery, Foster, and Whitehouse, JJ., concurred.

GEORGIA SUPREME COURT.

Elizabeth HARALSON, Impleaded, etc.,
Plff. in Err.,
v.

W. I. McARTHUR.

(.....Ga.....)

*1. **The defendant's attorney being absent with leave of the court on account of sickness**, his relationship to the case being known to counsel for the plaintiff, although his name was not marked on the docket, his leave of absence applied to the case; and, if his client was also absent on account of a public announcement made by the judge in open court (she being then present and hearing it) that no case would be taken up in which the absent counsel was concerned, the judgment against such defendant ought to be set aside upon application made at the same term, supported by an affidavit of a meritorious defense.

2. **A joint verdict and judgment against several defendants, some of whom were never served, and had not waived service by appearance, should be set aside on motion made at the same term.**

(July 8, 1891.)

ERROR to the Superior Court for Montgomery County to review a decision refusing to set aside a judgment rendered against defendant Haralson during the absence from court of her attorney. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Martin & Smith and H. W. Carswell* for plaintiff in error.

*Head notes by **Simmons, J.**

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Messrs. E. A. Smith, D. C. McLennan and DeLacy & Bishop, for defendant in error:

It is not the fault of plaintiff or his counsel that the name of counsel for Haralson was not marked on the docket, and they are not responsible for its not being marked, nor for the counsel's relying upon the judge upon a private application to have his name marked, and it was the duty of defendant Haralson and her counsel to file their defense at the first term instead of allowing the case to be marked in default, and hence the motion to set aside should be denied.

Storey v. Weaver, 66 Ga. 300; *Morris v. Morris*, 76 Ga. 783; *Graham v. Smith*, 80 Ga. 676.

Motion for a new trial is the remedy, and not a motion to set aside the judgment.

Ga. Code, 3590.

McArthur could have sued Haralson alone for the trespass, and having sued several joint trespassers could have dismissed as to all but Haralson, and proceeded against her alone; and the fact that verdict and judgment were rendered improperly against other co-defendants, who are not complaining, furnishes no cause of complaint for Haralson who was duly served, and against whom the verdict and judgment were properly rendered.

Brooks v. Ashburn, 9 Ga. 302.

Simmons, J., delivered the opinion of the court:

1. At the time the judgment was rendered in this case in the court below, Mr. Stanley, the attorney of Mrs. Haralson, one of the defendants, was absent from the court under a

leave granted on account of sickness. This providential cause would have been a sufficient excuse for his absence without any leave from the court. It was known to plaintiff's counsel that he had been employed in this case, although his name was not marked on the docket. Mrs. Haralson heard the judge announce in open court that no case in which Mr. Stanley was concerned as counsel would be taken up. For this reason she was not present when the case was called, and, doubtless for the same reason, made no arrangement to be represented by other counsel. She ascertained during the term that a judgment had been rendered against her, and immediately before the expiration of the term moved to set the same aside, which the court declined to do. This decision, in our opinion, was erroneous. Although Mr. Stanley had neither filed a plea for defendant nor caused his name to be marked on the docket, his client should not, in our opinion, suffer on account of his failure to do these things, because at the time the case was called and disposed of he was at home sick, and unable to attend to any business. If his leave of absence had been obtained for any other cause, he could at least have done what was necessary to inform the court what cases were to be affected by the leave granted. This he could have accomplished by furnishing the court with a list of his cases, or by seeing to it that his name was marked on the docket in all of them. Where an attorney is well, and gets a leave of absence from the court for his own convenience, it would be negligence to allow a case he was employed to defend to stand on the docket till called for a final disposition, without having previously done anything whatever to inform the court the case was to be contested, and that he represented the defendant. There seems to be no good reason, other than sickness or some other providential cause, why an attorney could not do this much, in person or otherwise, before the case was reached in its order for a hearing; and, unless prevented by such cause, he would have until then to protect his cases under his leave of absence; but where he is sick his opportunity to do so does not extend up to that time, and for this reason we think the rule above indicated should be modified in a case like this, where providential interference cuts an attorney off from the full exercise of his rights and privileges.

In the case of *Bentley v. Finch* (Ga.) 13 S. E. Rep. 155, the record shows that the judge stated to Mr. Humphreys, counsel for defendant, who was present in the court, he would not try that day any case in which he was employed, yet nevertheless, on the same day did render judgment against his client in a case wherein Mr. Humphreys' name was not

marked on the docket, the judge not knowing that he was employed therein. The court below afterwards set that judgment aside, and was, we think, properly reversed by this court for so doing. The suit was upon an unconditional written contract, and was in default, no plea having been filed, and no counsel's name having been marked for defendant on the docket. Mr. Humphreys' client relied upon the clerk to enter his name, and, this being at his own risk, he could take nothing by the clerk's failure to comply with his request. Again Mr. Humphreys was present in court when the judge made the announcement as to his cases, and there is no reason why he could not have then had his name marked in the cases he defended, or at least have informed the judge what his cases were. Nothing of the sort was done, and under these facts we thought no sufficient reason appeared for setting the judgment aside. In the *Bentley Case*, the motion to set aside the judgment was not made at the term at which it was rendered, as was done in the case at bar; nor does the record in the former allege that defendant or his counsel were ignorant till after the term closed, of the rendition of the judgment, or state any reason whatever why the motion to set aside was not made during the term. These two cases differ in many respects, but the controlling distinction between them is that in one the defendant's counsel was prevented by providential interference from giving all needed attention to his client's interests, and in the other he was not, but had ample and sufficient opportunity to do so, and by availing himself thereof could have prevented the rendition of the judgment.

2. This was an action against several defendants, including the plaintiff in error, some of whom were not served at all, and never had their day in court. The verdict and judgment being a joint one in favor of the plaintiff against all the defendants, ought not to stand. Those who were not served, of course, are not bound by it; and this fact would effectually prevent the plaintiff in error, in case she satisfied the judgment, from having her right to contribution from all her co-defendants. In the event she should demand such contribution, they would only have to reply they were not bound by the judgment at all, and that it established no right against them in favor of anyone. If the plaintiff had obtained judgment against those defendants only who were served, it may have been valid as to them; but inasmuch as the judgment is against all the defendants, including those not served, we are clear it should be set aside for the reason above stated.

Judgment reversed.

Lumpkin, J., not presiding.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John J. WILLIAMSON

r.

Warren S. HILL.

(.....Mass.)

The first annual payment is optional with the obligor on a contract to purchase

13 L. R. A.

certain patents and inventions which does not mention a cash payment made when the contract took effect, but which calls for annual payments for fourteen years, amounting to \$250,000 or, in lieu thereof, the sum of \$100,000 at any time within two years, and provides that on failure to make any payment when due within sixty days after

demand the "sale shall be null and void and of no effect" and the patents revert discharged of any obligations under the contract, with a further provision giving the obligor the right to assign the contract and thus free himself from personal liability.

(June 26, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County overruling a demurrer to the declaration and admitting certain evidence as well as to instructions and refusals to instruct made in an action brought to recover money alleged to be due under a contract for the purchase of certain patent rights which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts sufficiently appear in the opinion.

Mr. Charles M. Barnes for defendant.

Mr. Thomas William Clarke for plaintiff.

Knowlton, J., delivered the opinion of the court:

The plaintiff was the owner of certain letters-patent, and of an invention on which letters-patent had been applied for, all for methods or processes of manufacturing electrical conducting wires. On April 26, 1887, he made a contract in writing with the defendant to sell these letters-patent and inventions, and stipulated also to sell and convey any other letters-patent which he should obtain or inventions which he should make for wires of similar compounds during the term mentioned in the contract. The contract proceeds in the following language: "The conditions of sale, and the payments to be made, and the times and mode of so making them are hereinafter expressly stipulated, as follows:—

"Said Warren S. Hill, or his assigns, shall pay to said Williamson, his heirs or assigns, the sum of twenty-five hundred dollars in one year from the first day of May, A. D. 1887."

[Then follows a statement of sums to be paid annually on the first day of May for fourteen years from May 1, 1887, amounting in all, including the \$2,500, to \$250,000.]

It being understood and provided that in case any of the aforesaid payments being due, and having been demanded, and such payment be not made or tendered within the sixty days next succeeding such demand (except as is hereinbefore provided), then and in that case this contract and agreement and sale shall be null and void and of no effect from the date so determined, and the patents shall revert to said Williamson or to his assigns, discharged of any obligations of whatever nature due to this contract, and of any rights to manufacture thereunder." The next clause relates to the places where the payments are to be made. The next stipulates that the defendant or his assigns may at any time within two years from the 1st day of May, 1887, make payment or tender of payment of \$100,000 in cash to the plaintiff, and that the plaintiff shall receive the same and the title to all such payments "shall pass absolutely to said Hill or his assigns discharged of all future payments."

The last provision is as follows: "Said Warren S. Hill may assign this agreement, 18 L. R. A.

subject to all the conditions of payment, to any person or corporation; and in case of the payment by such assigns or their assigns, or their successors in interest, at or before the conclusion of any calendar year, or shall make the special single payment on or before May 1, 1889, as above stipulated, the sale hereby provided for shall inure to the benefit of such assigns or persons having his or their title. But in case such payments be not made this agreement ceases and determines as hereinbefore provided."

The suit is brought to recover the first payment mentioned in the contract, which was duly demanded soon after May 1, 1888. "At the time it appeared by the evidence that the sum of twelve hundred and fifty dollars was paid to the plaintiff at or about the time of the execution of the contract, by one Edwin S. Thayer, and at the same time, or shortly after, the plaintiff paid two hundred and fifty dollars of this sum to the defendant Hill, in pursuance of a verbal agreement had by the plaintiff and defendant before the time of the execution of the contract; and that in all the negotiations between the plaintiff and defendant concerning the making of the contract, the plaintiff insisted on a payment being made to him at the time of the execution of the contract, and the payment was made at such time in pursuance of this agreement which was not contained in the contract; and by such agreement it was understood that twelve hundred and fifty dollars should be paid to the plaintiff at the time of the delivery of the contract, and that two hundred and fifty dollars of that money should be paid back by the plaintiff to the defendant Hill." It also appeared that at the time the contract was made the wire had not been manufactured for the market, nor put to any use except for the purpose of testing its mechanical and electrical qualities, and there was uncontradicted evidence that the plaintiff had been, for some years before the execution of the contract, trying to get someone to undertake the manufacture of the wire, and that on one occasion previously he had had a contract with the defendant, concerning the purchase of the patents, which had run out.

The question before the court is, What is the true construction of the contract in regard to the payments mentioned in it. Was it an absolute sale, and did the defendant become bound absolutely to pay the sum of \$250,000, or was it a contract which merely secured him rights in the patents on his making payments from time to time so long as he continued to pay in accordance with the contract. The defendant contends that the purpose of the contract was to enable the defendant to experiment with the patents and to endeavor to obtain a purchaser of them, and that the payment of \$1,250 by Thayer, who testified that he was interested in the purchase of the patents, was to secure to the defendant rights in them for one year, and that at the end of the year he had his option either to pay \$2,500 within sixty days after a demand by the plaintiff, and thereby secure control of the patents for another year, or to decline to pay, and so make the contract "void and of no effect."

There can be no doubt that his failure to make the payment demanded terminated all

his rights in the patents and his liability for future payments. If such a failure had occurred several years later, after some of the payments had been made, it would have rendered the contract of no effect from the date—that is to say, so far as the contract had been completely executed in the making of payments it would remain in effect, but so far as it remained entirely executory it would be terminated and none of the payments provided for in the future could be collected. The only question of difficulty relates to the payment which had become due, either absolutely or conditionally, but remained unpaid. As to that, is the contract in force so that it can be invoked for the collection of it? That depends on whether the payment had become absolutely due and payable before the contract became void.

It is worth while to inquire whether the parties intended this provision for the benefit of the defendant as well as the plaintiff. Was the defendant entitled to be free from all future liability by refusing to pay on demand, or could the plaintiff if he saw fit compel him to pay the whole sum of \$250,000? The stipulation is absolute that on the defendant's failure to pay within sixty days after a demand the contract shall become of no effect for the future; and, considering the nature of the contract, we cannot doubt that the parties intended to allow the defendant to avail himself of this provision at the end of any year to relieve himself from future liability. This the plaintiff's counsel concedes in argument; but he says that the defendant could not relieve himself from liability for the payment which had been demanded, and which he contends had become absolutely payable on the first day of May. But the contract becomes void only after the expiration of sixty days from the plaintiff's demand for the payment; and if the plaintiff's construction were correct, following literally the terms of the contract, he would have nothing to do but to decline to make a demand, and at the expiration of a year the second payment would become due, and at the expiration of another year with no demand the third would become absolutely due, and so on, while the defendant would have no way of avoiding an absolute liability for the whole. To hold that each payment becomes absolutely due on the first day of May, when the contract says it shall be paid, is equivalent to holding that this provision of the contract is for the plaintiff only, and that the defendant has no option if the plaintiff sees fit to hold him as an absolute purchaser.

If we look critically at the contract we notice that the stipulation for a payment on the first day of May in each year is only one of the "conditions of sale," and is qualified by the clause beginning, "it being understood and provided." When we look at the subject matter of the contract, the situation of the parties, the apparently experimental nature of the

transaction, and the payment made by the defendant in advance, we think the parties intended that each payment should be made only in case the defendant wished to keep the contract in force for his benefit, and that he was to have sixty days after a demand in which to determine whether to pay or to allow the contract to become void except as to those parts which had been fully executed. If he failed to pay, the contract would become of no effect as to the payment demanded. This appears also by the last paragraph of the contract, which gives the defendant a right to assign "the agreement, subject to all the conditions of payment, to any person or corporation" and to be relieved from further personal liability upon it by substituting another in his place. On such an assignment the assignee would be under no direct obligation to the plaintiff, and the plaintiff would have no remedies under the contract except as it gives him security on the patents. Yet it is stipulated that on payment by such assignee or his assigns or successors in interest "at or before the conclusion of any calendar year," etc., the sale provided for by the contract shall inure to his or their benefit. But if the payment be not made the agreement ceases and determines as before provided. Under this provision it is clear that, if the contract should be assigned, the plaintiff could not recover a payment which should subsequently accrue and be demanded of the assignee; and the contract assumes that this part of it is identical in legal effect with that on which this suit is brought.

We are of opinion, therefore, that the exceptions to the ruling at the trial should be sustained.

In passing on the demurrer to the declaration we are obliged to consider the question presented without the benefit of the facts proved at the trial, and the solution of it is not easy. But in the contract itself, although it does not appear that the payment was made in advance, there is much to show the experimental nature of the transaction. The principal patents had been in existence about three years, as appears by the description of them, and one application for a patent was then pending, and the contract by the terms looked to future inventions to be made and patents to be obtained by the plaintiff which were to be assigned to the defendant. Then the provision for assignment by the defendant "to any person or corporation," and the stipulation that a payment of \$100,000 at any time within two years might stand instead of \$250,000 to be paid year by year, indicate that this was not considered an absolute sale with security back to the seller, but a grant of a privilege to be kept alive by annual payments, or lost on the failure to pay annually. We are of opinion that the demurrer should be sustained.

Exceptions sustained. Demurrer sustained.

MICHIGAN SUPREME COURT.

Benjamin WOLF *et al.*
v.
William O'CONNOR, *Appt.*

(.....Mich.....)

1. An assignment preferring some creditors whom it fails to specify either in the instrument itself or in an indexed schedule is void upon its face.
2. An execution purchaser of land included in an assignment for creditors which is void on its face may have his title quieted against such assignment where the statute at the time of the purchase authorized a levy on lands fraudulently conveyed. It was not necessary for the judgment creditor to seek aid in equity before the sale.

(October 30, 1891.)

APPEAL by defendant from a decree of the Circuit Court for Osceola County in favor of complainants in a suit brought to quiet title to certain real estate. *Affirmed.*

Statement by **Long, J.** in the opinion handed down July 2, 1890, after the first hearing.

The bill is filed in this cause to quiet title to certain lands in Osceola County. The bill avers that complainant is in possession and has the original or government title, and also has certain tax titles, and that certain conveyances to the defendant, and claims made by him, cloud the title. On the hearing in the court below the tax titles asserted by each party were admitted to be void, and the only controversy here arises under the original title. All the lands in question were patented by the United States to Dennis Robinson under two patents dated, respectively, November 8 and December 15, 1855. October 5, 1857, Dennis Robinson made a deed of assignment conveying these and other lands, and all his property, real and personal, the lands being specifically described, to Nelson Robinson and George H. White of Grand Rapids, and Robert R. Robinson, of Newaygo County, this State, in trust for the benefit of creditors. This assignment

was signed and acknowledged by all the parties and witnesses, and was recorded October 6, 1857. On March 24, 1859, August Washman recovered a judgment against Dennis Robinson for \$683 and costs in the Circuit Court for Newaygo County. March 23, 1859, Mr. Washman sold and assigned in writing this judgment and claim against Dennis Robinson to William S. Utley, who was then the clerk of that court. August 12, 1859, Utley issued an execution to the sheriff of Newaygo County to collect the Washman judgment. This execution was returned and filed November 1, 1859, by Utley. December, 1859, Utley issued another execution to the sheriff of Mecosta County, Osceola County, forming a part of Mecosta County at that time. By virtue of this execution the sheriff of Mecosta County levied upon the lands in question and other lands. The execution on March 10, 1860, was returned satisfied in full by sale of these lands. Mr. Utley bought in the lands in question under this execution sale. August 28, 1871, Utley conveyed the lands to Delos A. Blodgett and James Kennedy, by deed of quitclaim, for a consideration of \$500; and on June 3, 1874, Blodgett purchased Kennedy's interest therein, taking a quitclaim deed; the consideration being named as \$500. The defendant claims under the following chain of title: (1) The assignment from Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George H. White, dated October 5, 1857; Mr. Nelson Robinson, the other assignee, having died in January, 1888. Deed of warranty from Dennis Robinson to him (William O'Connor), dated December 23, 1887, consideration \$1, conveying one-half interest in these and other lands, subject to taxes and tax titles. Deed of quitclaim from Robert R. Robinson and George H. White, trustees, etc., dated January 28, 1888, to Dennis Robinson, consideration therein \$1; and also warranty deed from Dennis Robinson to him (William O'Connor) conveying all the lands, dated March 4, 1889, for a consideration therein expressed of \$50. About the time of the filing of the bill in the present case, two other bills were also filed against the defendant, William O'Connor, one by Henry O.

NOTE.—Recitals of the assignment.

The principal case was decided upon well-recognized rules of law. These rules require that the instrument creating the assignment must itself fix and determine the rights of the creditors in the assigned property. Preferred creditors must be named, and, generally, it may be said that the omission of any of the statutory formulas is a vice which will avoid the instrument. The debtor cannot reserve to himself or transfer to his assignee the right to declare future preferences, or to change the order of the preferences already given, or to give preference at the assignee's discretion. *Grover v. Wakeman*, 11 Wend. 187; *Boardman v. Halliday*, 10 Paige, 223, 228, 4 L. ed. 953, 956; *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 7 L. ed. 216; 2 Kent, Com. (532) 601, *note*; *Kerchels v. Schloss*, 49 How. Pr. 288.

Assignments containing provisions to this effect have been repeatedly held fraudulent and void. *Barnum v. Hempstead*, 7 Paige, 568, 4 L. ed. 278; *Boardman v. Halliday*, *supra*; *Sheldon v. Dodge*, 4 13 L. R. A.

Denio, 217; *Strong v. Skinner*, 4 Barb. 546; *Averill v. Loucks*, 6 Barb. 470; *Mitchell v. Stiles*, 13 Pa. 306; *Gazzam v. Poyntz*, 4 Ala. 374; *Burrill*, Assignm. 3d ed. § 179.

In the case of *Wakeman v. Grover*, 4 Paige, 41, 3 L. ed. 334, the New York Court of Chancery decided that a debtor could not put his property beyond the reach of his creditors at law by assigning it to trustees to pay debts, without settling the rights of creditors under the assignment, leaving it to the assignees to give such future preferences in payment as they might deem proper.

It is a familiar rule on the subject of preferences that the debtor must declare such preferences in the assignment and there should be no power reserved to him by the assignment to interfere with the distribution of the property, and no means or opportunity reserved to him in any way, nor for any length of time, after the execution of the instrument, to make preferences among his creditors, or to use the assignment as a means of extorting terms from them. *Kerchels v. Schloss*, 49 How. Pr. 284.

Bevier, and the other by William F. Seeley. These other two cases presented by these bills were heard in the court below at the same time with the present case, and the evidence, under the stipulation of counsel, was to be treated as taken in all the cases. Decree was entered in the court below granting the prayers of the bills, and declaring the trust deed void, and a cloud upon the title of the several complainants; the other complainants having derived their titles also through the execution sale to Utley. The tax deeds held by defendant were also declared void. The decree provided that the defendant should release to complainants his claims to said premises, and, in default, that the decree stand in lieu of such conveyance, and be recorded for such purpose. From these decrees the defendant appealed, and all three cases are heard as one in this court. The whole question hinges upon the validity of this trust-deed, as it appears that none of the complainants, except possibly Mr. Bevier, has been in actual possession and occupancy the time required by the statute to settle his title by adverse possession.

It is the claim of the complainants, (1) that the trust deed was never accepted, and that the assignment was never acted upon by the parties, and was never operative; (2) that the instrument is void upon its face. The testimony was taken in open court, and the court below found with the complainant upon these two propositions. These facts are controverted by the defendant. Defendant's contention is, (1) that the complainants cannot assert in a court of equity a title procured through an execution sale; (2) that the trust deed conveyed the estate and title to the trustees, and it was so vested in the trustees at the time of the levy and sale under the execution; (3) that, the title being conveyed to Dennis Robinson by the trustees, the defendant procured an absolute title to the premises under his deeds. The complainant fails to point out the reason for his assertion that the deed of assignment is void on its face. It purported to convey the whole of the property of the assignor for the use and benefit of his creditors. It was executed prior to our Statute regulating the manner of making and execution of assignments for the benefit of creditors. It was signed and acknowledged by the assignors, as well as the assignees, and placed upon record in the office of the register of deeds of the County of Mecosta, where the assignor and one of the assignees resided, and in which the lands in controversy here were situate. Upon its face, it was not void, but a valid conveyance of all the property of Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George H. White for the benefit of the creditors of the assignor. At the time of its execution, it appears that Washman, under and through whose judgment the complainants now claim to hold the property, was a creditor of Dennis Robinson, and after the execution of the trust deed, those claiming under his judgment called upon the assignees for payment of the claim. Washman, Utley, nor any other of the creditors, appear to have moved to set the deed of conveyance aside, but, after the lapse of two years and more from the time the deed was recorded, and while the title of record stood in the

trustees, levied upon and sold the land under an execution directed against the assignor. There is an abundance of evidence contained in the record showing that the assignees never acted, or attempted to execute the trust. It appears that, after the deed of assignment was recorded, the assignor continued to control the personal property assigned, of which there was about \$2,000, consisting of horses, wagons, harnesses, and lumbering outfits, etc.; that it was disposed of by someone, or spirited away, and no creditor was ever paid a dollar, so far as here shown. It also appears that the assignor afterwards gave deeds of conveyance of a portion of the lands described in the deed of assignment, and did other acts showing that he still claimed an interest in and control over the property. It also appears that certain of the creditors called upon the assignees, or some of them, and demanded payment of their claims, and that they denied any interest in the property; and stated expressly that they never had anything to do with it, and should not, so far as the execution of the trust was concerned. The legal title to these lands, however, conveyed by the trust deed, remained in the assignees, and the survivor of them, until the execution of the deed of quitclaim of January 28, 1888, by White and Robert R. Robinson, the surviving assignees, to Dennis Robinson. So that, at the time of the levy and sale of the lands under the Utley execution the legal title stood in the assignees, and not in Dennis Robinson. Washman and Utley had notice by the record of this deed that the legal title had gone out of Dennis Robinson, and the testimony shows that they had actual notice of that fact; yet they levied upon and sold the land as the property of Dennis Robinson, without any proceeding for the enforcement of the trust, or to set it aside as fraudulent. Utley then stood in the position of purchaser under execution sale of whatever interest Dennis Robinson had in the premises at the time of the levy. As we have seen, he at that time did not have the legal title; and, whatever the attitude of Dennis Robinson or of the assignees towards the property may have been thereafter, or the refusal of the assignees to act under and carry out the terms of the trust would not operate to reconvey the title to the realty to Dennis Robinson. The creditors have the right to its enforcement, as the assignees had accepted the trust in writing, acknowledged its execution, and placed the same of record.

Messrs. Cahill & Ostrander for appellant.

Mr. C. H. Rose, with *Mr. G. A. Wolf*, for appellees:

If the assignment substantially reserves the right to name the preferred creditors in the future it is fraudulent and void.

Averill v. Loucks, 6 Barb. 470; Bump, Fraud. Conv. 3d ed. 382.

The law requires that the assignment must itself fix and determine the rights of the creditors in the assigned property. Otherwise it places the creditors in the power of the debtor and compels them to acquiesce in such terms as the debtor may think proper to prescribe as the only conditions upon which they are permitted to participate in his property. This is a fraud

upon the creditors, and necessarily delays and hinders them in the collection of their debts.

Wakeman v. Grover, 4 Paige, 41, 3 L. ed. 384, 11 Wend. 203; *Barnum v. Hempstead*, 7 Paige, 571, 4 L. ed. 279; *Boardman v. Halliday*, 10 Paige, 227, 4 L. ed. 956; *Sheldon v. Dodge*, 4 Denio, 221; *Hyslop v. Clarke*, 14 Johns. 462.

The law prior to 1867 did not require a bill to be filed at all.

Cleland v. T aylor, 3 Mich. 201; *Trask v. Green*, 9 Mich. 368; *Jenison v. Rankin*, 57 Mich. 49.

The law in this State at that time followed the common-law rule that the purchaser at the sale could bring ejectment or file a bill.

Bump, Fraud. Conv. 3d ed. 546; *Wait, Fraud, Conv.* § 126. See *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 481.

Every equity in this case is in favor of complainants.

It was the duty of the assignees, if they had accepted the trust, to proceed without delay in the premises.

Clark v. Craig, 29 Mich. 398.

The great lapse of time and the acquiescence of all parties interested in the sheriff's sale, made in 1860, will preclude defendant from now attacking complainant's rights thereunder.

Montgomery v. Merrill, 18 Mich. 383.

Messrs. Uhl & Crane, also for appellees:

The complainants are entitled to the same relief against the assignment upon the ground that it was made to defraud the creditors of the assignor as the judgment creditor had either before or after the execution sale.

Hildreth v. Sands, 2 Johns. Ch. 36, 1 L. ed. 287; *Sands v. Hildreth*, 14 Johns. 497; *Barr v. Hatch*, 3 Ohio, 527; *Frakes v. Brown*, 2 Blackf. 295; *Rhodes v. Magonigal*, 2 Pa. 39; *Pepper v. Carter*, 11 Mo. 540; *Harrison v. Kramer*, 3 Iowa, 543; *Gerrish v. Mace*, 9 Gray, 235; *Eastman v. Schettler*, 13 Wis. 324; *Warren v. Williams*, 52 Me. 343; *Gallman v. Perrie*, 47 Miss. 131; *Oliver v. McClure*, 28 Ark. 555; *Porter v. Parmley*, 52 N. Y. 185; *Miller v. Jamison*, 26 N. J. Eq. 411; *Cook v. Ligon*, 54 Miss. 652.

A purchaser of land at an execution sale acquires title to the land if the judgment debtor owned the land at the time of the sale, and may go into equity to set aside a fraudulent deed of the judgment although he is not in possession of the property.

Mohawk Bank v. Atwater, 2 Paige, 54, 2 L. ed. 810; *Hager v. Shindler*, 29 Cal. 48; *Bunce v. Gallagher*, 5 Blatchf. 481; *Ormsby v. Barr*, 22 Mich. 80; *Jones v. Smith*, 22 Mich. 360; *Horie v. Price*, 31 Wis. 82; *Gould v. Steinburg*; 84 Ill. 170; *King v. Carpenter*, 37 Mich. 363; *Newark M. E. Church v. Clark*, 41 Mich. 730; *Stock Grocers Bank v. Newton*, 13 Colo. 245; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

A creditor having a valid lien upon the real estate of his debtor by the levy of an execution issued upon a valid judgment may sell such real estate upon his execution and the purchaser at such sale may impeach a prior fraudulent conveyance made by the judgment debtor in an action at law. The purchaser may resort to a bill in aid of execution, but he is not compelled to adopt the equitable remedy.

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Jackson v. Myers, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 78; *Jackson v. Tymmerman*, 7 Wend. 436, 12 Wend. 299; *Stephens v. Sinclair*, 1 Hill, 143; *Cleland v. Taylor*, 3 Mich. 201; *Chautauqua County Bank v. Risley*, 19 N. Y. 869; *Bergen v. Carman*, 79 N. Y. 146.

The courts almost universally hold that a judgment creditor may levy upon land which the judgment debtor has fraudulently conveyed, sell it upon execution, and test the validity of the fraudulent conveyance in an action at law.

Bridge v. Eggleston, 14 Mass. 245; *Den v. Underwood*, 4 Wash. C. C. 129; *Hinde v. Longworth*, 24 U. S. 11 Wheat. 199, 6 L. ed. 454; *Doe v. Rowe*, 4 Bing. N. C. 787; *Middleton v. Sinclair*, 5 Cranch, C. C. 409; *Carter v. Castleberry*, 5 Ala. 277; *Rhodes v. Magonigal*, 2 Pa. 39; *Webb v. Dean*, 21 Pa. 29; *Eastman v. Schettler*, 13 Wis. 324; *Warren v. Williams*, 52 Me. 343; *Mulford v. Peterson*, 35 N. J. L. 127.

The assignment is fraudulent and void on its face, in that it did not declare the trusts created by it, but practically reserved to the assignor the power of subsequently expressing and defining the trusts.

Grover v. Wakeman, 11 Wend. 188; *Barnum v. Hempstead*, 7 Paige, 568, 4 L. ed. 278; *Gazzam v. Poyntz*, 4 Ala. 374; *Boardman v. Halliday*, 10 Paige, 223, 4 L. ed. 953; *Sheldon v. Dodge*, 4 Denio, 217; *Averill v. Loucks*, 6 Barb. 470; *Pierson v. Manning*, 2 Mich. 447; *Kercheis v. Schloss*, 49 How. Pr. 284.

The assignor directed his assignee to pay the fund received by him to certain creditors named in schedules to be annexed to the assignment. There are no schedules annexed to the assignment, and none have been found. The assignor has departed this life, and two of the assignees have died. The trusts created by the assignment are therefore incapable of execution, and are null and void.

Gloucester v. Wood, 3 Hare, 131; *Gloucester Corp. v. Osborn*, 1 H. L. Cas. 272; *Atty-Gen. v. Windsor*, 24 Beav. 679; *Aston v. Wood*, L. R. 6 Eq. 419.

Champlin, Ch., J., delivered the opinion of the court:

We granted a rehearing in this case upon the application of the complainants, and the case has again been submitted to us for our consideration. The opinion handed down by us is reported in 83 Mich. 301. One of the points made upon the original hearing was that the instrument was void upon its face. In the opinion handed down we said that the complainants had failed to point out the reason of their assertion that the deed of assignment was void upon its face; but in their motion for a rehearing they have stated the grounds upon which this claim is made, and to which our attention is now challenged. It is claimed that the assignment is void upon its face, because it declares preferences in favor of certain creditors, and such preferred creditors are not named either in the body of the instrument or in a schedule attached thereto. For a statement of the claim made by the complainants and of the chain of title of the respective parties reference is made to our former opinion.

It appears from the testimony that at the

time of the assignment Robinson was considerably indebted to different persons, and was unable to pay them, and executed an assignment purporting to be for the benefit of all his creditors, with certain preferences, hereinafter more particularly referred to. The contest here is not between creditors claiming any benefit under the deed seeking to enforce an execution of the trust, but complainants claim through a creditor acting in defiance of the title of the trustees. The defendant is not a creditor, and does not claim title through the trustees in the execution of their trust. The bill charges that the deed of assignment was executed to hinder, delay, and defraud creditors. Patent proof of such intention is shown by the fact that the assignees never took any steps to enforce the trust, never took possession or control of the property, never sold it in execution of the trust, and never paid a creditor of the assignor. The creditor under whom the complainant claims title, instead of acquiescing in or recognizing the validity of the assignment, proceeded to judgment, and levied execution upon the lands as the property of Dennis Robinson. The property was sold under such execution levy, the sheriff's deed executed, and it has passed through successive purchasers; and for more than twenty-nine years this action has remained unchallenged by either party to the assignment, or by any creditor of Robinson. The testimony shows conclusively that the assignment was a mere formality, executed with the intention of defrauding, delaying, and defeating creditors of Dennis Robinson. Two, at least, of the assignees asserted as early as 1859 that they had never accepted the assignment, and never had done anything under it, and never should; and Dennis Robinson himself directed the assignee of the judgment, who obtained the title under the sheriff's sale, to convey the title which he so obtained to a parcel of the land to Mr. Ryan, in payment of a debt due from Robinson to Ryan.

The assignment refers to a schedule of creditors who were preferred in the instrument. No schedule of creditors accompanies the instrument, and it does not appear that any was ever prepared or furnished to the assignees. It was an imperfect instrument when delivered, and two of the grantees named in it stated that they never had accepted it; and if it can be said that they did in fact accept the instrument in writing by signing their names to the instrument as recorded, still it cannot be said that they ever accepted a complete assignment. The assignment contains this clause: "They shall apply the surplus or residue of said trust moneys in and towards the payment and satisfaction of the several debts and sums of money due to the persons or creditors named in the schedule marked 'A,' as aforesaid, and enumerated in and under class number one, and so marked and indicated; and they, in the successive order in which they relatively stand in said class, to wit, after full payment and satisfaction of the debts due the first (1st), then the residue, if any there be, to be applied to the payment of the second (2d), and then in succession to the third (3d), and that thus successively the whole may be paid as far as the property and effects hereby assigned as afore-

said may or shall be sufficient to pay the same, and, after payment and satisfaction of such last above referred to debts and creditors mentioned in class number one, so marked in said schedule, and of all such costs, charges, and expenses aforesaid, then in trust, that they, or the survivor of them, his executors or administrators, do and shall apply the surplus or residue of said trust moneys in and towards payment and satisfaction of the several debts and sums of money due to the persons or creditors named in said schedule marked 'A,' as aforesaid, and enumerated in and under said class number two, so marked and indicated in said schedule to them *pari passu*, and without any preference or priority of payment in reference to the order or succession in which they stand in said class." While it will not invalidate an assignment which professes to convey all the assignor's property, and refers therein to a schedule of such property to be annexed, if such schedules are not annexed at the time of the execution of the assignment, yet I have not met with any authority which holds an assignment valid as against non-consenting creditors where the assignor prefers certain creditors over others unless such creditors are specified in the assignment itself, or embraced in a schedule annexed at the time the instrument was executed. The reason is obvious. It cannot be left to the debtor or to the assignees to say what creditors shall be preferred after the assignment is executed. This would leave the door open to the grossest frauds and favoritism. The debtor might sell his favors at a premium, and the assignees would not know at the time they accepted the trust who they were to pay in preference to other creditors of the debtor. Thus, in *Averill v. Loucks*, 6 Barb. 470: "Where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto according to the priority of the several schedules, and provided that such schedules should be made within sixty days, and be annexed to and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors, and it appears that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time, held, that the assignment was fraudulent and void." And Mr. Burrill, in his work on Assignments, at page 280, says: "Where a preference is intended to be indicated by a schedule it must be distinctly shown by some separation of the debt intended to be preferred from the other debts specified. The mere placing of a debt at the head of a schedule is not sufficient; and where an assignment refers to one or more schedules, as fixing the order in which certain preferred creditors shall be paid, it is essential that they should be annexed to the assignment previous to its execution, unless the assignment itself prescribe what debts shall be inserted in them, and in what order." And he cites, in support of what has been quoted, *Winslow v. Ancrum*, 1 McCord, Eq. 100, and *Averill v. Loucks*, 6

Barb. 470. See also *Barnum v. Hempstead*, 7 Paige, 571, 4 L. ed. 279; *Boardman v. Halliday*, 10 Paige, 227, 4 L. ed. 956; *Sheldon v. Dodge*, 4 Denio, 221; *Hyslop v. Clarke*, 14 Johns. 462; *Kercheis v. Schloss*, 49 How. Pr. 284.

It is urged by defendant's solicitor that the complainants are too late in seeking relief against the alleged fraudulent and invalid conveyance; that under the decisions of the court the judgment creditor through whom complainant claims should have filed his bill in aid of his execution before sale; and in support of this position they cite the following: *Messmore v. Huggard*, 46 Mich. 558; *Cranson v. Smith*, 47 Mich. 189; *Jenison v. Rankin*, 57 Mich. 49; *Munson v. Ellis*, 58 Mich. 335; *Edsell v. Nevins*, 80 Mich. 148.

If those cases were applicable to the present, I should be loth to follow them where to do so would be to inflict palpable injustice upon the parties who have obtained rights relying upon the decisions and intimations of this court in its reported cases. In *Cleland v. Taylor*, 3 Mich. 202, the action was ejectment, and the plaintiff relied upon the sheriff's deed, made upon a levy upon land which the plaintiff claimed had been conveyed by defendant with intent to defraud his creditors, and the question raised and decided was that the plaintiff could introduce evidence tending to show that the conveyance was executed with intent to hinder, delay, and defraud the creditors of the defendant in the execution. The presiding judge, at page 206 of the opinion, said: "It is said that a conveyance intended to defraud creditors is not void, but voidable only, at the instance of such creditor. In some respects this is so. As between the parties to the deed it conveys the legal title, which is good also as against the creditor until he pursues his remedy as such creditor, and acquires a lien upon or an interest in the land. When he has done this, the deed is void as to him, and may be treated by him in the prosecution of his remedies as creditor as absolutely void in law as well as in equity. The Statute makes no distinction,"—citing the Revised Statutes, p. 828. And in *Trask v. Green*, 9 Mich. 368, *Mr. Justice Christiancy* says: "Where the title before the conveyance has been vested in the debtor himself, and he has conveyed for the purpose of defrauding his creditors, the right of creditors to levy and sell rests upon the ground that, the deed being void as to creditors, the legal title, as to them, still remains in the debtor, as if no conveyance had been made. The land may therefore be sold on execution at law, without invoking the aid of a court of equity; and the purchaser may, if he chooses, try the question of fraud in an action at law (*Cleland v. Taylor*, 3 Mich. 201, and cases cited); and he may, doubtless, file his bill in a proper case, after sale, to remove the cloud created by the fraudulent conveyance. But it is generally more advantageous to all parties, and therefore more common, for the creditor to bring his bill before sale, in aid of the execution. And this may be done at any time after the creditor has obtained a lien upon the land by his judgment, when that of itself creates the lien, or only after the levy of an execution, where, as in this State, the levy is necessary to give the lien." It is true that what 18 L. R. A.

was thus said by *Mr. Justice Christiancy* was only the reasoning of the court, but all of the justices of the court concurred in this reasoning, *Mr. Justice Campbell* so expressly stating. The decisions were not questioned until the case of *Messmore v. Huggard*, 46 Mich. 558. In that case it was claimed that the mortgage had been executed by the judgment debtor before the levy of execution, which mortgage, it was claimed, was fraudulent and void as to the judgment creditor, and after sale he filed a bill to have the mortgage set aside and discharged as a cloud upon his title. The defendant claimed that the bill should have been filed before sale in aid of execution; and *Mr. Justice Cooley*, at page 561, said: "The point has never before been distinctly presented in this State, though since the decision in *Cleland v. Taylor*, 3 Mich. 202, it has perhaps been assumed that the right to question the bona fides of any conveyance by the judgment debtor was as much available to the creditor after he had caused the land to be sold on execution and become the purchaser as it was before. In that case the debtor had made an absolute conveyance, and the creditor, without proceeding to have the conveyance set aside, had become purchaser at the execution sale, and then brought ejectment. The defendant in ejectment questioned the right to inquire into the fraud in a court of law for the purpose of avoiding the deed; but the court, citing and relying upon *Jackson v. Myers*, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 78; *Jackson v. Timmerman*, 7 Wend. 486, 12 Wend. 299; and *Stephens v. Sinclair*, 1 Hill, 143,—decided that it was as competent to set aside the fraudulent deed by suit at law as by bill in equity, and that ejectment by the purchaser at the execution sale was a suitable proceeding for the purpose. There are numerous decisions in other States to the same effect, and we do not question their authority. But the case of *Cleland v. Taylor*, and the others referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed; but, as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant. In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage." It is thus seen that *Messmore v. Huggard* does not overrule *Cleland v. Taylor*. In *Cranson v. Smith*, 47 Mich. 189, the bill was filed in aid of execution by a purchaser at the execution sale. The execution debtor had, prior to the levy, executed a quitclaim deed of the premises to his wife, which the complainant alleged was done with the intent to cheat, delay, and defraud his

creditors. It was held that the bill in aid of execution must be filed before sale, and could not be afterwards. *Mr. Chief Justice Marston* distinguishes the case from *Cleland v. Taylor* and *Trask v. Green*. It will furthermore be perceived that this case originated since the amendment to the Statute in 1867, by which the practice is regulated. In *Jenison v. Rankin*, 57 Mich. 49, the court pointed out the distinction which the amendment to the Statute (Sess. Laws 1867, p. 132) made in the remedies to be pursued, and called attention to the fact that *Cleland v. Taylor* was decided under the Revised Statutes of 1846, and that since the amendment the parties must pursue the remedy provided by the amendment; and this was again announced in *Eidell v. Nevins*, 80 Mich. 146. The levy and sale were made in this case under the statute authorizing a levy of execution on lands fraudulently conveyed, as such statute read before amendment in 1867, and as it read when the cases of *Cleland v. Taylor* and *Trask v. Green* were decided; and so we may say that, if the deed of assignment was valid upon its face, the creditor at that time might attack it by a levy and sale upon the real property as the property of the debtor, and, as pointed out by *Mr. Justice Cooley* in *Messmore v. Huggard*, the judgment debtor had conveyed away his whole interest, and any offer to sell on execution necessarily attacked his conveyance. It has never been decided in this State, in cases which arose previous to the amendment of the Statute in 1867, that an execution purchaser cannot attack a conveyance made in fraud of creditors, either in action of ejectment or by bill in equity to remove cloud upon the title. In this case the defendant is not in a position to appeal to the conscience of a court of equity in his behalf. After the lapse of more than twenty-five years, through someone's instigation, the trustees in the deed of assignment, without having attempted to execute the trust, reconveyed in consideration of one dollar the land described in Schedule B to Dennis Robinson, the debtor, who executed the assignment. In this they merely attempted to discharge themselves of the trust, not to execute it. Robinson obtained no right, title, or equity superior to the purchaser at the execution sale against him. Utley was both prior in time and prior in right. Robinson could not successfully contend against the title of the execution purchaser, and O'Connor stands in no better situation than Robinson. I do not consider it necessary to place the decision of this case upon the ground simply that the assignment was executed for the purpose of cheating, delaying, and defrauding creditors, although I think it might safely be rested there, but I place it also upon the ground that the conveyance is void upon its face, and conveyed no title whatever to the grantees, for the reason that it did not contain the names of the creditors preferred, either in the body of the instrument or in the schedule annexed at the time of its execution. If the instrument were a valid one, the defendant in the original and complainant in the cross-bill would not be entitled to the relief here prayed.

If there was a trust which had not been executed by the trustees, he would become trustee by the transfers under which he claims title, 13 L. R. A.

and his title would be subject to the execution of the trust in equity, and he could not be allowed relief without paying the debts for which the assignment was executed; but it is not necessary to consider this branch of the case, as the other is a sufficient answer to his claims for relief, and it follows that *the decree of the court below should be affirmed.*

The other Justices concurred.

James S. AYRES *et al.*

v.

Henry C. DUTTON *et al.*, *Appls.*

(....Mich.....)

Subscribers of money and land to induce a third person to establish a manufactory in a certain community, the entire cost of which is nearly four times the value of the subscriptions, cannot, in the absence of a stipulation as to the time the business shall be continued, maintain an action to recover back their subscriptions, or to enjoin a removal of the machinery; if, after an honest and faithful attempt for two and one half years to render the business a success, it proves a losing venture.

(October 9, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Huron County in favor of plaintiffs, in an action brought to enjoin defendants from removing the machinery from a certain manufacturing establishment, without paying back to plaintiffs certain subscriptions which they had given toward the establishment of the manufactory. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Q. A. Smith, with *Messrs. William T. Bope* and *Horace G. Snover*, for appellants:

If any of complainants have paid Dutton any money on a consideration that has failed, they can recover it in an action at law.

Barrows v. Doty, Harr. Ch. 1; *Bennett v. Nichols*, 12 Mich. 23; *Torrent v. Muskegon Boom Co.* 22 Mich. 354; *Hagenbuch v. Howard*, 34 Mich. 1; *Torrent v. Rodgers*, 39 Mich. 85; *Webster v. Gray*, 37 Mich. 37.

Plaintiffs have no equitable lien upon the mill property for their contributions.

NOTE.—*Forfeiture of gifts made to secure location of public buildings, etc.*

Land given for the location thereon of the public buildings of a parish reverts to the original owner on their removal. *Police Jury v. Reeves*, 6 Mart. N. S. (La.) 221.

But a conveyance on the consideration that the county seat shall be "permanently located" upon the land, without stipulating that it shall forever remain there, does not give a reversion on its removal some years later. *Harris v. Shaw*, 13 Ill. 455; *Adams v. Logan County*, 11 Ill. 336.

Nor in case of a donation to build a court-house under a statute stipulating that the "place shall forever thereafter be the permanent seat of justice of the county." *Armstrong v. Dearborn County Comrs.* 4 Blackf. 208.

Nor where the land was given under a statute declaring that a county seat on the fulfillment of certain conditions shall be "permanently established" at that place. *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710.

A lien cannot be created except the relation of debtor and creditor exists.

1 Thomas, Mort. 2d ed. § 41.

Equitable liens cannot exist without a precedent agreement for security.

1 Jones, Mort. § 168.

It is clear that there was no implied trust.

Wright v. King, Harr. Ch. 17; 2 Story, Eq. Jur. § 1195; *Cook v. Fountain*, 3 Swanst. 585; *Hascall v. Madison University*, 8 Barb. 174.

Mr. W. L. Carpenter, with *Mr. James H. Hall*, for appellees:

A bonus is not a gift or gratuity, but a sum paid for services, or upon a consideration, in addition to, or in excess of, that which would ordinarily be given.

2 Am. & Eng. Encyclop. Law, p. 467, note 2; *Kenicott v. Wayne County Supers.* 88 U. S. 16 Wall. 452, 470, 21 L. ed. 819-822.

The property of a religious corporation, dissolved by reason of expiration of its charter, vests in its members.

Roman Catholic Church of Ascension Cong. v. Texas & P. R. Co. 41 Fed. Rep. 564.

The Legislature enacted, in 1887, that "it shall be unlawful for any railroad company whose road has been constructed wholly or in part by public aid or local subscription given as a bonus, to take up, or abandon, or cease the operation of said road."

Act Oct. 1887, p. 275.

The courts will restrain, in equity, a like wrong when the improvement is a grist-mill which the subscribers aided in placing here as a public, as well as a private, benefit to serve the people, which it ought to have done with impartiality the same as a common carrier.

Merrill v. Cahill, 8 Mich. 55.

Contributors to a fund to build a church, who were deprived in a measure of their privilege of worship, might maintain their bill for protection.

Ludlam v. Higbee, 11 N. J. Eq. 342.

Complainants had a right to have the mill operated in Fort Austin. They therefore had a right to an injunction from the court of

equity restraining the removal of the mill.

Avery v. Baker, 27 Neb. 388.

The subscription paper, does not constitute the entire contract.

Davis v. Belford, 70 Mich. 120; *Northern Cent. M. R. Co. v. Eslow*, 40 Mich. 222; *Parker v. Northern Cent. M. R. Co.* 83 Mich. 24; *Kalamazoo Novelty Mfg. Works v. McAlister*, 40 Mich. 84.

Grant, J., delivered the opinion of the court:

The complainants, sixteen in number, are residents of the Village of Port Austin. They, together with others, numbering in all one hundred and forty-seven, were desirous of having a flouring-mill built at said village. Conversations took place between some of complainants and the defendant, Henry C. Dutton, who was a practical miller, and then a stranger in that community. The result of these conversations was that Dutton offered to erect a mill of a certain capacity, provided that a bonus of \$2,500 was raised by the citizens of the village and vicinity, and sufficient ground given on which to erect the mill. A meeting of citizens was called, and a committee of three was appointed, two of whom are complainants here, to complete the arrangement and attend to the raising of funds. A subscription paper was drawn up, which reads as follows: "In consideration of our mutual promises, and in consideration of and for the purpose of inducing H. C. Dutton to construct a roller-process flouring mill in the Village of Port Austin, Michigan, of seventy-five barrels per day capacity, we severally promise to pay to said H. C. Dutton the sums set opposite our respective names, as follows: Two fifths thereof when the mill building is completed and ready for the machinery, and two fifths thereof when the machinery is delivered at the mill ready to be set up, and the balance when the mill is completed of that capacity and in operation, which shall be February 11, 1888. Dated Port Austin, Mich., this 12th day of September, 1887." The subscriptions amounted to \$2,374,

The ground of these decisions as to county seats is that the donors must have given with knowledge of the power to remove the county seat. On the other hand it was said *obiter* in *Twifold v. Alameda County*, 4 Greene (La.) 20, that a county should reconvey on removal of a county seat "permanently" located on condition of a conveyance.

Subscribers of money for an educational institution on condition that "it shall locate permanently" in a certain place may have an injunction against its removal. *Hascall v. Madison University*, 8 Barb. 174.

But unsolicited contributions toward the cost of purchasing a site for a county seat do not give the donors a right to restrain the sale thereof. *Warren County v. Patterson*, 54 Ill. 111.

A grant in consideration of a railroad company's placing its station on the grantor's land entitles him to damages or the restitution of his land on the removal of the depot one and a half miles away after twenty years. *Jessup v. Grand Trunk R. Co.* 28 Grant, Ch. (U. C.) 583.

And a deed "for a site for a depot . . . to have and to hold . . . for the purpose aforesaid . . . in consideration of the permanent location" of a railroad depot gives a reversion on removal of the depot after eighteen years. *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580.
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But these cases are much limited by later ones. Thus land conveyed "expressly for the use and purpose of depot grounds," to revert back if the company shall "fail to erect buildings and occupy said ground for that purpose," is held not to revert on a removal of the depot thirty years afterward, there being no express stipulation that such occupancy should be perpetual. *Jeffersonville, M. & I. R. Co. v. Barbour*, 80 Ind. 375.

Nor is there any reversion of land donated to a railroad company under a contract that it shall "permanently" establish the terminus of its railroad and its main machine works and carworks at that place where after eight years they are removed in whole or in part in accordance with the interests of the public and of the railroad company. Such contract does not amount to a covenant to keep such works there forever. *Texas & Pac. R. Co. v. Marshall*, 136 U. S. 383, 34 L. ed. 385.

And there is no forfeiture of title to land donated for a tan-yard by discontinuance of its use for that purpose after twenty-four years use. *Hunt v. Beeson*, 18 Ind. 380.

But an express provision in a deed donating land for depot purposes that it shall revert upon discontinuance of such use is valid and enforceable. *Owensboro & N. R. Co. v. Griffith* (Ky.) Oct. 17, 1891.
B. A. R.

of which \$165 still remains unpaid. Three of the complainants, Frederick, James and Ebenzer Ayres, comprised the firm of Ayres & Co. They deeded the land to Dutton, September 29, 1887, and at the same time Dutton executed an agreement with them by which, among other things, it was provided "that in case said flouring-mill, to be erected upon said lots, should be destroyed by fire within three years, and another flouring-mill of like kind and capacity is not erected upon said lots within said three years, or its erection begun within said three years and completed within a reasonable time thereafter, said Dutton shall deed back said lots to said Ayres and Co.; . . . " or, if he was unable to reconvey, he should pay Ayres & Co. \$300 as liquidated damages. These are the only two written documents in connection with the transaction. All else rests in parol.

The defendant, Dutton, erected the mill, according to the terms and specifications, and carried on the business for about two years and a half. The investment was a losing one for him, and, after offering to sell the property to other parties, who are complainants in this suit, at a considerable sacrifice, he sold the machinery, and was proceeding to remove the same, when this bill was filed, and he was enjoined. The original bill set up a bonus of \$2,500 paid to Dutton, and prayed that said sum, with interest from the time of payment, be decreed to be paid into court for payment back to the several subscribers; that the complainants Ayres be paid the sum of \$300; and that, in default of such payments, the defendants be enjoined from removing the mill. Subsequently complainants filed an amended bill, in which their prayer for specific relief was to enjoin the removal of the mill and its machinery. There was also a general prayer for relief. The court below found that the amounts subscribed were paid upon the equitable and implied consideration that Dutton should erect the mill and operate it with ordinary business skill, and fairly attempt to make the same a profitable and permanent business; that it was not carefully and skillfully conducted; and that it was inequitable towards the subscribers to remove the mill. The decree was for a lien upon the mill and machinery for the amounts paid by complainants, and that until such payments be made defendants be enjoined from removing the machinery. There was no express stipulation, either verbal or written, that Dutton should continue the business for any specified time. The building and plant were erected by Dutton, as agreed upon, at an expense of about \$10,500.

1. Complainants have failed to establish a case for the relief asked. Complainant Campbell is in default upon his subscription, and makes no offer to pay the balance due from him. The bill alleges that the agreement was for a bonus of \$2,500; that this amount was subscribed and turned over to Dutton, and accepted by him as money. It is now conceded that the whole \$2,500 was not raised nor subscribed. It is neither alleged nor proven that Dutton received the subscription pledges as a fulfillment of the agreement on the part
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of the complainants and their co-subscribers. The demand of complainants, therefore, is in violation of the universal rule that they who ask equity must do equity.

2. It was undoubtedly contemplated by the subscribers, and by Dutton, that the business would be permanent, as the plant itself was permanent in character. It was undoubtedly also contemplated that the business would be successful. Neither party, therefore, thought of making any provision as to time. No bonus would have been subscribed, and Mr. Dutton would not have expended nearly all his means, if any serious doubt of the success of the enterprise had existed. The subscribers to the bonus gave no guaranty. It was a common venture, in which the subscribers staked their bonus of \$2,500, and Mr. Dutton the balance, about \$8,000. It would be against reason and common sense, under these circumstances, to imply an agreement on the part of Mr. Dutton to continue the business at a loss. We have not before us the case of a successful business under like conditions, and upon such a case we intimate no opinion. It remains, therefore, to determine, from the record presented to us, whether defendant Dutton made a fair and honest effort to render the business a success, so as to warrant its continuance. The business was not successful; and the court below attributed the failure to want of care, skill and attention on the part of Mr. Dutton. There is no charge or evidence of bad faith on his part. He fully complied with his agreement in erecting the mill. He had more at stake and was more deeply interested in the success of the enterprise than any other person. The chief complaint against him is that certain customers who took wheat to the mill did not receive good flour in return, and in some instances received short weights, and that in consequence farmers took their wheat to other mills, or sold it in other places. Several other mills of a like character were doing business not far from this one. Several millers testified in the case, and from the evidence it is at least doubtful whether the complaints against Mr. Dutton in this respect were more common than against millers generally. Several causes operated against Mr. Dutton, which it is not necessary to enumerate. I think the evidence establishes the fact that Mr. Dutton fully complied with his agreement, and made an honest and faithful attempt to render the business a success. Having done this, he was no longer compelled to carry on the business, and had the right to sell and remove the machinery.

3. It follows that the complainants did not by their subscriptions obtain a lien upon the mill plant. There was no express provision for a lien, and none can be implied in such a case as this. It would be most inequitable to hold that Mr. Dutton took all the risks, and, in the event of failure, must pay the subscribers in addition to the large loss which he has incurred.

The decree of the court below is reversed, and bill dismissed, with the costs of both courts.

The other Justices concurred.

NEW YORK COURT OF APPEALS (2d Div.).

David MILLER, *Respt.*,

v.

Sarah F. MEAD, Impleaded, etc., *Appt.*

(.....N. Y.)

(October 6, 1881.)

The insertion in a contract for the sale of real estate of a clause binding the vendee to erect certain described buildings on it within a specified time shows the vendor's consent to such erection so as to render his interest in the property liable for liens for labor and material furnished for them, and its effect is not diminished by the insertion in the contract of a stipulation that mechanics' liens shall be subsequent to those of the vendor.

APPEAL by defendant Mead from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term in favor of plaintiff in an action brought to enforce a mechanics' lien. *Affirmed.*

Statement by **Follett, Ch. J.**:

May 25, 1887, the defendant owned in fee land in the City of New York extending from 127th to 128th Street, and bounded on the east by Madison Avenue and on the west by a line drawn parallel with and 35 feet west of the avenue. On the date mentioned she and one

NOTE.—*New York Mechanics' Lien Law of 1885; legislative intent.*

The legislative intent, as disclosed by the judicial interpretation of similar preceding Acts, is "to enlarge the remedy afforded by the former Acts on the same subject." *Heckmann v. Pinkney*, 81 N. Y. 216; *Hackett v. Badeau*, 68 N. Y. 478; *Loonie v. Hogan*, 9 N. Y. 440; *Knapp v. Brown*, 45 N. Y. 207; *Stuyvesant v. Browning*, 1 Jones & S. 204; *Muldoon v. Pitt*, 4 Daly, 104, 54 N. Y. 239.

The principle object is to provide security for a class of persons whose claims gradually accumulate from day to day, and who cannot protect themselves in any other way. As the lien attaches from the outset upon the land as well as upon the improvements, and rests alike upon both, it must be held to remain upon the land after the improvements have been destroyed or removed. *Steigleman v. McBride*, 17 Ill. 801; *Clark v. Parker*, 58 Iowa, 509.

The object of the Legislature was not arbitrarily to give a personal privilege to certain persons and refuse it to others, but it was to charge the fund or property which was not by the common law chargeable with the debt. *Donaldson v. Wood*, 22 Wend. 397.

The lien is to have "an operation somewhat in the nature of an attachment of the fund in the owner's hands." *Miller v. Moore*, 1 E. D. Smith, 741.

The lien is akin to that given by the common law to artisans upon materials in their possession for labor bestowed on them, and is a favored lien both in law and equity. 2 Kent, Com. 684; *Roberts v. Fowler*, 3 E. D. Smith, 632.

The Legislature intended altogether to discard the requirements of "a contract, express or implied," on the part of the owner of the land, and to enlarge the remedy of the workman or furnisher of materials in the direction of all cases where the owner of the land should consent to the work, or at all events instigate, or in any way procure it to be done on his land. *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 24 Hun, 538; *Loonie v. Hogan*, 9 N. Y. 435; *Riley v. Watson*, 3 Hun, 670; *Reno v. Pinder*, 20 N. Y. 301; *Pierson v. People*, 18 Hun, 248; *Eckhard v. Donohue*, 9 Daly, 214.

In order to confirm this view of the legislative intention, and to ascertain its compass, it is allowable to refer to contemporaneous legislation, although, not precisely in *pari materia*. *Chase v. Lord*, 6 Abb. N. C. 276.

Judicial construction of the Act.

Under a very recent construction placed upon this Act by the New York Court of Appeals it appears that

pears that in an action to foreclose the lien its beneficial effects cannot be defeated by the stipulation as against one not in privity with either of the parties to it, and who, without notice of the stipulation, have furnished labor or material. It was further held that the contract was proof of defendant's consent to the erection of the building and is sufficient to subject the owner's interest to all the incidents of the lien. *Miller v. Mead*, 127 N. Y. 544.

The Act of 1885 recognizes only the legal ownership, as contra-distinguished from the equitable ownership. *Riley v. Watson*, 3 Hun, 590; *Schmaltz v. Mead*, 23 N. Y. S. R. 117; *Nellis v. Bellinger*, 6 Hun, 560; *Hackett v. Badeau*, 68 N. Y. 476; *Husted v. Mathes*, 77 N. Y. 888.

We are at liberty to regard the judicial interpretation of the statutory recitals in a similar preceding law as it is an elementary rule of interpretation that where an Act is of the same general character as the former Act, and is in furtherance of the same general policy, it is subject to the same rules of construction. *Turnipseed v. Schaefer*, 76 Ga. 109.

Nature and scope of the remedy.

The lien of mechanics and materialmen on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the "creation of statute," and was unknown either at common law or in equity. *Phillips, Mechanics' Liens*, § 1, citing *Davis v. Farr*, 13 Pa. 187; *McNeil v. Borland*, 23 Cal. 144; *Doellner v. Rogers*, 16 Mo. 340; *Ayers v. Revere*, 25 N. J. L. 474; *Spencer v. Barnett*, 85 N. Y. 94; *South Fork Canal Co. v. Gordon*, 73 U. S. 6 Wall. 561, 18 L. ed. 894; *McCoy v. Quick*, 30 Wis. 521.

Statutes governing mechanics' liens are remedial, and must be liberally construed. *Rogers v. Omaha Hotel Co.* 4 Neb. 59.

This proceeding is wholly statutory, and, to entitle a claimant to its benefits, the recitals of the enactment must be closely observed; any substantial failure in this respect will avoid the lien and the court has no power or authority to sustain the proceeding, as a compliance with the requirements of the Statute is necessary to confer jurisdiction, and when that is omitted in any essential particular, the benefit designed by the Statute cannot be obtained. *Brown v. New York*, 6 Thomp. & C. 164; *Van Loon v. Lyons*, 61 N. Y. 22; *Burrows v. Ford*, 6 N. Y. 178; *People v. Knowles*, 47 N. Y. 415.

The State "prescribes the conditions under which a court may act; those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact." *Davidsburgh v. Knickerbocker L. Ins. Co.* 90 N. Y. 530.

Herman Gierke entered into a written contract by which she covenanted to sell, and he to purchase, the premises for \$70,000. Gierke also covenanted to complete, on or before October 1, 1887, six dwelling-houses, then begun on the south part of the lands, in a style specified in the contract, and costing at least \$6,000 each. The defendant covenanted to advance Gierke \$21,000, payable by installments as the work progressed, to aid in the erection of the buildings. It was mutually covenanted that when the houses were completed the defendant would convey the land to Gierke, and that he, concurrently therewith, would give his bonds to secure the payment of the purchase price, \$70,000, and the \$21,000 to be advanced, secured by mortgages on the premises. The contract contained the following provision: "And it is

agreed that, should any mechanics' lien be filed against the property herein described during the progress of said buildings, or against any part thereof, . . . such mechanics' lien . . . shall be subsequent to the liens and claims of the party of the first part (Sarah F. Mead), but in such cases, or either of them, it is agreed that all payments or advances due or to become due under this contract may, at the option of the party of the first part (Sarah F. Mead), be withheld until such lien or liens shall be removed and discharged of record; or said party of the first part may, at her option, apply such payments or advances to the payment and discharge thereof, or said party of the first part (Sarah F. Mead) may, at her option, in the case of a mechanics' lien, deposit an amount sufficient to cover said lien or liens, or give security

The foundation of a mechanics' lien is an indebtedness existing upon a contract by the person sought to be charged. *Tiley v. Thousand Island Hotel Co.* 9 Hun, 424; *Dixon v. LaFarge*, 1 E. D. Smith, 722; *Pendleburg v. Meade*, 1 E. D. Smith, 728; *Quinn v. New York*, 2 E. D. Smith, 558; *DeRonde v. Olmsted*, 47 How. Pr. 175; *Knapp v. Brown*, 45 N. Y. 207; *Gay v. Brown*, 1 E. D. Smith, 725; *Broderick v. Poillon*, 2 E. D. Smith, 554; *Walker v. Paine*, Id. 662; *Meyers v. Bennett*, 7 Daly, 471; *Muldoon v. Pitt*, 54 N. Y. 289.

Proceedings and judgment under the Mechanics' Lien Law are held to be *in personam* and not *in rem*. The lien of the judgment upon the particular property relates back to the time the work, etc., began, but is in other respects a general judgment. An invariable and inseparable quality, etc., of a proceeding *in rem* is the seizure of the thing, *e. g.* seizure under an attachment, although such writs issue against the defendants by name. *Capelle v. Baker*, 3 Houst. (Del.) 344.

Lien governed by the contract with the owner.

A party furnishing materials or doing work, relying upon the lien given by statute for security, must examine the contract with the owner; for it is only to the extent of what is due or to become due upon this contract, that his lien can attach. If he furnishes the material, or does the work for a sub-contractor, in like reliance, he should not only examine the contract with the owner, but also that of the sub-contractor; for, if the sub-contractor fails to perform his contract, so that nothing becomes payable thereon, or is paid in full, according to its terms, in case of performance, there can be no lien within the principle of the decisions in *Carman v. McInerow*, 13 N. Y. 70; *Lumbard v. Syracuse*, B. & N. Y. R. Co. 55 N. Y. 491; *Crane v. Genin*, 60 N. Y. 127; *Hagan v. American Baptist Home M. Soc.* 14 Daly, 131.

To what the lien attaches.

As between the owner and mechanic, everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold; as wheels of a mill, the stones and even the bolting-cloth, a copper kettle or boiler in a brewing-house, when proved to be essential to the brew-house, are subject to the Mechanics' Lien Law. *Gray v. Holdship*, 17 Serg. & R. 418.

So is a cooking range (*Reilly v. Hudson*, 62 Mo. 383); and a cotton gin placed in a gin-house, *Ewell*, *Fixtures*, 296.

So the engine by which a steam saw-mill is propelled is part of the building. *Morgan v. Arthurs*, 3 Watts, 140.

Likewise mill-stones (*Wademan v. Thorp*, 5 Watts, 13 L. R. A.

115), and machinery put up for a mill, fastened by screws and bolts. *McGreary v. Osborne*, 9 Cal. 119.

Under a statute that "every person performing labor upon, or furnishing materials to be used in the construction of, any building, shall have a lien upon the same," mirror-frames set in the wall, fastened by hooks and screws, so they can be removed, but designed by the owner to be permanent and to go with the building when sold, entitle the mechanic to a lien on the building. *Ward v. Kilpatrick*, 85 N. Y. 413; *Phillips, Mechanics' Liens*, 2d ed. § 177.

It covers anything used in the construction of the building. *Hazard Powder Co. v. Byrnes*, 12 Abb. Pr. 490; *Henderson v. New York*, 82 U. S. 268, 23 L. ed. 547; *Kent v. New York Cent. R. Co.* 12 N. Y. 631, 632; *Phillips, Mechanics' Liens*, §§ 3, 48, 153.

When the articles furnished are in fact and in intention annexed to the freehold, so as to become a part of it, and would, as between vendor and vendee pass by deed of the premises without special enumeration, the materialman has performed labor and furnished materials used in altering or repairing a building, or appurtenances thereto, for which he is entitled to a lien under the statute. *Ward v. Kilpatrick*, 85 N. Y. 413; *Voorhees v. McGinnis*, 48 N. Y. 278; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Laws 1885*, chap. 342.

The materials furnished may become so affixed to the realty as to entitle the party furnishing the same to file a mechanics' lien. *Ombony v. Jones*, 19 N. Y. 235; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Dobschuetz v. Holliday*, 82 Ill. 371; *Gaty v. Casey*, 15 Ill. 189, 191; *Grosz v. Jackson*, 6 Daly, 463.

A lien lies for the flagging laid on the sidewalk in front of a building. *McDermott v. Palmer*, 8 N. Y. 387; *Moran v. Chase*, 52 N. Y. 346.

Who are within the Act.

The several Mechanics' Lien Acts of this State unite in making the privilege of a lien as broad as language can frame it. "Every person" says the New York City Act, "Any person," say the other Acts, who performs labor or furnishes materials by the "request" (N. Y. City Act), "consent" (State Act), or "permission" (Kings Co. Act), of the owner, may have a lien. Construing this language strictly, there is no limit to the right so far as parties are concerned. Unfortunately for this simple construction, the term "Any person" is not always construed literally (*Freethy v. Freethy*, 42 Barb. 641). It only covers those persons whom it is reasonable to presume the Legislature intended to be designated, and who are capable, legally and physically, of coming within its terms. *Kneeland, Mechanics' Liens*, 2d ed. § 2.

The word "contractors," as used in the Act, is to be understood to embrace all who employ "laborers" in the construction of the work, whether they

under the Statute, and contest the same at the cost and expense of the party of the second part (Herman Gierke), and deduct the same from said payments or advances; and the said party of the first part (Sarah F. Mead) expressly reserves the right to make the said payments or advances, or any part of the said payments or advances, before they, or either of them, may be due and payable, or out of the order in which they, or either of them, may become due and payable." June 9, 1887, Gierke, with the assent of Sarah F. Mead, assigned the contract to Edward Grippentrog. On the 20th of June, 1887, David Miller (the plaintiff), and Grippentrog entered into a written contract by which Miller contracted to furnish stone for the completion of the buildings for \$9,060, under which, prior to January 24, 1888, the plain-

tiff furnished stone of the value of \$1,500; and, the price thereof not being paid, a lien was filed on the 24th of January, 1888, pursuant to chapter 342 of the Laws of 1885, to foreclose which this action was brought. Upon the trial the court found that the plaintiff had furnished under the contract stone used in the buildings of the value of \$1,500, which was adjudged to be due, and a judgment was entered foreclosing the lien, with costs; from which the defendant appealed to the general term, where it was affirmed, and thereupon the defendant appealed to this court.

Mr. E. N. Taft for appellant.

Mr. William E. Stewart, with *Mr. James T. Hoyt*, for respondent:

It was the design of the Statute to charge

be original or sub-contractors. So, too, the word "laborers," in contra-distinction to the word "contractors," is intended to include such persons as upon the employment of contractors actually engage in the construction of the work. *Warner v. Hudson River R. Co.* 5 How. Pr. 454.

An architect has been held to come within the protection of the statute and his work is as much entitled to the designation of labor and services as that of carpenters, masons or plumbers. *Knight v. Norris*, 18 Minn. 473-476; *Bank of Pennsylvania v. Gries*, 35 Pa. 423-426; *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, 397; *Conant v. VanSchaick*, 24 Barb. 87; *Hovey v. Tenbroeck*, 3 Robt. 816; *Vincent v. Bamford*, 12 Abb. Pr. N. S. 252; *Jones & S.* 506, 510; *Coffin v. Reynolds*, 37 N. Y. 640-642; *Eriasson v. Brown*, 38 Barb. 390; 1 Domat, Civ. Law, by Strahan, §§ 1736, 1744; *Aikin v. Wasson*, 24 N. Y. 482; *Richardson v. Abendroth*, 43 Barb. 162, 298, 299; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 368, 367, 371; *Williamson v. Wadsworth*, 49 Barb. 294; *Mulligan v. Mulligan*, 18 La. Ann. 20-22; *Capron v. Strout*, 11 Nev. 304, 310.

Labor upon a building and materials used in its construction are the test of the lienor's right. In other words, the work and the materials, both in fact and in intention, must have become part and parcel of the building itself. *Ward v. Kilpatrick*, 85 N. Y. 413.

The law is solicitous for all parties who are within the Act and where a right of lien has been created and no express waiver of this right is shown, the law is reluctant to imply a waiver of that right. *Payne v. Wilson*, 74 N. Y. 848.

Sub-contractor or materialman.

In order to entitle a sub-contractor or materialman to a judgment against the owner, he must show either that at the time of the creation of the lien, by the filing of the notice, a debt was actually owing from the owner to the contractor, or else that the same subsequently became due and owing. *Smith v. Coe*, 2 Hilt. 365; *Ferguson v. Burk*, 4 E. D. Smith, 760; *Lynch v. Cashman*, 3 E. D. Smith, 660; *Sullivan v. Brewster*, 1 E. D. Smith, 682. See also *Schneider v. Hobeln*, 41 How. Pr. 232.

A sub-contractor or materialman can acquire a lien to the extent of the sum due from the owner to the contractor at the time of filing the lien. *Gibson v. Lenane*, 94 N. Y. 183.

It is not the duty of the contractor to hunt up everyone who may have worked for or furnished materials to a sub-contractor, and ascertain whether they have been paid, but it is the duty of such persons to give the contractor the notice required by law in order to bind him. *French v. Bauer*, 32 N. Y. S. R. 326.

Upon proof of the indebtedness and of the facts as to filing the notice, the question as to the liability

of the owner becomes a question of law. *Smith v. Coe*, 29 N. Y. 686. See note to *Schroeder v. Galand* (Pa.) 7 L. R. A. 711.

Term "owner" defined.

The word "owner," in statutes relating to mechanics' liens, is construed to mean the owner of the legal title, the vendor before the actual conveyance of the land, and not the vendee under a contract for conveyance. *Thaxter v. Williams*, 14 Pick. 49; *Lamb v. Cannon*, 38 N. J. L. 362; *Metcalf v. Hunnewell*, 1 Gray, 297; *Hayes v. Fessenden*, 106 Mass. 228; *Guy v. Carriere*, 5 Cal. 511; *Johnson v. Pike*, 35 Me. 291; *Steinmetz v. Boudinot*, 3 Serg. & R. 541.

Consent of owner sufficient.

However manifested, the consent of the owner to the erection of the house is sufficient to give persons furnishing labor or materials a mechanics' lien. *Husted v. Mathes*, 77 N. Y. 388; *Nellis v. Bellinger*, 6 Hun, 560.

Consent implies a degree of superiority, at least the power of preventing; it implies not merely that a person accedes to, but authorizes, an act. *Crabbe's Synonyms*; *Ottwell v. Watkins*, 15 Daly, 306.

It is synonymous with "permission." *Hackett v. Badeau*, 63 N. Y. 476.

Such consent may be implied by the acts and declarations of the owner, and such implied consent is operative to the same extent as if he contracted directly for the improvements. *Otis v. Dodd*, 90 N. Y. 336. See *Ross v. Simon*, 30 N. Y. S. R. 545.

The knowledge and approbation of the work by the owner are sufficient to subject her interest in the land to the operation of the lien. *Hellwig v. Blumenberg*, 28 N. Y. S. R. 75.

There is an implied consent of the owner to furnish necessary labor and materials where he leases the land and agrees that his tenant may make improvements thereon, which are to become his property at the end of the term. *Burkitt v. Harper*, 79 N. Y. 273.

But under a prior Statute (Act of 1875), it was held that where the owner, during the running of the lease, approved of certain improvements made by the lessee, he did not thereby subject his interest to a lien thereon on the ground of consent. *Jones v. Manning*, 25 N. Y. S. R. 771. See *Craig v. Swinerton*, 8 Hun, 144.

Where the owner contracted with a building company to erect a building, and the company ordered certain equipments, and the owner, with the company's consent, ordered larger and more expensive equipments as a substitute on his own responsibility, his interest was subjected to a lien therefor. *Richardson & B. Co. v. Reid*, 3 N. Y. Supp. 224.

The knowledge of a married woman that im-

the land with debts contracted in improving it, in case the owner consented to or permitted the work to be done, although under a contract made with the vendee.

Rollin v. Cross, 45 N. Y. 766; *Burkitt v. Harper*, 79 N. Y. 278; *Otis v. Dodd*, 90 N. Y. 836.

Where an owner of land agrees to sell it, and advances money with which to build upon the premises sold, and after completion of the houses the builder is to secure the purchase price and the advances by mortgages, the person who agrees to purchase builds by permission of the owner (*Hart v. Wheeler*, 1 Thomp. & C. 408), and the property is charged with a lien until the deed is actually delivered without regard to the terms of the contract of purchase.

Improvements are being made on her lands by her husband, where she interposes no objection, is an implied consent to their construction. *Husted v. Mathes*, 77 N. Y. 389.

Lien not assignable.

A mere inchoate right to a mechanics' lien is not assignable. Such lien passes with an assignment of the debt only where it has been perfected under the Statute. *Goodman v. Penoe*, 21 Neb. 459.

A contractor cannot at any time during the progress of the work assign all his claim to a third party, so as to deprive the sub-contractor of all the benefits afforded him by the Statute. *Bourget v. Donaldson*, 88 Mich. 478.

The lien under statutes of this character is, in general, a personal right given to the mechanic, materialman and laborer, for his own protection, and the right to create it cannot be assigned or transferred to another (*Daubigny v. Duval*, 5 T. R. 604; *Caldwell v. Lawrence*, 10 Wis. 332; *Pearsons v. Tincker*, 38 Me. 384), unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved. *Urquhart v. McIver*, 4 Johns. 102; *McComble v. Davies*, 7 East. 5. See note to *Farmers Loan & T. Co. v. Canada & St. L. R. Co.* (Ind.) 11 L. R. A. 740.

But after the lien has been filed by the original creditor, or if the assignee files it in the name of the assignor, or if the assignment is made for the benefit of the assignor, the assignee may afterwards foreclose it, either in his own name as assignee, or in the name of the assignor as his agent. *Hallahan v. Herbert*, 11 Abb. Pr. N. S. 326; *Rollin v. Cross*, 45 N. Y. 766; *Palmer v. Merrill*, 6 Cush. 232.

Notice to be filed.

While conceding that this statute gives a remedy, and is to be liberally and beneficially construed, it does not follow that a construction can be admitted under that rule which will impose a lien, unless the terms of the Statute have been complied with by filing the notice within the prescribed period. *Spencer v. Barnett*, 35 N. Y. 94.

One entitled to a mechanics' lien, until he files his notice, has no greater equities than other general creditors, and is affected by all equities existing at that time in favor of those dealing with his debtor. His lien attaches only to the estate and interest of the debtor as it then exists. His lien is subject to a prior equitable lien although he had no notice of it. *Payne v. Wilson*, 74 N. Y. 348.

The notice should state, among other things, the "situation of the building by its street and number, if the number be known." *Duffy v. McManus*, 3 E. D. Smith, 657.

That the owner of the soil had personal or actual knowledge that the work was being done need not be stated in the notice of a mechanics' lien. *Jewell v. McKay*, 82 Cal. 144.

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Gates v. Whitcomb, 4 Hun, 187. See *Nellis v. Bellingher*, 6 Hun, 590; *Husted v. Mathes*, 77 N. Y. 388; *Riley v. Watson*, 8 Hun, 569; *Hackett v. Baderu*, 63 N. Y. 476; *Schmaltz v. Mead*, 28 N. Y. S. R. 117.

Follett, Ch. J., delivered the opinion of the court:

It is provided by chapter 342 of the Laws of 1885 (the General Mechanics' Lien Law of this State), as follows: "Section 1. Any person . . . who shall hereafter perform any labor or service, or furnish any materials which have been used, or which are to be used, in erecting, altering, or repairing any house, . . . with the consent of the owner, as hereinafter defined, or his agent, or any contractor or subcontractor, or any other person contracting with such

If enough appears in the description of the property in the notice filed to enable a party familiar with the locality to identify the premises sought to be described with a reasonable degree of certainty, the description will be held sufficient. *Scholes v. Hughes*, 77 Tex. 482; *Northwestern Cement & C. Pav. Co. v. Norwegian D. E. L. A. Sem.* 43 Minn. 442; *Brown v. Wright*, 25 Mo. App. 54; *Duffy v. McManus*, *supra*.

The notice of a mechanics' lien need not state in so many words that the lien is claimed against the persons named; but if the names are given, and the facts subjecting their interest to the lien are stated, the statute is satisfied. *Ross v. Simon*, 30 N. Y. S. R. 545.

The lien which a contractor acquires by filing a notice with the county clerk attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired. *Ernst v. Reed*, 49 Barb. 367.

Under a statute requiring the verification of a notice of mechanics' lien to be that the statements therein are true to the knowledge or information and belief of the person making it, a verification stating that such statements are true to his knowledge, information and belief is sufficient. *Kealey v. Murray*, 15 N. Y. Supp. 403.

The New York Lien Law of 1862, chap. 478, applicable to Kings County, which does not require verification of notice of lien, is not repealed by N. Y. Laws 1880, chap. 486, for cities of the State generally, requiring such verification. *Graf v. Cunningham*, 12 Cent. Rep. 302, 109 N. Y. 369.

The filing of the notice within the period of statutory limitation is absolutely necessary, and without it the claim is totally void. *Hubbell v. Schreyer*, 14 Abb. Pr. N. S. 284; *Donaldson v. O'Connor*, 1 E. D. Smith, 696; *Tiley v. Thousand Island Hotel Co.* 9 Hun, 424; *Scott v. Cook*, 8 Mo. App. 123; *Duffy v. Baker*, 17 Abb. N. C. 357; *Spencer v. Barnett*, 35 N. Y. 94; *Lutz v. Ey*, 3 E. D. Smith, 627; *Gates v. Buddensick*, 6 Abb. N. C. 397; *Danziger v. Simonson*, 21 Jones & S. 138; *Barrows v. Knight*, 55 Cal. 155; *Dart v. Fitch*, 23 Hun, 361.

The lien is fatally defective in failing to state whether all the work for which it was filed was actually performed or furnished. *Luscher v. Morris*, 18 Abb. N. C. 67.

A certified copy of the notice of lien filed, as here, in provided, shall be entitled to be read in evidence with the same force and effect as if the original were provided, and such copy shall be prima facie evidence of the execution and filing of the original. *Laws 1885, chap. 342, § 8.*

Proof of notice.

The essential facts, and the burden of proof, depend upon the statute. The notice of lien is not

owner, to erect, alter, or improve, as aforesaid, within any of the cities or counties of this State, may . . . have a lien for the principal and interest of the price and value of such . . . material upon such house . . . and upon the lot . . . upon which the same may stand or be intended to stand, to the extent of the right, title, and interest at that time existing of such owner, whether owner in fee or of a less estate, . . . or of the owner of any right, title, or interest in such estate, which may be sold under an execution. . . . In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner, within the intent and meaning of this Act, until the deed has been actually delivered and recorded conveying said premises pursuant to such agree-

ment." Section 5. The parts of the Statute above quoted have been recently construed by the court of appeals in *Schmalz v. Mead*, 125 N. Y. 188, which affirms 4 N. Y. Supp. 614, the facts of which were as follows: The defendant, the owner in fee of the land involved in the case at bar, contracted in November, 1885, to sell and convey it to George Kuhn for an agreed price, and to advance to the vendee a certain sum in installments to enable him to erect buildings of a kind agreed to thereon. The vendor covenanted that when the buildings were completed he would convey the land, and take the grantee's bond, secured by a mortgage on the land, for the payment of the purchase price, and the sum to be advanced for building purposes. Under this contract, the vendee entered into possession, and began the

proved by the county clerk's certified copy (*Sampson v. Buffalo*, N. Y. & P. R. Co. 4 Thomp. & C. 600); but his certificate proves the filing. Mortgages and others acquiring interest in property against which the lien is claimed have a right to call for strict proof of all that is essential to the creation of the lien, and this includes proof of the commencement of the work, of its character, and of its completion. *Davis v. Alvord*, 94 U. S. 545, 547, 24 L. ed. 283, 284; *Abbott*, Tr. Ev. chap. 55.

Performance as a condition precedent.

In a building contract where performance is made a condition of payment, performance must be shown to entitle a party to recover. *Smith v. Brady*, 17 N. Y. 173, and cases cited.

But when the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects. *Johnson v. DePeyster*, 50 N. Y. 666; *Glacius v. Black*, 60 N. Y. 145.

Literal performance in every detail, according to the specifications, is not required in building contracts. Substantial performance is sufficient to sustain the lien. *Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. Gugerty*, 4 Barb. 614; *Smith v. Brady*, 17 N. Y. 173; *Colwell v. Lawrence*, 24 How. Pr. 324; *Thomas v. Fleury*, 26 N. Y. 32.

Where the evidence shows an abandonment of the contract by the defendant, plaintiff is not required to prove a legal excuse for nonperformance on his part in order to recover on a *quantum meruit*; and where the time agreed upon for performance has been waived, plaintiff need not notify defendant of his intention to foreclose and demand specific performance of the contract recitals within a reasonable time. *Powers v. Hogan*, 67 How. Pr. 255.

In an action for labor and material under a contract it is sufficient to show substantial performance; but where a defect in the performance exists the defendant may counterclaim and prove what damage he has sustained by reason of the defect. *Phillip v. Gallant*, 62 N. Y. 256; *Johnson v. DePeyster*, 50 N. Y. 666; *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665.

If the contractor has been induced by the owner to omit performance within the time limited, he would be required to complete the contract with due diligence. *Sinclair v. Tallmadge*, 35 Barb. 602, 607; *Wallman v. Society of Concord*, 45 N. Y. 485; *Green v. Haines*, 1 Hilt. 254; *Reed v. Brooklyn Board of Education*, 3 Keyes, 106; *Leslie v. Knickerbocker L. Ins. Co.* 63 N. Y. 27; *Ruff v. Rinaldo*, 55 N. Y. 664.

There must be no willful or intentional departure, and the defects must not pervade the whole, 13 L. R. A.

or be so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished. *Sinclair v. Tallmadge*, 35 Barb. 602.

This is a question of fact, and from the nature of the question it must be so. *Phillip v. Gallant*, 62 N. Y. 256.

But if it appears that there were departures by mutual consent from the original plan, and, furthermore, that after the time prescribed by the contract had expired the defendant Clark notified plaintiffs to go on and complete, under competent authorities either of these circumstances would operate as a waiver of the time conditioned in the contract. It has also been directly held that in a contract of this character a provision that the work shall be completed by a certain date, and paid for upon completion, does make time of the essence of the contract, and that, if the builder proceeds afterwards with the assent of the other party, he may recover at the contract price. *Dillon v. Masterton*, 7 Jones & S. 133.

Priority of liens.

The priority as between mechanics' liens and mortgages is largely controlled by statutory enactment in the different States. *Cheshire Provident Inst. v. Stone*, 52 N. H. 365; *Chadbourn v. Williams*, 71 N. C. 450; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1067; *Cal. Code Civ. Proc.* § 1186; *Shepardson v. Johnson*, 60 Iowa, 239; *Mass. Gen. Stat. chap. 150*; *Mellor v. Valentine*, 3 Colo. 258; *Davis v. Bilsland*, 85 U. S. 18 Wall. 659, 21 L. ed. 969.

The first mortgage given in good faith and duly recorded is prior, superior and paramount to a mechanics' lien subsequently filed. *Coe v. New Jersey M. R. Co.* 81 N. J. Eq. 127, 123; *West v. Klotz*, 37 Ohio St. 420; 2 Wood. Railway Law, 292; *Choteau v. Thompson*, 2 Ohio St. 114.

It is the law of Ohio that a mortgage takes effect from the date it is duly filed for record, and this fact controls its priority. *Kling v. Ballentine*, 40 Ohio St. 391; *Bloom v. Noggle*, 4 Ohio St. 52; *Bercaw v. Cockerill*, 20 Ohio St. 163.

In some States the lien attaches from the commencement of the work, although the particular work for which the lien is claimed was done after the execution of the mortgage. *Hall v. Hinckley*, 32 Wis. 362; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *Dubois v. Wilson*, 21 Mo. 214; *Meyer v. Delaware R. Const. Co.* 100 U. S. 457, 25 L. ed. 533; *Brooks v. Lester*, 3 Md. 65.

To allow the vested rights of third persons, not parties or privies to a contract, to be prejudiced by its terms would be destructive of the rights of property (*Brown v. Morison*, 5 Ark. 217) and en-

erection of the buildings, but soon failed, and abandoned his purchase. The vendor had performed her part of the contract, and no advances were due from her when the lien for materials furnished the vendee was filed or foreclosed. The vendor defended the action to foreclose the lien on the grounds (1) that the

contract of sale and for the erection of buildings was not sufficient evidence of the owner's (vendor's) consent, within the statutory meaning of "the consent of the owner" that the buildings be erected; (2) that only the interest of George Kuhn, vendee and contractor could be subjected to lien; (3) that the lien could at-

tirely at variance with the office of a lien, which is not to create an estate, or in the slightest degree affect or interfere with prior incumbrances. Its true function is to prevent subsequent alienations and incumbrances, except in subordination to itself. *Watkins v. Wassell*, 15 Ark. 73; *Spence v. Etter*, 8 Ark. 60.

To determine, therefore, priority among different lien-holders, it is only necessary to decide who has the first right or lien, unless it has been displaced by some act of the party holding it, which shall postpone him to subsequent claimants. *Parker v. Kelly*, 10 Smedes & M. 184; *Weller v. McNabb*, 4 Sneed, 422; *Twelves v. Williams*, 3 Whart. 485.

This may be either by agreement of parties, or fraud in its creation. *Phillips, Mechanics' Liens*, 2d ed. § 225.

The principle may be regarded as established, that an equitable mortgage duly created before the filing of a mechanics' lien has priority over it. *Cox v. Broderick*, 4 E. D. Smith, 721; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Noyes v. Burton*, 29 Barb. 630; *Quimby v. Sloan*, 2 E. D. Smith, 594; *Cronk v. Whittaker*, Id. 647; *Lohretter v. Koffman*, 1 E. D. Smith, 664; *Chamberlain v. O'Connor*, Id. 665; *Kaylor v. O'Connor*, Id. 672; *McAuley v. Mildrum*, 1 Daly, 306; *Bailey v. Johnson*, Id. 61; *Ernst v. Reed*, 49 Barb. 367.

A mortgage duly executed and recorded holds superior equities to that of a mechanics' lien, and the latter will attach only to the equity of redemption. *Bayne v. Wilson*, 11 Hun, 305, 74 N. Y. 355; *Munger v. Curtis*, 42 Hun, 465.

Summarizing the principles which underlie this subject of priority, it may be said that if the premises are already incumbered by a mortgage to a bona fide incumbrancer, the claim of the mechanic is subordinate to that of the mortgagee; and this is a well-recognized law governing the subject. *Munger v. Curtis*, 42 Hun, 465.

Mechanics' lien on lands of married women. See note to *Esterbrook v. Riley* (Iowa) 10 L. R. A. 33.

Lien created by consent of owner. *Ibid*.

Materials must be furnished with knowledge of the wife, to bind her. *Ibid*.

In such case the husband's agency is a question of fact, and he may be called as a witness to controvert his alleged agency. *Robe v. Hesse*, 118 N. Y. 668.

It has been held that where the contract for the improvements was made expressly with the husband and upon his credit, the wife's consent will not be inferred. *Ziegler v. Galvin*, 45 Hun, 44.

Discharging the Lien.

The lien can be discharged only in one of the modes provided by the Statute. The whole proceeding is a special one, and such remedies only as are given by the Statute can be pursued. A lapse of one year without proceeding discharges the lien; and a more speedy mode of testing its validity may be had by a notice to the claimant to foreclose his lien. The court has not the power to discharge the lien, and the bringing of a suit could not of itself have that effect. *Fettrich v. Totten*, 2 Abb. Pr. N. S. 264.

On an application to discharge a mechanics' lien for failure by the holder to foreclose after notice, the court must take into consideration the equities of the case, and exercise a sound discretion in 13 L. R. A.

granting or refusing the application. *Re Poole*, 38 N. Y. S. R. 806.

The purpose of the provisions, allowing the payment of money to the county clerk, is to remove the lien from the lands of the party and impose it upon the money, the object being to enable the owner of real estate, by substituting money to the amount of the alleged lien, to enjoy the power of disposing of his land relieved from the incumbrance. *Dunning v. Clarke*, 2 E. D. Smith, 535.

The proceeding to foreclose a mechanics' lien is a proceeding *in rem*, founded on statute, not *in personam*, and operates only as a foreclosure, and not as an action for the collection of a debt. *Randolph v. Leary*, 3 E. D. Smith, 587, 4 Abb. Pr. 205; *Quimby v. Sloan*, 2 E. D. Smith, 600; *Cronkright v. Thomson*, 1 E. D. Smith, 661; *Cox v. Broderick*, 4 E. D. Smith, 721.

It is not an action within the meaning of the Code, but a special proceeding. *Hallahan v. Herbert*, 57 N. Y. 409.

In an action to enforce a lien, the owner may avail himself of all matters allowable by way of recoupment or counterclaim arising out of the contract between the owner and the contractor, and which would be available against the contractor. The rights of the parties are determined by the facts existing at the time of the creation of the lien. *Cheney v. Troy Hospital Assn.* 65 N. Y. 282.

The proceedings must be conducted strictly in accordance with the provisions of the Lien Law. *Mushitt v. Silverman*, 50 N. Y. 300; *Burroughs v. Tostevan*, 75 N. Y. 567.

Amount recoverable.

The extent of the lien is distinctly made to depend upon the time when the notice was filed. The amount which the owner can be required to pay depends entirely (according to the construction of the Statute in *Doughty v. Devlin*, 1 E. D. Smith, 625), upon the time when the notice was filed. *Kaylor v. O'Connor*, 1 E. D. Smith, 672.

The clause in the Statute "must not exceed the amount which the owner would be otherwise liable to pay at the time of the filing of the claim," was intended solely to limit the liability of the owner in the aggregate to the amount which he had contracted to pay, after deducting such payments as he had made before the filing of the lien. The present Lien Law limits the liability to the stipulated price of the contract remaining unpaid at the filing of the lien. *Heckmann v. Pinkney*, 81 N. Y. 211.

The plaintiffs can recover no more than they claimed when they filed the paper to create the lien. The subsequent notice is to enforce the lien so created. By the notice filed, the amount originally stated, with interest, is the extent of the recovery. *Protective Union of New York v. Nixon*, 1 E. D. Smith, 671.

Costs.

The right to costs is created by statute, and wholly depends upon it, and the right does not become fixed until the determination of the suit. *Onondaga Suprs. v. Briggs*, 13 Denio, 173.

This rule was again asserted in *Garling v. Ladd*, 27 Hun, 112, and in *Balcom v. Terwilliger*, 42 Hun, 170.

tach only to advances due from her, if any, and not to her interest as vendor in the real estate. These defenses were overruled, and the lien was held to attach and bind the vendor's interest in the realty. *Schmalz v. Mead* differs from the case at bar only in the fact that the contract of sale and for building did not contain the stipulation contained in the agreement under consideration and quoted in the statement of facts,—that if any mechanics' lien was filed it should be subject to the lien and claim of the vendor. The defendant's relation to and interest in the land constituted her the owner thereof, within the meaning of the word "owner" as defined in the fifth section of the Mechanics' Lien Law (*Schmalz v. Mead, supra*), and her estate could be subjected to the liens of persons furnishing labor or materials for the construction of buildings erected thereon with her consent. By the contract entered into May 25, 1887, between Mrs. Mead, then the owner of the fee, and Gierke, and by him assigned to Grippentrog with her consent, she not only agreed to sell and thereafter convey the land, but bound the vendee to build within a specified time six houses according to plans which had been agreed on, to cost not less than \$6,000 each, she agreeing to advance \$21,000 for the purpose of partly paying the cost of their erec-

tion; which contract was proof of her (the owner's) consent that the buildings be erected, and rendered her interest in the premises subject to such liens as might be filed for labor and materials furnished for the construction of the houses, unless in some way relieved from liability by the stipulation that any mechanics' lien should be subject to her interest in the property. *Schmalz v. Mead, supra; Rollin v. Cross*, 45 N. Y. 766; *Husted v. Mathes*, 77 N. Y. 388; *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336.

The stipulation in respect to the priority of liens did not destroy the owner's consent that the houses should be built, nor diminish its effect, nor did it lessen the absolute obligation resting upon the vendee to build them. It was not the design of the parties to accomplish any such results, but simply to circumvent the statute, and defeat the rights given by it to persons furnishing labor and materials for the work, which design could not be accomplished by such a stipulation as against persons not in privity with either of the parties to it who should, without notice of the stipulation, furnish labor or materials for the work.

The judgment should be affirmed, with costs. All concur.

CALIFORNIA SUPREME COURT.

Frank BURKETT, *Appl.*,

G. J. GRIFFITH, *Reept.*

(....Cal.....)

1. An action for slander of title cannot be maintained for statements causing the

breach by a third person of a valid contract to purchase plaintiff's property.

2. The complaint in an action to recover damages for slander of title by charging that plaintiff had broken the covenants of certain leases and forfeited all rights thereunder, must aver facts sufficient to show that plaintiff had rights under the leases and that there were covenants to be broken; and the want of

NOTE.—Slander of title.

An action lies for false and malicious slander of title to real property causing damage; as, for instance, in claiming a lease thereof thereby preventing a lease to another. *Gerrard v. Dickenson*, Cro. Eliz. 196.

Or stating that ore on plaintiff's land is nearly played out, thereby preventing a sale. *Paul v. Halferty*, 63 Pa. 46.

Or for forbidding an auction sale of land on the ground that the party offering it has no right to sell it. *Gent v. Lynch*, 23 Md. 58.

Or for alleging insanity of a former owner thereby casting doubt on plaintiff's title. *Pitt v. Donovan*, 1 Maule & S. 639.

Or for alleging the illegality of a marriage which would make a defect in plaintiff's title. *Bold v. Bacon*, Cro. Eliz. 346.

By application of the same principle damages caused by a wrongful suit by the vendor, attacking the title of his purchaser, may be deducted from the purchase money. *Akerly v. Vilas*, 23 Wis. 207.

To personal property.

The action will also lie for slander of title to personal property. *Steward v. Young*, L. R. 5 C. P. 126; *Newman v. Zachary*, Aleyn, 3; *Like v. McKinstry*, 41 Barb. 186.

So in respect to a slave. *Hill v. Ward*, 13 Ala. 310.

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Slander of quality of goods or property.

The action lies for falsely publishing statements disparaging the quality of plaintiff's goods, thereby causing him damage. *Western Counties Manure Co. v. Lowe's Chem. Manure Co.* L. R. 9 Exch. 218.

To say that a dealer's watches are bad is not actionable unless the words import that he is guilty of deceit or malpractice. *Tobias v. Harland*, 4 Wend. 537.

But to charge one with having nothing but rotten goods in his shop has been held actionable as imputing deceit or malpractice. *Burnet v. Wells*, 12 Mod. 420.

And charging a brewer with putting lime in his ale, thereby causing the death of one who drank it, is actionable. *Nuton's Case*, Freem. 25.

So a publication imputing an immoral tendency to works published by plaintiff. *Tobart v. Tipper*, 1 Campb. 350.

Charging infringement.

An action lies for falsely charging infringement of a patent, thus preventing the sale of plaintiff's articles. *Snow v. Judson*, 38 Barb. 210.

But not if it is done in good faith. *Wren v. Weild*, L. R. 4 Q. B. 730; *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386.

It also lies for circulars sent out falsely claiming a copyright with intent to injure plaintiff's business for defendant's benefit. *Dicks v. Brooks*, L. R. 15 Ch. Div. 22; *Barley v. Walford*, 9 Q. B. 197.

such averments is not cured by the fact that the leases themselves, from an inspection of which all such facts would appear, were attached as exhibits to the complaint, at least where they were attached merely to identify the leased land.

3. Only damage which is the natural and direct result of slander of title is recoverable therefor.

4. A person is not liable for statements in disparagement of the title to another's property because a third person has been thereby deterred from purchasing it, unless he made the statements to the latter or directed or authorized their communication to him.

(August 21, 1891.)

APP^EAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to recover damages for alleged slander of title. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. John Roberts and John D. Bicknell, for appellant:

If A states in public that B has no title to land which he (B) is about to sell, and thereby prevents the sale by him, A's statement that B has no title or that his title is defective, is a conclusion of law, and is slander of title. Addison, Torts (Dudley & Baylie's ed.) pp. 969, 970, and notes; *Brook v. Rowl*, 4 Exch. 521, 19 L. J. Exch. 114.

Slander of title ordinarily means a statement

of something tending to cut down the extent of title, which is injurious only if it is false and malicious, not malicious in the worst sense, but with intent to injure the plaintiff, and that he has suffered damage thereby.

Pater v. Baker, 3 C. B. 868; Cooley, Torts, p. 221.

False, defamatory and malicious statements, made with the intent to injure the owner of land and his title thereto, constitute slander of title.

Dodge v. Colby, 11 Cent. Rep. 466, 108 N. Y. 445.

An action on the case is the proper remedy.

1 Bacon, Abr. 7th Eng. ed. pp. 108, 143; *Pennymann v. Rabanks*, Cro. Eliz. 427.

Defendant having maliciously and without probable cause, and with intent to prevent the consummation of the sale, declared that he would not execute the deed provided for in the leases, even if tendered the purchase price as therein provided, Sketchley would have been justified in refusing to take a title from Burkett that was not marketable; and Burkett could not have prevailed in an action against Sketchley to enforce specific performance.

A vendee will not be compelled to buy a lawsuit.

Price v. Strange, 6 Madd. 159-165; *Sharp v. Adcock*, 4 Russ. 374; *Butler v. O'Hear*, 1 Desaus. Eq. 382; *Parkin v. Thorold*, 16 Beav. 67; *Rogers v. Waterhouse*, 4 Drew. 329; *Jeffries v. Jef-*

But not for a publication charging infringement of copyright, although the copyright claimed is not valid, unless there was express malice. *John W. Lovell Co. v. Houghton*, 6 L. R. A. 363, 116 N. Y. 520.

The action also lies for slandering title to a trademark alleging infringement and threatening plaintiff's customers. *McElwee v. Blackwell*, 94 N. C. 261.

Denying right to sing copyrighted song.

An action lies for letters falsely denying the truth of a notice published by vocalists in which their right to sing certain copyrighted songs is claimed. *Hart v. Wall*, L. R. 2 C. P. 146.

Malice; good faith.

Malice is the gist of the action. *Steward v. Young*, L. R. 5 C. P. 126; *Smith v. Spooner*, 3 Taunt. 246; *Hargrave v. LeBreton*, 4 Burr. 2422; *Like v. McKinstry*, 41 Barb. 186.

A claim of title to property asserted in good faith will not constitute an actionable slander of title. *Walden v. Peters*, 2 Rob. (La.) 331; *Bailey v. Dean*, 5 Barb. 297; *Harriss v. Sneed*, 101 N. C. 273.

Stating the truth as to the facts of a lease with a bona fide claim of right under it at a sale of land will not sustain the action. *Cornwell v. Parke*, 52 Hun, 596.

Good faith is the test and not a belief such as a man of sense and knowledge would form. *Pitt v. Donovan*, 1 Maule & S. 639.

Malice is not presumed from an injurious slander of title. *McDaniel v. Baca*, 2 Cal. 326.

Nor from an erroneous statement by a surveyor of highways at a sale concerning his power to require highways to be made before the purchasers could construct buildings. *Pater v. Baker*, 3 C. B. 831.

But the falsity of a publication disparaging the quality of plaintiff's school books, if there is special damage shown, has been held to raise the presumption of malice. *Swan v. Tappan*, 5 Cush. 104.

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Special damages; proofs.

Special damages are also necessary to make out a case of slander of title. *Cane v. Goulding*, Styles. 176; *Tasburgh v. Day*, Cro. Jac. 484; *Manning v. Avery*, 3 Keb. 153; *Lowe v. Harewood*, Sir Wm. Jones, 196; *Linden v. Graham*, 1 Duer, 670.

This rule applies in case of slander of title to land. *Kendall v. Stone*, 5 N. Y. 14; *Stark v. Chitwood*, 5 Kan. 144.

Of slander of title to personal property. *Like v. McKinstry*, 41 Barb. 186.

Of for disparaging of qualities of ship. *Ingram v. Lawson*, 6 Bing. N. C. 212.

Of for false publication disparaging the quality of school books. *Swan v. Tappan*, 5 Cush. 104.

Of for saying that a dealer's watches are bad. *Tobias v. Harland*, 4 Wend. 537.

Of that a brewer's beer is worthless. *Fenn v. Dixie*, Sir Wm. Jones, 444.

But otherwise in case of charging that he puts lime in his ale and that a person on that account has lost his life from drinking it. *Nuton's Case*, Freem. 25.

If plaintiff's contracts to sell are valid he cannot recover for slander causing a breach of them. *Morris v. Langdale*, 2 Bos. & P. 204; *Vicars v. Wilcocks*, 8 East, 1; *Walden v. Peters*, 2 Rob. (La.) 331.

Plaintiff to make out his case must show title to the property slandered. *Edwards v. Burris*, 60 Cal. 157.

He must prove not only malice and falsity of the slander but an injury to his title. *Like v. McKinstry*, 41 Barb. 186.

Joinder of parties.

Two persons cannot be sued jointly for verbal slander of title. *Webb v. Cecil*, 9 B. Mon. 198.

Closely connected with this subject is the matter of injunctions against false statements concerning property or business which will be treated in another note.

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fries, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

If the false representation was made with knowledge of its falsity and with intent to deceive, this is "actual malice."

Pitt v. Donovan, 1 Maule & S. 639; *McDaniel v. Baca*, 2 Cal. 326; *Stark v. Chitwood*, 5 Kan. 141; *Wilson v. Dubois*, 35 Minn. 471; *Wren v. Weild*, L. R. 4 Q. B. 730; *Roscoe*, Ev. title, *Slander of Title*, 12th ed. 768.

Messrs. Stephen M. White and George W. Knox, for respondent:

After the offer was made and accepted, the defendant, it is said, publicly asserted that plaintiff had no rights, or property, which he could thus convey to Sketchley; and thereupon Sketchley withdrew his proposal. But Mr. Sketchley could not have withdrawn his offer without plaintiff's consent, because that offer had been already accepted.

McDonald v. Mission View Homestead Assn. 51 Cal. 210; *Brennan v. Ford*, 46 Cal. 8; *Vassault v. Edwards*, 43 Cal. 458; *Miles v. Thorne*, 38 Cal. 335; *Wakefield v. Greenhood*, 29 Cal. 598.

Where one under contract for the purchase of property is induced to refuse to complete the purchase by reason of slanderous words uttered concerning the property, by a third person, the vendor cannot sue such third person for slander. His remedy is on the contract of sale.

Ensor v. Bolgiano, 87 Md. 190; *Brentman v. Note*, 24 N. Y. S. R. 281; *Morris v. Langdale*, 2 Bos. & P. 288; *Vicars v. Wilcocks*, 8 East, 1; *Bailey v. Dean*, 5 Barb. 297; *Townshend, Slander & Libel*, 4th ed. § 206, p. 284.

The publication must be made by the defendant. If the party to whom the slanderous words or statements of a written libel are sent, being the one defamed, gives it to the world, the defendant is not responsible.

3 Lawson, Rights, Remedies and Practice, § 1236, p. 2189; *Prime v. Eastwood*, 45 Iowa, 640.

A person who utters a slander is not responsible for its voluntary and unjustifiable repetition without his authority or request, by others over whom he has no control, and who thereby rendered themselves liable to the person slandered.

Hastings v. Stetson, 126 Mass. 329. See also *Shurtleff v. Parker*, 130 Mass. 293.

While the authorities above cited do not directly treat of slander of title, the principle is manifestly applicable. It is not perceived that there can be any distinction as far as this issue is concerned.

Townshend, *Slander & Libel*, 4th ed. § 206.

It is necessary for plaintiff to aver and prove special damages.

Brentman v. Note, 24 N. Y. S. R. 281; *Newell*, *Defamation*, p. 204.

An action of this kind cannot be maintained unless the plaintiff shows title or interest in the property.

Edwards v. Burris, 60 Cal. 157.

The exhibits cannot be relied upon to cure defects.

Los Angeles v. Signoret, 50 Cal. 298.

Harrison, J., delivered the opinion of the court:

The plaintiff brought this action against the 13 L. R. A.

defendant to recover the sum of \$25,000 damages caused by certain false and malicious statements alleged to have been made by him concerning certain property of the plaintiff. The defendant demurred to the complaint upon the grounds of insufficiency and uncertainty, and from a judgment entered upon an order sustaining the demurrer the plaintiff has appealed.

Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law; and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and, as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint. *Linden v. Graham*, 1 Duer, 670; *Swan v. Tappan*, 5 Cush. 104; *Malachy v. Soper*, 3 Bing. N. C. 871.

It is not actionable to speak disparagingly of the title of another unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action unless damage has resulted therefrom (*Add. Torts*, 25); and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. As in all other cases dependent upon special damage, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury, and give the right of action; and the pecuniary damage sustained is the measure of recovery. If the words uttered are not false, or if there be no malice, there is no right of action, and there can be no recovery unless some special pecuniary damage has resulted from their utterance. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. *Folkard, Starkie, Slander & Libel*, § 128; *Odgers, Slander & Libel*, 188.

"This action lieth not but by reason of the prejudice in the sale." Per *Fenner, J.*, in *Bold v. Bacon*, Cro. Eliz. 346.

If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, or are uttered after the sale is completed or agreed upon and contracted for, the plaintiff does not suffer any damage from their utterance.

It is alleged in the complaint that in August, 1888, the plaintiff was the owner of a certain leasehold interest, with option and privilege of purchasing two certain tracts of land in Los

Angeles County, and that one Arthur Sketchley was then negotiating and treating with him for the purchase of, and offered to purchase from him, an undivided one half of the same for the sum of \$25,000, "and that the plaintiff accepted said offer;" that the defendant, well knowing the premises, did willfully, maliciously, and without probable cause, during the period that the said Sketchley was so negotiating and making the offer aforesaid, and prior and subsequent thereto, publicly state to divers persons (naming them), and to the plaintiff, "that the plaintiff had broken the covenants of his said leases, and had forfeited all rights thereunder and by virtue thereof," and that the defendant would not sell to the plaintiff, or to any person purchasing from him, the lands described in said leases, or execute a deed therefor on the tender of said purchase price; that the said statement and declarations were false, and were made by the defendant for the purpose of preventing the plaintiff from disposing of said leasehold interests and option, and that said Sketchley was informed of the said statements, and was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, and withdrew his offer to purchase, and refused to purchase the same; that, but for said statements by defendant, Sketchley would have completed said purchase; and that by reason of the said statements plaintiff has been unable to sell said property to Sketchley, and has been thereby damaged in the sum of \$25,000. The averment in the complaint that Sketchley offered to make the purchase from the plaintiff, and to pay therefor the sum of \$25,000, and that "the plaintiff accepted said offer," must, for the purposes of the demurrer, under the familiar rule that the pleading is to be construed *contra proferentem*, be regarded as an allegation of a valid and efficient offer and acceptance, and that by virtue thereof a complete and executed contract of purchase and sale was entered into between them. This construction is corroborated by the subsequent averment that, after Sketchley was informed of the statements of the defendant, he was "intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff," and shows that it was the intention of the pleader to allege such contract. This acceptance by the plaintiff of Sketchley's offer, and the agreement between them for the purchase and sale of the property, terminated the "treaty," and gave to the plaintiff a contract capable of being enforced against Sketchley, and on which he can recover any damages he may have sustained from its violation. The subsequent refusal by Sketchley to carry out his agreement did not give the plaintiff the right to recover in this action the damages thus sustained. In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it

has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement.

In *Morris v. Langdale*, 2 Bos. & P. 284, in an action for defamation, the special damage alleged was that certain persons had refused to fulfill their contracts with the plaintiff in consequence of the words spoken; but Lord Eldon said: "Now, if the plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons; and the law supposes that in such actions the plaintiff would receive a full indemnity." A similar principle is laid down in *Townshend, Slander & Libel*, § 206; *Kendall v. Stone*, 5 N. Y. 14; *Vicars v. Wilcocks*, 8 East, 1; *Paull v. Halferty*, 63 Pa. 46; *Brentman v. Note*, 24 N. Y. S. R. 281.

It is not shown by the complaint whether the plaintiff accepted the refusal of Sketchley to complete his purchase as a termination of the contract, or whether he still holds his right of action to enforce the contract. From the averment that "the said Sketchley was then and there, and at all times since has been, able and willing to purchase" the property contracted for, it would seem that Sketchley is still bound by the contract; and, if so, the complaint fails to show that the plaintiff has sustained any damage. In any action against Sketchley founded upon the contract, it would be no defense that he had been induced to refuse to complete his purchase by reason of the statements of the defendant alleged herein; and as, in such action, the plaintiff can recover all the damages he has sustained, he has no right of action herein against this defendant. If, on the other hand, the plaintiff has released Sketchley from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon this defendant. *Kendall v. Stone*, *supra*.

2. The complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff. It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done him any injury. The defamatory statements alleged to have been made by the defendant are "that this plaintiff had broken the covenants of his said leases, and that plaintiff had forfeited all rights thereunder and by virtue thereof." The only leases referred to in the complaint are those which are annexed to it as exhibits for the purpose of identifying the lands in which the plaintiff had a "leasehold interest, with option and privilege of purchasing." The plaintiff has not alleged the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder; nor has he alleged that the covenants or the option are those which are contained in the exhibits. As the

statements alleged to have been made by the defendant referred to the "covenants of his said leases, and his rights thereunder," it was necessary to aver facts sufficient to show whether he had any rights, or whether there were any covenants to be violated or broken. The exhibits attached to the complaint are made a part thereof only for the purpose of identifying the lands referred to, and do not satisfy this requirement of pleading. Argumentative pleading is no more permissible under the Code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint. *Los Angeles v. Signoret*, 50 Cal. 298.

The only property to which the plaintiff alleges that he had any title is the leasehold interest and option to purchase. He does not allege that the defendant denied his title to this property, but charges him only with disparaging certain rights which the complaint does not allege that he possessed. The allegation that the defendant had stated that he would not sell the lands described in the leases cannot be regarded as any slander of his title, even if the complaint had shown any right to make a purchase from the defendant. The plaintiff, moreover, does not allege that Sketchley was informed of this declaration of the defendant.

3. The complaint also fails to show that the special damage alleged to have been sustained by the plaintiff is the natural and direct result of the statements and declarations made by the defendant. This action is governed by the same rule that obtains in the ordinary action of slander, viz., that, if the words are not actionable in themselves, the originator of the slander is only liable for such damage as is the direct and natural result of his act, and that he is not liable for the subsequent repetition of those words by another without his direction or authority. *Folkard, Slander & Libel*, Starkie's ed. § 642; *Addison, Torts*, 795; *Parkins v. Scott*, 1 Hurlst. & C. 153; *Ward v. Weeks*, 7 Bing. 211; *Tervilliger v. Wands*, 17 N. Y. 54; *Gough v. Goldsmith*, 44 Wis. 262; *Hastings v. Stetson*, 126 Mass. 329.

This is but the application of the general rule that, when special damages are to be recovered, they must be the legal and natural consequence arising from the tort itself, and not from the wrongful act of a third party, remotely induced thereby. *Crain v. Petrie*, 6 Hill, 524.

The only special damage which the plaintiff has alleged is that Sketchley was informed of the statements and declarations made by the defendant, and withdrew his offer to purchase, and that the plaintiff thereby sustained damage. It is not alleged that the defendant ever made any statement or declaration to Sketchley, or in his presence, or that he directed or authorized any of his statements to be communicated to him; nor is it alleged that either of the persons to whom the defendant made such statements repeated them to Sketchley, or by whom or in what manner Sketchley "was informed" of the statements. The only connec-

tion between the statements by the defendant and their reaching Sketchley is that the defendant made them for the purpose of circulating the rumor and conveying the impression that the plaintiff had violated the covenants and conditions of his leases. This, however, is too remote to render the defendant liable.

We are of the opinion that the complaint fails to state a cause of action, and that the demurrer was properly sustained, and *the judgment is therefore affirmed.*

We concur: *Paterson, J.; Garoutte, J.*

Emma B. COHEN, *Resp't.*,

v.

Charles C. KNOX, Impleaded, etc., *Appl't.*

(.....Cal.....)

1. **A conveyance by a father to his daughter** in consideration of her marriage, made without intent on the part of either to defraud, is not fraudulent as to creditors, although the father is insolvent at the time.
2. **Failure of a complaint to state a cause of action** is cured by the filing of a cross-complaint in which the omitted facts are stated, even though a demurrer was interposed.

(July 18, 1891.)

A PPEAL by defendant Knox from a judgment of the Superior Court for Alameda County in favor of plaintiff in an action brought to enjoin the sale of certain property

NOTE.—*Ante-nuptial settlement.*

The American rule is favorable to marriage articles when the party marrying on their faith had good reason to rely upon them as such. *Schouler, Dom. Rel.* § 177.

The consideration of marriage is a good and valuable consideration for such contracts. *Bradish v. Gibbs*, 8 Johns. Ch. 523, 1 L. ed. 704; *Wright v. Wright*, 54 N. Y. 440.

In England after-acquired property may be settled by the parties. *Smith v. Osborne*, 6 H. L. Cas. 375; *Re Peddler*, L. R. 10 Eq. 536; *notes to Story, Eq. Jur.* §§ 933, 934; *Banning, Mar. Set.* 80, 172, 179.

Ante-nuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. 2 Kent, Com. 166; *Re Youngs*, 27 Hun, 54, affirmed, 92 N. Y. 235.

No especial formality is requisite in such instruments, and, in order to effectuate the intentions of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree their specific performance, and when such relief is inadequate or impracticable from the situation of the property or the character of the contract, will award damages for its breach. *De Barante v. Gott*, 6 Barb. 496; *Peck v. Vandemark*, 99 N. Y. 23; *Pom. Eq. Jur.* §§ 1297, 1408; *Schouler, Dom. Rel.* 263-266, *et seq.*; *Pierce v. Pierce*, 71 N. Y. 154, 156.

The same principles apply to a conveyance in consideration of marriage, which is not only a val-

levied upon by execution as belonging to Watson A. Bray. *Affirmed.*

The facts are stated in the opinion.

Messrs. William B. Sharpe and S. C. Devson for appellant.

Messrs. Scrivner & Boone and Garber, Boalt & Bishop for respondent.

McFarland, J., delivered the opinion of the court:

In the year 1888 there was a treaty or agreement of marriage pending between the plaintiff, then a young unmarried woman, and Alfred H. Cohen. Cohen was then a young lawyer just beginning the practice of his profession, and having no income or means sufficient to procure a home and support a family, and they were both unwilling to get married until they had a home. These facts coming to the knowledge of Watson A. Bray, the father of plaintiff, he concluded, in order to encourage the consummation of said marriage, to convey to plaintiff a lot of land and build a house thereon as a home for the young couple, provided the father of said Cohen would furnish it. After some conferences between the said Bray and the father of said Cohen, the proposition was accepted by the latter; whereupon Bray, on July 12, 1888, conveyed a lot

of land, being the premises described in the complaint herein, to the plaintiff (then Emma Bray) and proceeded immediately to build a house thereon, which was completed in the early part of 1884. This was done with the knowledge of Cohen, and he was consulted about it. The house was furnished by said Cohen's father. In February, 1884, plaintiff and Alfred H. Cohen were married, and moved into the house, where they have lived ever since. It is found by the court, and clearly established by the evidence, that the said conveyance of said lot to plaintiff, and the construction of said house thereon, were the consideration which induced said marriage, without which it would not then (if ever) have been consummated. The value of the lot and the cost of the house amounted at the time to about \$16,000, and the present value of the property is \$18,000. At the time of the conveyance of said lot to plaintiff and the building of said house, the said Bray was the owner of several hundred thousand dollars' worth of property, and supposed himself to be worth a quarter of a million of dollars. The conveyance was not made with any design on his part to hinder or defraud creditors (whether that fact be material or not), and it is entirely clear that plaintiff and her husband believed

unable consideration, but the highest consideration known in law.

Thus, it is said by Story, J., in *Magniac v. Thompson*, 32 U. S. 7 Pet. 398, 8 L. ed. 725. Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the seller alone intends a fraud, and the other party has no notice of it, he is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration, and, so that it is bona fide and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors. To the same effect, see *Campion v. Cotton*, 17 Ves. Jr. 264, 272, and notes.

This is also the settled doctrine in Alabama. *Andrews v. Jones*, 10 Ala. 400, 421.

Consequently, if it is made in good faith, and without notice of fraud to the parties who take under it, it is unimpeachable by creditors. *Eppes v. Randolph*, 2 Call, 108; *Bunnell v. Witherow*, 29 Ind. 123; *Frank's App.* 53 Pa. 190; *Magniac v. Thompson*, 32 U. S. 7 Pet. 348, 8 L. ed. 709; *Campion v. Cotton*, 17 Ves. Jr. 264; *Ex parte McBurnie*, 1 DeG. M. & G. 441; *Coutts v. Greenhow*, 2 Munf. 363, 4 Hen. & M. 485; *Tunno v. Trezeant*, 2 Desaus. Eq. 264; *Jones' App.* 62 Pa. 324; *Bank v. Marchand*, T. U. P. Charlt. 247; *Partridge v. Copp*, 1 Eden, 163 Amb. 596; *Cadogan v. Kennett*, 2 Cowp. 432; *Andrews v. Jones*, 10 Ala. 400; *Haselinton v. Gill*, 3 T. R. 620, note; *Croft v. Arthur*, 3 Desaus. Eq. 223.

An ante-nuptial settlement, though made by the intended husband with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of the wife's participation in the fraud. *Prewitt v. Wilson*, 103 U. S. 22, 26 L. ed. 360.

Tyler, on *Infancy and Coverture*, p. 464, says: "A court of equity will always support a marriage settlement, if no particular evidence of fraud is

made out, showing an intention to deceive and defraud creditors."

Bishop states the doctrine on this subject as follows: "If a man, wishing to enter into matrimony with a particular woman, should, being insolvent, convey to her all his property, which was accepted by her with full knowledge of the fact, the nuptial intent being not to defraud his creditors, as a primary object, but to contract marriage, each on such terms as could be reasonably procured from each other, the case would not be within either of the Statutes of Elizabeth. Neither would it be in violation of any principles of the common law, because the common law, though it abhors every sort of cheating, loves matrimony; its principles all point towards it, whenever the circumstances of a case expose them to this attractive force." 1 Bishop, *Married Women*, § 784.

As against creditors, if both parties intend, or if the settlor intends, and the settlee has notice of such intent (*Magniac v. Thompson*, 32 U. S. 7 Pet. 348, 8 L. ed. 700), to hinder, delay, or defraud his creditors, the contract, to the extent at least of the settlor's debts (*Smith v. Cherrill*, L. R. 4 Eq. 390), is void (*Bulmer v. Hunter*, L. R. 8 Eq. 46; *Cadogan v. Kennett*, 2 Cowp. 432; *Andrews v. Jones*, 10 Ala. 400; *Phillips v. Meyers*, 82 Ill. 67; *Jones' App.* 62 Pa. 324; *Herring v. Wickam*, 29 Gratt. 628; *Colombine v. Penhall*, 1 Sm. & G. 228); no matter what the consideration (*Bulmer v. Hunter*, 38 L. J. Ch. 543; *Casen v. Murray*, 15 Mo. 378; *Ashmead v. Hean*, 13 Pa. 534; *Bozman v. Draughan*, 3 Stew. 243; *Moely v. Gainer*, 10 Tex. 393, 419; and mere knowledge of the settlor's indebtedness (*Campion v. Cotton*, 17 Ves. Jr. 264; *Richardson v. Horton*, 7 Beauv. 112), or insolvency (*Sisson v. Roath*, 30 Conn. 15), will not amount to fraudulent intent or notice, though they may go to prove it (*Ex parte McBurnie*, 1 DeGex. M. & G. 441; *Marshall v. Morris*, 16 Ga. 368; *Croft v. Arthur*, 3 Desaus. Eq. 223; *Colombine v. Penhall*, 1 Sm. & G. 228), just as the unreasonableness of the settlement may. *Ex parte McBurnie*, *Marshall v. Morris*, *Croft v. Arthur*, and *Colombine v. Penhall*, *supra*; *Simpson v. Graves*, *Riley*, Eq. 232; *Bank v. Marchand*, T. U. P. Charlt. 247; *Stewart, Mar. & Div.* § 39. See notes to *McNutt v. McNutt* (Ind.) 2 L. R. A. 372; *Deshon v. Wood* (Mass.) 1 L. R. A. 518.

him to be a man of large means, and fully able to make the said provision for her marriage, and that she accepted the same without any intent of hindering or defrauding his creditors. It turned out afterwards, however, that said Bray was, in fact, insolvent at the time said conveyance was made to plaintiff. On said July 12, 1888, the date of said conveyance to plaintiff, said Bray was indebted to the defendant Charles C. Knox in an amount exceeding \$60,000; and on August 12, 1885, said Knox recovered judgment against said Bray for \$79,218. On April 26, 1887, Knox caused an execution to be issued on said judgment, and delivered the same to the sheriff with instruction to levy it upon said lot conveyed by said Bray to plaintiff as aforesaid, as the property of said Bray. The sheriff made said levy, and was about to sell said lot, when the plaintiff brought this present action to restrain such sale, upon the ground that it would cast a cloud upon her title. The court gave judgment for plaintiff according to her prayer, and from said judgment, and from an order denying a new trial, the defendant Knox appeals.

The main question presented is whether the said conveyance from Bray to his daughter, under the circumstances above stated, was void as against the creditors of Bray. This question has been very ably and elaborately discussed by counsel, and a multitude of authorities have been cited. We will not undertake here to review these authorities, but will merely state the conclusions to which they clearly lead. Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose. Marriage is the highest and most valuable of considerations; and when a conveyance is made upon such consideration, the grantee, if guiltless of fraud herself, is in at least as firm and sure a position as if she had paid in money the full value of property conveyed. It has even been held that a voluntary conveyance to a daughter, intended as a settlement, and without present reference to her marriage, will become *ex post facto* valid against creditors and purchasers with only implied notice, if upon the credit of the conveyance a person has been induced to marry her. Marriage being in its nature permanent, and being the most important of all civil relations, the law will not lightly allow the inducements which have led to it to be disturbed. And the dowry of a bride, without special proof, is presumed to be an inducement to her marriage. The law does not require a delicate investigation into the *quantum* of influence which her property has had with her suitor. A few of the many authorities which establish the principles above stated are the following: Bump, *Fraud. Conv.* pp. 305, 306, and cases cited; Wait, *Fraud. Conv.* § 212, and cases cited; *Magniac v. Thompson*, 32 U. S. 7 Pet. 348, 8 L. ed. 709; *Pruitt v. Wilson*, 103 U. S. 22, 26 L. ed. 360; *Wood v. Jackson*, 8 Wend. 9; *Herring v. Wickham*, 29 Gratt. 633; *Iluston v. Cantril*, 11 Leigh, 146, 155; *Sterry v. Arden*, 1 13 L. R. A.

Johns. Ch. 260, 271, 1 L. ed. 183, 187; *Brown v. Carter*, 5 Ves. Jr. 877, 878; *Otis v. Spencer*, 102 Ill. 622; *Dugan v. Gittings*, 3 Gill, 138, 43 Am. Dec. 306.

The case at bar presents a clear field for the application of these principles. It has none of those peculiarities or complications of facts which often make it difficult to determine what rule of law applies. It is a plain case of a conveyance upon the express consideration of marriage, which was the direct and immediate inducement of the marriage, and made, not only without any knowledge of fraud by the grantee, but without any intent to defraud on the part of the grantor. The court was therefore right in upholding the said conveyance against appellant, claiming as a creditor of Bray.

2. Appellant contends that the judgment should be reversed, because the complaint does not state facts sufficient to constitute a cause of action, and because his demurrer on that ground was erroneously overruled. The point is, as we understand it, that facts constituting a cloud on plaintiff's title are not stated, because it does not appear that plaintiff derived her title from Bray, against whom the execution runs. The complaint shows, among other things (in brief), that since July 12, 1888, plaintiff has been the owner and in possession of a certain described lot of land; that said land is "a portion of W. A. Bray's Oak Tree farm tract, as surveyed for W. A. Bray by James T. Stratton, April, 1869, as per map," etc.,—"all of which was and is well known to the defendants herein;" that defendant Knox recovered judgment against Bray, caused an execution to be issued, and levied on said land as the property of Bray, and is about to have the same sold, as in this opinion heretofore stated, and that said sale will cast a cloud upon plaintiff's title, and greatly damage and impair the value thereof. It is not necessary to definitely determine whether this complaint is so totally defective in its statement of a cause of action as to be bad on general demurrer, or whether it merely presents a case of defective averments, assailable only on special demurrer; because defendant, in addition to his answer in which the averments of the complaint are denied, filed a cross-complaint in which he asked for affirmative relief, and in which he averred specifically the very facts which he contends should have been averred in the complaint of plaintiff. In his cross-complaint he avers that on said July 12, 1883, and for a long time prior thereto, the said Bray was the owner in fee and in possession of said land; that on said day he conveyed the same by deed to plaintiff, who is his daughter, that the deed was voluntary and without consideration; that plaintiff holds under said deed, and not otherwise; and that the deed was made to hinder and delay creditors, and particularly defendant. He prays that the deed be declared fraudulent and void, and that he be allowed to proceed with the execution. To this cross-complaint plaintiff filed an answer, in which she admitted said deed from Bray, and that she held under it, but denied that it was voluntary, or without consideration, or fraudulent, and averred the consideration of marriage, and the facts concerning said marriage, as heretofore stated. Upon these pleadings the case went to

trial; and it would be a vain thing to reverse the judgment, and allow plaintiff to amend her complaint by averring facts already averred in the cross-complaint, and to again in that form present issues which have already been raised and determined. The appellant made no objection to the introduction by plaintiff of the said deed to her from Bray; and the issue of the validity of said deed, raised by the cross-complaint and answer to it, was the one issue tried; and therefore, if it be conceded that the complaint failed to state sufficient facts, such failure was cured by the statement of the omitted facts in the other pleadings, which present a case of "express aider." And the fact that there was a demurrer does not take it out of the rule. There was a demurrer in *Schenck v.*

Hartford F. Ins. Co., 71 Cal. 28, but the court held there that the omission of a material fact in the complaint was cured by its averment in the answer. That case, in principle, cannot be distinguished from the case at bar. See also Pom. Rem. § 579. Many cases to the same point are cited by counsel for respondent.

3. We see nothing in the point that an ante-nuptial contract must be in writing. No question arises here as to the enforcement of a verbal contract which ought to have been in writing. There are no other points necessary to be specially noticed. *The judgment and order denying a new trial are affirmed.*

We concur: **De Haven, J., Sharpstein, J.**

UTAH SUPREME COURT.

Dwight PECK *et al.*, *Repts.*,

v.

Cecilia REES, *Appt.*

(.....Utah.....)

1. **The amendment of an answer** by striking out certain allegations is properly refused, where, after the amendment, the answer would still contain affirmative allegations of similar import to those stricken out.
2. **Death of the grantor before delivery of a deed of gift** which he has placed in his agent's hands to be delivered, terminates the agent's authority, and a subsequent delivery is invalid.
3. **The mere intention, evidenced by the execution of a deed, on the part of one about to die, to make a gift** of property to a person towards whom he is under no obligations, legal or moral, creates no equity in the latter's favor superior to that of the grantor's heirs, and unless the gift is completed in the grantor's lifetime no title can pass.
4. **The delivery by a grantor to his own agent of a deed of gift** intended for one who has no knowledge that it was to be made, is not a valid delivery to the latter.

(September 12, 1891.)

A PPEAL by defendant from a judgment of the District Court for Webber County in favor of complainants, in a suit brought to quiet title to certain real estate. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Miller & Maginnis, for appellant:

To constitute a delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed and all right and authority to control it, either finally and forever, as where it is given

over to the grantee himself or some person for him.

Prutsman v. Baker, 30 Wis. 644.

If a grantor deliver any writing, as his deed to a third person to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently and the third person is a trustee of it for the grantee.

Wheelwright v. Wheelwright, 2 Mass. 452; *Hathaway v. Payne*, 84 N. Y. 106; *Ball v. Foreman*, 37 Ohio St. 187; *Cooks v. Cooks*, 34 Ohio St. 616; *Albright v. Albright*, 70 Wis. 538.

Messrs. Smith & Smith for respondents:

An instrument, whatever is its form, is testamentary in its operation and quality if it be intended not to operate till the death of the party who made it, and the intention of the maker may be gathered either by the instrument or from extrinsic testimony.

Hatch v. Hatch, 9 Mass. 308, 310, and *note*.

There was no delivery of the deed in this case.

Herbert v. Herbert, 1 Ill. 278, 12 Am. Dec. 192; *Jackson v. Phipps*, 12 Johns. 419; *Maynard v. Maynard*, 10 Mass. 457; 2 Bl. Com. 307; *Hibberd v. Smith*, 87 Cal. 547; *Fitch v. Bunch*, 30 Cal. 210; *Pennington v. Pennington*, 75 Mich. 600.

To constitute a good *donatio mortis causa*, the first thing that is required is that the thing given must be personal property; second, that the gift must be made by the donor in peril of death and to take effect only in case the giver dies; third, there must be an actual delivery of the subject to convey a *donatio* in cases where delivery can be made.

The first requirement concludes the defendant in this case. It is impossible that there should be a gift *mortis causa* of real estate.

Bouvier, Law Dict. title *Donatio Mortis Causa*, pp. 559, 560.

The death of Henry Peck terminated absolutely the authority of Jones, who was his agent.

2 Kent, Com. 645, par. 4.

Anderson, J., delivered the opinion of the court:

The complaint in this case alleges that the

NOTE.—*Donations causa mortis*. See notes to *Drow v. Hagerty* (Me.) 3 L. R. A. 230; *Williams v. Guile* (N. Y.) 6 L. R. A. 386; *Devol v. Dye* (Ind.) 7 L. R. A. 436; *Ridden v. Thrall* (N. Y.) 11 L. R. A. 664 and *Walsh's App.* (Pa.) 1 L. R. A. 533. 18 L. R. A.

plaintiff Julia Eliza Peck is the widow and the other plaintiffs are the children and heirs-at-law of Henry Peck, late of Oneida County, Idaho Territory, deceased; that Henry Peck died at Malad, Oneida County, Idaho Territory, on or about the 28d day of July, 1889; that about ten days before his death he made a will by which he devised to the defendant certain real estate situated in Cache County, Utah Territory; that the devise in the will was for the purpose of having carried out the testator's temple work (meaning thereby certain pious, superstitious, and polygamous practices of the Mormon Church), to be carried on in the Mormon temple at Logan, Cache County, Utah; that the will was duly probated August 29, 1889, and the plaintiffs Howard Peck and Dwight Peck duly qualified as executors, and letters testamentary were duly issued to them on that day; that after the execution of the will, to wit, on the 17th day of July, 1889, the said Henry Peck executed a deed for the same real estate to the defendant, but that the deed was wholly without consideration, and was never delivered, and that after the death of the said Henry Peck the deed came wrongfully into the possession of the defendant, and she caused the same to be recorded in the records of Cache County, Utah. The plaintiffs claimed to be the owners of the land under the will and as heirs of Henry Peck, and asked to have their title quieted against the defendant. The defendant, by her answer, denied that the deed was never delivered, or that it came wrongfully into her possession, and alleged that the deed was duly executed by Peck in his lifetime, and "by him delivered to one Jenkin Jones, unconditionally, for the use and benefit of this defendant, with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck, as a gift *causa mortis*; and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," and that Jones delivered the deed to her in pursuance of such authority. The depositions of Jenkin Jones, Henry R. Jones, and Howard Peck were introduced and read on behalf of plaintiffs. No evidence was offered by the defendant. At the close of the evidence the defendant asked leave of the court to amend her answer by striking out the words "*causa mortis*, and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," which was refused by the court, to which ruling the defendant excepted, and assigns the same as error.

The court found that Henry Peck was the owner of the land in controversy at the time of his death; that within ten days prior to his death he made an attempted devise of his property to the defendant, Cecilia Rees, by will, which devise was void under the statutes of Idaho Territory, where he resided prior to his death on the 22d day of July, 1889, and after his said will had been written; "and as an attempt to make a testamentary disposition of said property to the defendant, and without any consideration whatever, either good or valuable, made, executed, and delivered to one Jenkin Jones a deed for said property, said deed being in favor of the defendant, Cecilia Rees, she being named as grantee therein; that Jenkin Jones

had no authority from the defendant to receive said deed, and was directed by said Henry Peck to keep said deed until after his death, and then deliver the same to the defendant; that about one week after the death of Henry Peck, Jenkin Jones sent said deed to the defendant through the United States postoffice; that until she received said deed through the mail the defendant had no knowledge of the existence of such deed, or of any deed." The court found that the plaintiffs are the only heirs-at-law of said Henry Peck, and are the residuary legatees under the will. As conclusions of law the court found that the deed never became operative and is void; that the plaintiffs are the owners of the property, and entitled to a decree quieting their title to the same. The defendant made a motion for a new trial, which was overruled, and the appeal is from the findings and judgment.

Counsel for defendant say in their brief that all claim of the defendant under the will is abandoned, and that they rest their case on the deed alone, and that the only question they present for determination is, Was there a delivery of the deed? They further say in their printed brief in this court that "it is admitted that the grantee, Cecilia Rees, had no knowledge of the execution of the deed until received by her through the postoffice, about one week after the death of Henry Peck. It is further admitted that neither the grantee, nor any person for her, paid any consideration for the deed." The evidence as to the delivery of the deed is as follows: Jenkin Jones, a witness for the plaintiff, testified: "I knew Henry Peck in his lifetime. I saw a deed for the Cache County land which appeared to be executed by him, and the deed was in my possession. Henry R. Evans delivered the deed to me at my residence in Malad City, just a little time before Henry Peck's death, and said, at the time of delivery, here was a deed for me to keep. No instructions at that time were given me. The deed was delivered to Cecilia Rees, after the death of Henry Peck for fully a week. I sent it, addressed to her, through the postoffice . . . A short time before the death of Henry Peck he called on me, and told me he was very sick, and did not know whether he would get well or not, and said he might make a paper or deed for Cecilia Rees, and asked me if I would deliver it, and told me to keep the matter to myself." Henry R. Evans testified: "Was acquainted with Henry Peck in his lifetime. I wrote a deed for him, conveying to Cecilia Rees the property in Cache County, and described in the complaint. . . . I had possession of the deed after it was made, and delivered it to Jenkin Jones. I received from Henry Peck instructions to deliver the deed to Jenkin Jones, with directions that he should send it to Mrs. Cecilia Rees, and I gave Jenkin Jones that direction. The deed was made and executed about a week before the death of Henry Peck. I delivered the deed to Jenkin Jones on the day it was made and executed. The deed was made in view of the approaching death of Henry Peck, and there was no express instruction whether it was or was not to be delivered in case he should live. He said Jenkin Jones would know what

to do with it. I had already written his will for him." Howard Peck, a son of Henry Peck, and one of the plaintiffs in this action, testified that the deed was intended by his father as a gift in view of approaching death.

It will be observed that, even if the court had permitted the defendant to make the proposed amendment to the answer, striking out the admission that the deed was intended as a gift in view of the approaching death of Henry Peck, still that fact was abundantly proved by the evidence already introduced, and without objection; so that, even if the court erred in refusing to allow the amendment, it worked no prejudice to the defendant. The right to make the amendment is claimed under section 3256, 2 Comp. Laws 1888. We think there was no error in refusing the amendment. If the amendment had been made, the answer would have still contained the affirmative allegation that Peck executed and delivered the deed to Jenkin Jones for her benefit, and "with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck."

While there can be but little doubt that the deed from Peck to the defendant was made to evade the Statute of Idaho Territory which rendered the devise in the will to defendant void in case Peck should die in less than thirty days after the execution of the will, still he had a right to deed her the property as a gift, and confer upon her a good title; and the only question for determination is, Did he so far execute his intentions as to render the deed operative? It is essential to the validity of every deed that it be delivered to and accepted by the grantee. It need not be delivered by the grantor himself, but may be delivered by anyone duly authorized by him to make such delivery. Nor need it be delivered to the grantee in person, but may be delivered to anyone authorized by the grantee to receive or accept it. If, however, a grantor execute a deed of gift of real estate, and place it in the hands of an agent to deliver to the grantee, and the grantor dies before delivery, no delivery can then be made, because the authority of the agent to act ended with the death of the principal; and in this case, unless the delivery to the agent Jones was a delivery to the defendant, there was no such delivery of the deed as would render it operative, and transfer the title to the defendant.

Peck being under no obligation, legal or moral, by reason of indebtedness, kinship, or otherwise, to convey the land to the defendant, no equity was created in her favor by reason of his intention to make the gift, superior to the equity of his heirs, and unless he succeeded in making the gift to her complete in his lifetime by delivery of the deed, no title could pass to her. But Jones was not the agent of the defendant to accept the deed for her, and hence a delivery to him was not a delivery to her. It does not appear in the evidence that Jones even knew her, but it does appear that he was not her agent for any purpose connected with the deed, for it is conceded she had no knowledge that such a deed, or any deed, would be made by Peck to her. Jones was the agent of Peck, and had no authority to do anything with the deed except as author-

ized by Peck, and Peck could have demanded and regained possession of it at any time during his lifetime. While, therefore, it was out of his immediate possession, it was under his control, and liable at all times to be recalled and canceled by Peck. The title, then, was in Peck at the time of his death, and not in defendant, for she had not so much as heard of the deed, much less accepted it, and did not hear of it for a week after Peck's death. Suppose she had died the next day after Peck's death, but before Jones forwarded her the deed, to whose heirs would the property have descended,—the heirs of Peck or the heirs of the defendant? If to her heirs, it could only be because the title was fully vested in her by the execution of the deed, although she had never accepted it by herself or agent, nor even heard of it, and we would have a case where a delivery of a deed was not essential to transfer title. If we concede that Jones could deliver the deed to the defendant a week after the death of Peck, and, when delivered to her, it would vest the title in her from that date, where was the title between the death of Peck and the delivery of the deed to the defendant? If the title was in abeyance during this time,—floating around, as it were,—what would have been the result if Jones had lost or destroyed or refused to deliver the deed? Suppose the instructions to Jones should be construed to mean that he was not to await the death of Peck before delivering the deed, and Peck had demanded the return to him of the deed, and that the defendant had heard of the deed and demanded of Jones that he deliver it to her, who would have had the greater right to it? We think there can be no question but that Jones, being the agent of Peck, would have been bound to redeliver the deed to him, for it is of the essence of a gift that it be voluntary, and may be recalled any time before actual completion. In *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 262, the grantor executed and caused to be recorded a deed to the grantee, without the knowledge of the grantee, and he did not know of its execution until after the death of the grantor, when the deed was found among his papers. In a suit between the heir of the grantor and those holding under the grantee the Supreme Court of the United States said: "The delivery of the deed is essential to the transfer of title. It is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery."

In *Parmalee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542, one Bovey conveyed certain real estate to Simpson, to whom he was indebted, and placed the deed on record without the knowledge of Simpson. Two days later he mortgaged the same lands to Parmalee, and the mortgage was recorded before Simpson knew of the deed to him, and the court held that the mortgage took precedence over the deed. The court said: "The placing of the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts,

there was manifestly no delivery. The execution and registration of a deed, and delivery of it for that purpose, does not vest the title in the grantee. If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been, in legal contemplation, a delivery to him." See also *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Met. 281;

Jackson v. Phipps, 12 Johns. 419; *Jackson v. Leek*, 12 Wend. 105. So, in this case, the delivery of the deed to Jones did not vest the title in the defendant; and before she knew of its existence and had an opportunity to accept it, the title passed upon the death of Peck to the plaintiffs by operation of law.

The judgment of the District Court is affirmed.

Zane, Ch. J., and Blackburn, J., concur.

IOWA SUPREME COURT.

Max J. BAEHR

v.

A. A. CLARK, *Appt.*

(.....Iowa.....)

A bona fide purchaser of diamonds from one who obtained them from their owner, under the fraudulent representation that he had a customer for them, and would return them or their price in an hour, with the intention of appropriating them to his own use, acquires no title as against the bailor.

(October 5, 1891.)

APPEAL by defendant from a judgment of the District Court for Pottawattamie County, in favor of plaintiff in an action to recover possession of certain diamonds. *Affirmed.*

Statement by **Rothrock, J.:**

Action of replevin for a diamond ring and a diamond stud. The plaintiff and the defendant each claim to be the owner of said property. The cause was submitted to a jury, and the jury being unable to agree upon a verdict, by agreement of the parties the issue was afterwards submitted to the court without a jury, on the evidence taken by the short-hand re-

porter at the jury trial. The court, upon an examination of the evidence, found for the plaintiff. Defendant appeals.

Messrs. Flickinger Bros., for appellant:

Even if a criminal act had been committed by Barker this would in no way or manner determine the passing of the title to the property. Property does pass if the vendor so intends, however fraudulent the devices of the buyer may be to induce that intention.

Benjamin, Sales, § 437, and authorities cited.

In cases of fraud, criminal or otherwise, as between the parties, the property passes subject to the right of rescission on the ground of fraud, unless the rights of innocent third parties intervene.

Oswego Starch Factory v. Lendrum, 57 Iowa, 578; *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394; *Plummer v. People's Nat. Bank*, 65 Iowa, 465.

Plaintiff, in stating the contract made with Barker, brings the case fairly within section 1922 of the Code, which provides: "No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend on any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession, and obtained in pursuance thereof, without notice, unless same be in writing executed by the vendor or les-

NOTE.—When the vendee of personal property will not acquire title.

The principle is well recognized in the established rules regulating the sale of personal property, that no person can transfer title to another's property, unless the owner by some direct and unequivocal act has clothed him with the indicia of ownership. *McGoldrick v. Willits*, 52 N. Y. 612.

The reasoning in the case last cited is controlling upon *McGoldrick v. Willits*, *supra*. The defendant bought the plaintiff's whiskey from a third person who had neither real nor apparent authority from the owner to sell it. The ruling was that the vendee could acquire no better title, merely because it was disclosed by the evidence that he purchased in good faith. The rule *caveat emptor* applies, if any rule at all be necessary, to show that you cannot get a title to my property by a purchase, no matter how high your faith, from one who has no authority from me, real or apparent, to sell it.

One having possession of personal property as a bailee for hire, with an executory and conditional agreement for its purchase, which conditions have not been performed, can give no title thereto to a purchaser, although the latter acts in good faith and parts with value, and is without notice of the want of title of his vendor. *Ballard v. Burgett*, 40

N. Y. 314; *Wait v. Green*, 36 N. Y. 556; *Austin v. Dye*, 46 N. Y. 500.

A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities of the title. *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 538.

And it is a rule of extended application, that no person can transfer any greater title than he himself has in the thing transferred. 2 Kent, Com. 324; *Salts v. Everett*, 20 Wend. 267, 275; *Brower v. Peabody*, 13 N. Y. 121; *Peer v. Humphrey*, 2 Ad. & El. 495; *Dows v. Perrin*, 16 N. Y. 325; *Covill v. Hill*, 7 Denio, 323, 327; *Whistler v. Forster*, 14 C. B. N. S. 248; *Ballard v. Burgett*, 40 N. Y. 314.

The sale of chattels by one not in possession of the legal title conveys to the transferee no title in the goods, even where the purchase is for value and in entire good faith. This rule is supported by well-recognized authority. *Boyce v. Brockway*, 31 N. Y. 490; *Brower v. Peabody*, 13 N. Y. 121; *Hoffman v. Carow*, 22 Wend. 235; *Spaulding v. Brewster*, 50 Barb. 142; *Dudley v. Hawley*, 40 Barb. 397; *Cobb v. Dows*, 10 N. Y. 335; *Murray v. Burling*, 10 Johns. 172; *Everitt v. Coffin*, 6 Wend. 604; *Salts v. Everett*, 20 Wend. 270; *Connah v. Hale*, 23 Wend. 462; *Covill v. Hill*, 4 Denio, 323; *La Place v. Auport*, 1 Johns. Cas. 407; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397.

F. S. R.

sor, acknowledged and recorded the same as chattel mortgages."

A sale is "the transfer of an absolute or general property in a thing for a price or money," and a conditional sale is such transfer subject to conditions, etc.

See Benjamin, Sales, chap. 1; *Warner v. Jameson*, 52 Iowa, 70; *Singer S. Mach. Co. v. Holcomb*, 40 Iowa, 33; *Moline Plow Co. v. Braden*, 71 Iowa, 141, citing *Pash v. Weston*, 52 Iowa, 875, and *Thorpe v. Fowler*, 57 Iowa, 541. See also *Thatcher v. Union Scale Co.* 74 Iowa, 117.

Messrs. A. W. Askwith and Wright & Baldwin, for appellee:

If Barker never had the title to the diamonds, any attempted transfer of title by him would confer none on his vendee.

Gimble v. Ackley, 12 Iowa, 27; *Frans v. Young*, 24 Iowa, 375.

Baehr did not sell the diamonds to Barker, but Barker obtained them under the false and fraudulent representation that he wanted to show them to a purchaser, and he had no intention of showing the diamonds to a purchaser at the time he got possession of them. The court could not reach any other conclusion. Such acts amount to a crime.

State v. Anderson, 47 Iowa, 142; *State v. House*, 55 Iowa, 466; *State v. Joaquin*, 48 Iowa, 131.

Baehr never intended to pass title to Barker.

Rothrock, J., delivered the opinion of the court:

1. The court made special findings of the facts which it was thought were established by the evidence. We need not set out these findings in detail, but will recite such as are deemed material to a determination of the rights of the parties upon an appeal. The plaintiff is a dealer in diamonds at the City of Omaha, in the State of Nebraska. In the month of December, 1888, one J. J. Barker made his appearance at the plaintiff's place of business, and represented that he had a customer for a diamond ring and stud, and desired to examine the plaintiff's goods. He selected the ring and stud now in controversy, and the plaintiff delivered them to him to take them and show them to the party who desired to make the purchase. The sum of \$450 was fixed as the price of the diamonds, and Barker was to return them, or return with the price, in an hour. The plaintiff saw no more of Barker for two or three days, when he succeeded in having an interview. Barker at first stated that he had been robbed of the diamonds; said he had been knocked down and robbed, and called attention to certain bruises on his face and marks on his fingers. The plaintiff threatened to have Barker arrested, and then he stated he had lost the diamonds at a gambling-house; and afterwards he stated that they were in possession of the defendant, Clark, at Council Bluffs. It was afterwards ascertained that Barker, after obtaining possession of the diamonds, crossed the Missouri river to Council Bluffs and stopping at a gambling-house kept by one Carrigg. While there he was in urgent need of money, and Carrigg advanced money to him, from time to time, and took and held the diamonds as security. When these advances amounted

to \$247 Carrigg, refused to make further advancements, and he and Barker went to the defendant with the diamonds, and sold them to him for the sum of \$275 and Clark paid Carrigg, the keeper of the gambling-house, the sum of \$247, and he paid Barker the balance, being \$28. Barker represented to the defendant that the diamonds belonged to him. There are other facts disclosed in evidence as to efforts made by plaintiff to obtain payment for the property, and offers to purchase the diamonds from Clark, which are of no importance in the case. The plaintiff did no act which would in law estop him from asserting any claim he may have had at any time to recover the property from Clark. The court found that Clark was an innocent purchaser for value, and we incline to think that finding was correct. The only real question in the case is whether Clark is entitled to the property as an innocent purchaser? Other facts might be stated which authorize the conclusion that Barker obtained the possession of the goods by fraudulent representations, but enough has been stated to show that the court was fully authorized in finding that Barker had no customer for valuable diamonds. The fact that he did not return in an hour, but repaired to a gambling-house and pledged the diamonds to the keeper of the house, fully warrants the finding that he obtained possession of the property by fraud. If the plaintiff had sold and delivered the diamonds to Barker upon these representations, and Barker had resold to the defendant, he being an innocent purchaser, the plaintiff could not maintain this action. It is well settled that when goods are obtained from their owner by fraud, and the facts show a sale to the party guilty of the fraud, an innocent purchaser of the goods from the fraudulent vendee for value, and without notice of the fraud, will take the title. The true inquiry is, Did the owner intend to transfer both the property in and possession of the goods to the person guilty of the fraud. If he did, there is a contract of sale, however fraudulent the device, and the property passes, and subsequent innocent purchasers for value will be protected. *Rouley v. Bigelow*, 12 Pick. 312; *Perkins v. Anderson*, 65 Iowa, 398; 1 Parsons, Cont. 520. And see *Onwego Starch Factory v. Lendrum*, 57 Iowa, 573, in which the rule announced is recognized, but held not applicable to an attaching creditor of the fraudulent vendee. *Robinson v. Pogue*, 86 Ala. 257; *Hutchinson v. Watkins*, 17 Iowa, 475; *Chicago Dock Co. v. Foster*, 48 Ill. 507.

But this rule has no application unless there is an actual sale of the property by the alleged vendor. If one delivers property to another as a mere bailee, a purchaser from the bailee acquires no title, however innocent he may be. He has no more right to assert title to the property than if it had been stolen, and his purchase had been from the thief. The principle upon which this distinction rests is that the vendor in the cases last supposed does not part with the title to the property, nor does he have any such intention, and the fraudulent possessor of the property can convey no title to any third person, however innocent; for no property has passed to himself from the true owner. Benjamin, Sales, 369; *Rohrbough v. Leopold*, 68 Tex. 254; *Church v. Melville*, 17 Or. 418.

It is very plain that the transaction between the plaintiff and Barker did not pass the title of the diamonds to Barker. He did not pretend or claim that he wanted to purchase diamonds. He was intrusted with the possession of them merely as the agent of the plaintiff, and instead of returning them, he embezzled them by pawning them in a gambling-house, and by subsequently, in connection with the keeper of the house, selling them to the defendant. The authorities appear to be uniform that in such case the purchaser from a mere agent or bailee acquires no title, even though he pay value, and has no notice of the embezzlement, and that the rule *caveat emptor* applies. It is idle to contend that Barker did not have the criminal intent to embezzle the diamonds when he obtained possession of them from the plaintiff. There is no evidence that he had any friend who was in need of diamonds. All of his acts subsequent to the time he acquired possession indicate that his purpose, from the inception of his enterprise, was not to procure a purchaser for the property, but to appropriate it to his own use. There are no other questions in the case which demand consideration.

The judgment of the District Court is affirmed.

REYNOLDS & CHURCHILL, *Appts.*,

v.

G. W. HANES *et al.*

(.....Iowa.....)

The proceeds of a policy of insurance on the books and instruments of a physician, which are by statute exempt from sale under execution for his debts, are also exempt.

(October 9, 1891.)

APPEAL by plaintiffs from a judgment of the District Court for Fayette County in favor of defendants in a proceeding by garnishment to enforce payment of a judgment in favor of plaintiffs out of the proceeds of a policy of fire insurance, upon certain books and instruments belonging to defendant Hanes, which had been destroyed by fire. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Exemption Laws should receive a liberal construction.*

The Statute exempting certain property of the debtor from execution should be fairly construed to enable the debtor to enjoy such property. If when such property is wrongfully taken from the debtor against this will, the law does not afford him an adequate remedy for the injury and protect him in its enforcement, the Statute is to the extent of the failure rendered nugatory. Such construction should be adopted as will secure the debtor in the enjoyment of the exempt property, and afford him an adequate and complete remedy for a violation of his right. *Andrews v. Rowan*, 28 How. Pr. 128.

Even an agreement "to waive all exemptions to property" creates no estoppel, and in the eye of the law such a contract is hard, oppressive and unconscionable, and totally void as in contraven-

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Messrs. George H. Phillips and Ainsworth & Hobson, for appellants:

The proceeds of exempt insured property are not exempt while in the hands of the insurer, in the absence of a statutory provision making it so.

Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128; *Smith v. Ratcliff*, 66 Miss. 688.

There are numerous cases in Iowa which are in favor of the position of appellants.

See *Webb v. Holt*, 57 Iowa, 712; *Cranz v. White*, 27 Kan. 319; *Spelman v. Aldrich*, 126 Mass. 113; *Connell v. Fisk*, 54 Vt. 381; *Triplett v. Graham*, 58 Iowa, 135; *Goble v. Stephenson*, 68 Iowa, 270; *Robison v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Kellogg v. Waite*, 12 Allen, 529; *Cook v. Holbrook*, 6 Allen, 572.

The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt.

Harrier v. Fassett, 56 Iowa, 284.

While life insurance policies may be exempt from execution under our Statute, property acquired by sale or assignment thereof is not.

Friedlander v. Mahoney, 31 Iowa, 311.

The proceeds of a policy of insurance upon the life of the husband or wife are not exempt from the debts of the survivors after the proceeds shall be realized.

Smedley v. Felt, 43 Iowa, 607.

The Exemption Law cannot be legally or properly construed to apply to exemptions not therein given.

Mitchell v. Joyce, 69 Iowa, 121; *Charless v. Lamberson*, 1 Iowa, 435; *Christy v. Dyer*, 14 Iowa, 438; *Eaton v. Robinson*, 23 Iowa, 208; *Givans v. Dewey*, 47 Iowa, 414.

Mr. D. W. Clements, for appellee:

The law applicable in this case should receive a liberal construction, and one that will carry out the spirit and object sought, as well as the letter of the Statute.

Bevan v. Hayden, 13 Iowa, 125; *Davis v. Humphrey*, 22 Iowa, 137, 140; *Kaiser v. Seaton*, 62 Iowa, 463, 466.

The more liberal construction given by this and other courts of last resort, not only includes articles embraced in the letter, but also those coming within the spirit and intent of the Statute.

Under a statute exempting a cow, her butter was held to be also exempt, although not enumerated.

tion of the spirit of our statutes, and of public policy. *Harper v. Leal*, 10 How. Pr. 276.

A statute exempting property from levy and sale is not to be construed strictly, but so as to carry out the obvious intention of the law-maker. *Washburn v. Goodheart*, 88 Ill. 229; *Haines, Treatise*, 537, *note*.

Where personal property was insured, and a fire renders an insurance company liable to replace the furniture destroyed or its equivalent in money, it has been held that for a reasonable time the debtor has a right to the money due from the insurance company, to replace the articles of household furniture, if he has not used other means for that purpose. *Cooney v. Cooney*, 65 Barb. 524.

Exemption in favor of debtors is favored by liberal interpretations. The Exemption Law of a State bars an execution on a judgment in favor of the United States. *Fink v. O'Neil*, 106 U. S. 230, 37 L. ed. 199.

Leavitt v. Metcalf, 2 Vt. 842, 19 Am. Dec. 718.

The proceeds of a voluntary sale of an exempt cow were held exempt.

Mulliken v. Winter, 2 Duv. 258.

A judgment for damages by reason of the seizure and sale of an exempt horse on execution was held exempt.

Tillotson v. Wolcott, 48 N. Y. 188.

The proceeds of exempt property in excess of a chattel mortgage thereon were exempt.

Evans v. St. Paul Harvester Works, 68 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 648. See also *Davis v. Humphrey*, 22 Iowa, 187; *Patterson v. Johnson*, 59 Iowa, 397, 400.

Where exempt property is invaded and converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time.

Kaiser v. Seaton, 62 Iowa, 463; *Stebbins v. Peeter*, 29 Vt. 289; *Keyes v. Rines*, 37 Vt. 260; *Mitchell v. Milhoan*, 11 Kan. 617; *Houghton v. Lee*, 50 Cal. 101; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188.

A judgment for damages to the homestead by fire was held exempt.

Mudge v. Lanning, 68 Iowa, 641.

Also money in the hands of the sheriff under condemnation proceedings for railroad right of way.

Kaiser v. Seaton, *supra*. See also *Chicago S. W. R. Co. v. Swinney*, 38 Iowa, 182.

Beck, Ch. J., delivered the opinion of the court:

1. The plaintiffs caused process of garnishment to be issued against the Capitol Insurance Company upon a judgment against defendant, claiming that the insurance company is a debtor of defendant upon a policy issued to him upon which there had been a loss of the property insured. A motion to dismiss the proceeding was sustained, upon the grounds, which were not disputed, that the property insured was exempt from execution, being books, instruments, etc., used by defendant, who was a physician and surgeon, in the practice of his profession.

2. The question presented for decision by the record is this: Are the avails of insurance upon personal property which is exempt under the Statute from debts of the assured also exempt? The Statute (Code, § 8072) declares that "If the debtor is a resident of this State,

and is the head of a family, he may hold exempt from execution" certain personal property, which includes the books, instruments, etc., of a physician, the property covered by the policy of insurance in this case. There is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise.

3. The purpose of the Statute is to secure to the debtor, who is the head of the family,—a physician and surgeon in this case,—the instruments, books and other articles which enable him to practice his profession. Its purpose is to secure the necessities of life—food, raiment and shelter—to families who are dependent upon heads thereof, by securing to them the instruments and means by the use of which they are enabled to support their families. The exemption is plainly for the benefit of families of debtors, for those having no family can claim no exemption. The Statute must be liberally construed, to carry out its purpose and spirit. *Bevan v. Hayden*, 13 Iowa, 123; *Davis v. Humphrey*, 22 Iowa, 189; *Kaiser v. Seaton*, 62 Iowa, 463.

The debtor in the case before us was authorized, under the Statute, to hold the property in question exempt from debts, if it were used for the purpose of his profession. It is plain that the use for which the property was kept determined the question of its exemption. The books, instruments, etc., of the physician and surgeon may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character or improved construction. It is plain that the physician may sell his books, and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of

Exemption Laws seek to promote the general welfare of society by taking from the head of a family the power to deprive it of certain property by contracting debts which will enable creditors to take such property in execution. Parties ought not, therefore, to be permitted to contravene the policy of the law by contract. *Kneettle v. Newcomb*, 22 N. Y. 248; *Crawford v. Lockwood*, 9 How. Pr. 547; *Harper v. Leal*, 10 How. Pr. 278. *Contra*, *McKinney v. Reader*, 6 Watts, 34; *Case v. Dunmore*, 23 Pa. 98; *Lauck's App.* 24 Pa. 426; *Bowman v. Smiley*, 31 Pa. 225; *Anderson*, Law Dict. title, *Exemption*.

In most of the States, and probably in the larger number of cases in all the States where this exemption is claimed, it must be done by the debtor for whose benefit the provision of the Statute applies. In Illinois at least, however, where the subject of garnishment is wages due an employé, and such:

wages are exempt, it is the duty of the employer when garnished to make the claim for him. Thus, if a railroad company pay over to the plaintiff, when it is garnished, wages exempt by law, when the employé to whom such wages are due is the head of a family, it will still be liable to the employé. *Chicago & A. R. Co. v. Ragland*, 84 Ill. 375.

So in Vermont, where the garnishee knows that money in his hands was received for a pension due the defendant from the government, and is for that reason exempt, he cannot be charged, and should at least bring this fact to the knowledge of the court, if not make a complete defense against the proceeding by which he is sought to be held as garnishee. *Hayward v. Clark*, 50 Vt. 612; *Adams v. Newall*, 8 Vt. 190; *Lock v. Johnson*, 38 Me. 464; *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283; *Webb v. Holt*, 57 Iowa, 712; 2 Wade, Attachm. § 401.

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the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired *in invitum* by proceedings against the owner.

It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by the creditors. If he could do this, it would be a convenient method to defeat the exemptions of the Statute. As we before remarked, the object of the Statute is to secure to the family the benefit of certain property. These benefits cannot be enjoyed unless the debtor have the unrestricted use and control of the property, free from liability for debts as long as it is owned and used by him. When it is used for other purposes than the support of the family it becomes liable for debts. But the change of the property into money will not indicate an immediate abandonment of the claim of exemption to the money on the ground of a purpose to invest it in like or other exempt property. Until an opportunity exists to make such investment, which is not a change of articles of exempt property, the debtor ought not to be presumed to abandon his claim. The debtor, as we have seen, has the authority to change the articles of exempt property by sale and purchase, exchange, or otherwise. He cannot

be presumed to have abandoned his right to this authority until he has had an opportunity to exercise it. The creditor cannot complain of its exercise. He is defeated of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to the other like property.

These doctrines and conclusions find support in the following decisions of this court: *Kaiser v. Seaton*, 62 Iowa, 468; *Mudge v. Lanning*, 68 Iowa, 641. See also cases cited in *Kaiser v. Seaton*, *supra*, and the following: *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646; *Leavitt v. Metcalf*, 2 Vt. 342; *Mulliken v. Winter*, 2 Duval, 256; *Tillotson v. Walcott*, 48 N. Y. 188.

Counsel for plaintiffs cite *Wooster v. Page*, 54 N. H. 125. It is not in harmony with our conclusions. We think that the reasoning upon which it is based is not sound. Other cases cited by the same counsel are not in conflict with our conclusions. They are to the effect that sales of exempt property, with no purpose to reinvest the avails in other like property, or to exchange the articles of exempted property, or are cases involving the exemption of pension money, and some other cases involving like questions, none of which are in conflict with our conclusions in this case.

We reach the conclusion that *the judgment of the District Court ought to be affirmed.*

NORTH CAROLINA SUPREME COURT.

JAMESVILLE & WASHINGTON R. CO.,

Appt.,

v.

A. FISHER.

(....N. C....)

An infant may be appointed a deputy sheriff unless otherwise provided by statute, although under the State Constitution he cannot be an "officer."

(October 13, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County dismissing the action for want of legal service of process. *Reversed.*

Statement by **Avery, J.:**

This was a civil action originally instituted before a justice of the peace, and brought by appeal to the Superior Court of Beaufort County, in which court it was tried at the May

Term, 1890, before Whitaker, J. The return of the officer upon the summons was as follows: "Received March 24, 1890. Served March 24, 1890, by reading the within summons to A. Fisher. R. T. Hodges, Sheriff. By J. H. Hodges, D. S."

Both in the court of the justice of the peace and in the superior court the defendant entered a special appearance, and moved to dismiss for want of service, because James H. Hodges, who actually served the summons as deputy for R. T. Hodges, was at the time of serving it under the age of twenty-one years. It was admitted in both courts that he (James H.) was not twenty-one years old on said 24th March, 1890, when said summons was served by him. From the judgment of the court dismissing the action the plaintiff appealed.

Mr. John H. Small for appellant.

Mr. Charles F. Warren, for appellee:

By Const. art. 6, §§ 1, 4, the age at which

NOTE.—*Infants as deputy sheriffs.*

At common law the office of sheriff might be granted to one in fee, and the grant was not void although the office might descend to an infant. *Reynel's Case*, 9 Coke, 97b.

The reason assigned by Abbott, *Ch. J.*, for the validity of such grants was that responsible deputies might be appointed on behalf of infants in case the office descended to them. *Clairidge v. Favyn*, 5 Barn. & Ald. 81.

An infant could not be appointed general deputy sheriff, but might be deputed to serve a particular writ. *McCracken v. Todd*, 1 Kan. 169.

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Under the Vermont statutes a special deputation for the service of a particular writ is valid. *Barrett v. Seward*, 22 Vt. 178.

It has also been held valid in New Hampshire. *Moore v. Graves*, 3 N. H. 411.

Women as deputy clerks.

In strict analogy to the doctrine of the principal case are the following authorities holding that a woman, though incompetent to hold the office of clerk of court, may lawfully be appointed deputy clerk. *Warwick v. State*, 25 Ohio St. 21; *Jeffries v. Harrington*, 11 Colo. 191; *Wilson v. Genesee Circuit Judge* (Mich.) Oct. 6, 1891.

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persons may become officers is fixed at twenty-one years.

By section 2067 of the Code it is provided that no person shall be eligible to the office of sheriff who is not of the age of twenty-one years, etc.

If the position of deputy sheriff is an office under the laws of North Carolina, then it would seem to be reasonably clear under the Constitution of North Carolina and the Statute above referred to that a minor is ineligible.

In *Cuckson v. Winter*, 2 Mann. & R. 313, service by an infant acting as deputy was held as illegal.

Avery, J., delivered the opinion of the court:

A sheriff is liable to answer in damages for any wrongful act of his deputy done under color of his office, for which the sheriff would have incurred such liability had he done the act himself, and in all such cases he and his deputy are, in contemplation of law, one person. *Murfree, Sheriffs*, §§ 20, 59, 60, 62. So far has this doctrine, as to all wrongful acts of the deputy done *colore officii*, been carried by this court, that a demand on a defaulting deputy for money collected by him in that capacity has been declared equivalent to a demand on the sheriff. *Lyle v. Wilson*, 26 N. C. 226.

While a deputy is professing to act, and inducing others to believe that he is acting, under color of his office, his personality, like that of other agents, seems to be merged, in legal contemplation, in the person of the sheriff under whose directions, as principal, he is supposed to act. *Murfree, Sheriffs*, §§ 20, 61. The service of the summons is a mere ministerial duty which can be performed by a deputy, where the law gives the right to appoint one, and even as between him and third persons his official acts are considered those of the sheriff, done by his lawfully constituted agent. The right to appoint under-sheriffs or bailiffs and deputies is not always, if generally, regulated by statute. These subordinates are the servants and agents of the sheriff, and his responsibility for them and relations with them are controlled generally by the law governing the relation of principal and agent. *Id.* §§ 16, 60. While policy may have induced the courts to hold his responsibility in some instances to be greater, never less, than that of a principal for the acts of his agent within the scope of the agency, our Code is still silent as to the manner of appointment or the distinct duties of both general and special deputies, while this court has declared that there is no provision of the common law which requires the deputation of a sheriff to be in writing, and that, in any action against a sheriff for the misconduct of a person alleged to be his deputy, it is not necessary to prove a deputation, but it is sufficient simply to show that the person acted as deputy with the consent or privity of the sheriff. *State v. Allen*, 27 N. C. 36; *State v. McIntosh*, 24 N. C. 58.

In some of the States statutes have been enacted providing for the appointment of general deputies and bailiffs, and prescribing certain duties and liabilities arising out of the position; and the interpretations of these laws have given rise to some confusion, and apparent conflict,

in the decisions of different States. In some of these States we find distinctions drawn by the courts as to the duties, powers, and liabilities of general deputies, coming within the provisions of their statutes, and special deputies, who are left as at common law to be treated as the trusted servants or agents of the sheriff. *Proctor v. Walker*, 12 Ind. 660.

In North Carolina, both general and special deputies may be appointed by the sheriff without writing, and, when they act with his assent or privity, they are either his general or special agents as to the discharge of his ministerial duties, and are accountable to him as such. An individual can unquestionably constitute an infant his agent, and subject himself to responsibility for all acts of the latter within the scope of the agency. *Wharton, Ag.* §§ 15, 16; *1 Lawson, Rights, Remedies & Practice*, § 6; *Story, Ag.* § 7.

In the absence of statutory restrictions, we see no reason why a minor, appointed by the sheriff as his general or special deputy, should not have the power to perform a mere ministerial duty of his office, such as serving a summons issued in a civil action. *Murfree, Sheriffs*, § 71; *McGee v. Eastis*, 3 Stew. (Ala.) 307; *Barrett v. Senard*, 22 Vt. 176; *Miller v. McMillan*, 4 Ala. 530; *Ewell, Evans, Ag.* *40, 41. Indeed, *Judge Story* says (in a note to section 149 of his work on Agency): "There is a distinction between doing an act by an agent and doing an act by a deputy, whom the law deems such. An agent can only bind his principal when he does the act in the name of his principal. But a deputy may do the act and sign his own name, and it binds the principal; for the deputy, in law, has the whole power of the principal." This citation is made not to give approval to the distinction drawn by him, but to show that the learned jurist considered a deputy as sustaining the relation of an agent to the officer who appoints him. If a deputy-sheriff were, by law, constituted an officer, and the mode of appointing him and inducing him into office were prescribed, as in some of the States, our view of this case might be materially different. *Guyman v. Burlingame*, 36 Ill. 203; *Murfree, Sheriffs*, § 72.

The qualifications of an officer are clearly set forth in sections 4 and 5 of article 6 of the Constitution, and it is declared essential that he should be "twenty-one years old;" but we find no provision in our Constitution or laws which restricts the right to appoint agents on the one hand, or the liability for their acts on the other. In *Yeargin v. Siler*, 83 N. C. 348, *Justice Dillard*, for the court, says: "The rule in matters judicial is *delegatus non potest delegare*; but in duties ministerial the officer may act in person or by deputy, of his own choice and appointment." We think that, in the absence of any statutory restriction, the sheriff has the power to appoint a minor his general, as well as his special, deputy, and clothe him with the power of a bailiff, as to his ministerial duties, as effectually as he could constitute him his agent to attend to private business for him as an individual. *Broom, Legal Maxims*, 619. The current of authority in this country sustains this view. It is true that in the English case cited by counsel (*Cuckson v. Winter*, 3 Mann. & R. 313) the court held that it was

highly improper for a sheriff to intrust the service of a warrant in replevin to an infant, because the deputy was authorized to take possession of the goods, and was responsible for the custody of them, and that service of the warrant by the infant was illegal. The learned judge who tried the case below was doubtless influenced by this authority in holding the service void in our case. But the conclusion of the court in *Cuckson v. Winter* seems to be based upon the idea that a defendant, whose goods were taken for rent, had no remedy for an unlawful seizure except against the deputy. That difficulty is met by holding that the sheriff is civilly responsible for the unlawful acts of his deputy to the extent to which he would be liable if he had acted in his own proper person; and that he selects and appoints his agents at his own hazard, third parties having no interest in the security he may exact from them. *Murfree, Sheriffs*, §§ 20, 59, 60, 64. Thus in every way the courts of this country have, in the absence of specific statutory provisions, ad-

justed the powers of sheriffs and their deputies, and their liabilities to the public and to each other, according to the rules which determine the duties and responsibility of principal and agent, and have recognized the right of the sheriff to select such agents for the discharge of mere ministerial duties, as an individual could appoint and constitute for the transaction of private business, even though he might intrust the duty to a person not *sui juris*. *Id.* §§ 71, 75, and references; *Yeargin v. Siler*, *supra*. Mr. Wharton says, in substance, that the only qualification of the rule that infants may act as agents, and bind their principals, is that the infant agent must not be very deficient in mental capacity. Wharton, *Ag.* § 15.

We think that the judge below erred in sustaining the demurrer, and the judgment is therefore reversed. The cause will be remanded, to the end that the defendant may be allowed to answer if he be so advised.

Judgment reversed.

SOUTH CAROLINA SUPREME COURT.

John J. McCLURE, Admr., etc., of George W. Melton, Deceased,
v.

Margaret A. MELTON *et al.*, *Respts.*,
W. Holmes HARDIN, Intervenor, *Appt.*

(.....S. C.....)

1. The doctrine of subrogation cannot be invoked for the enforcement of a judgment against the estate of one who agreed to pay it as part of the consideration for property which he bought, subject to its lien, in favor of one who afterwards bought the property from him with notice of the judgment, and who was compelled to pay it for his own protection, where there was no privity between him and the one

with whom the agreement was made, and the judgment was against the latter and primarily payable out of the property purchased.

2. A mortgage on property given to secure payment of its purchase price cannot be kept alive against the mortgagor's estate in favor of one to whom the property was afterwards transferred, and who for his own protection had to make a payment contemplated by the mortgage, where it was never a lien on any other property of the mortgagor.

3. Sealed notes which have been surrendered up and canceled by a valid arrangement between the parties thereto, cannot afterwards form a legal cause of action in favor of a stranger against their maker's estate.

4. No damages can be recovered for

NOTE.—Voluntary covenants, how far enforceable.

The tendency of the early cases was specifically to enforce a voluntary covenant, especially where it was founded on a meritorious consideration; thus: *Elus v. Nimmo*, Lloyd & G. 333, held that an agreement by a father to make provision for his married daughter upon consideration of natural affection would be specifically enforced in equity against the father as being founded on a meritorious consideration. This case was questioned in *Holloway v. Headington*, 8 Sim. 324, and overruled in *Jefferys v. Jefferys*, 1 Craig & P. 138, where a covenant by a father to surrender certain copyhold estates for the benefit of his daughters was refused execution against the father's widow, who had gone into possession of them after his death. See also *Dillon v. Coppin*, 4 Myl. & C. 647; *Moore v. Crofton*, 3 Jo. & LaT. 442.

A covenant in a deed by a man to his grandchildren, granting slaves on consideration of love and affection, that the grantor will defend the title to the slaves, will sustain an action in favor of the grantees. *Stovall v. Barnett*, 4 Litt. 208.

Covenants founded upon a good or meritorious consideration are enforced specifically in equity. *Hayes v. Kershaw*, 1 Sandf. Ch. 258, 7 L. ed. 321.

But collateral consanguinity is not a meritorious consideration within the rule. *Ibid.*, citing *Ed-13 L. R. A.*

wards v. Jones, 1 Myl. & C. 228; *Meek v. Kettlewell*, 1 Hare, 464, 1 Phill. 342; *Buford v. McKee*, 1 Dana, 107.

These cases rest largely upon authority like the following: A voluntary agreement by a father with a child to convey land will be specifically executed. *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 8 B. Mon. 194; *McIntire v. Hughes*, 4 Ky. 186, citing *Husband v. Pollard*, cited in *Randal v. Randal*, 2 P. Wms. 467; *Cotton v. King*, 2 P. Wms. 357; *Goring v. Nash*, 3 Atk. 185; *Hardham v. Roberts*, 1 Vern. 132; *Bradley v. Bradley*, 2 Vern. 163; *Tudor v. Anson*, 2 Ves. Jr. 582; *Sarth v. Blanfrey*, Gilb. 166.

A sealed contract by a father to convey to his daughter land of which he put her in possession will, on her application, be specifically enforced in equity. *Haines v. Haines*, 6 Md. 435.

But it has been said that voluntary conveyances are not enforced in equity. *Anthony v. Harrison*, 14 Hun, 206, citing *Ellison v. Ellison*, 6 Ves. Jr. 661; *Jefferys v. Jefferys*, 1 Craig & P. 137; *Buford v. McKee*, 1 Dana, 107; *Hayes v. Kershaw*, 1 Sandf. Ch. 258, 7 L. ed. 321; *Duvoll v. Wilson*, 9 Barb. 487.

And where a man in consideration of love and affection executed a deed to his grandchildren, which contained a covenant of seisin, the grantees were not permitted to maintain an action against the grantor's executors to compel them to pay off

breach of a covenant of warranty in a deed given in consideration of love and affection, under a statute limiting the recovery in case of breach of covenants of warranty, to the amount of purchase money paid, with interest thereon.

5. **The grantee in a quitclaim deed, without warranty, who takes the property** with notice that it is subject to a judgment lien, cannot, upon paying the judgment for his own protection, maintain an action against his grantor to recover the amount paid; and it is immaterial that the latter may have assumed payment of the lien by contract with a third person.
6. **An injunction preventing the bringing of suits against a decedent's estate**, which does not prevent creditors from coming in and proving their claims in the case in which the injunction was granted, will not prevent a claim from becoming barred by the Statute of Limitations if it is not presented within the statutory period.
7. **An action cannot be maintained upon a simple contract** to relieve property from the lien of a judgment, after the expiration of six years, although one entitled to benefit by the obligation is not damaged by its breach, in having to pay the judgment himself until after the expiration of that time.

(September 14, 1891.)

APPEAL by the intervening petitioner from a judgment of the Common Pleas Circuit Court for Chester County dismissing his petition, setting up a claim against the estate of George W. Melton, deceased, in an action by Melton's administrator to marshal the assets of his estate. *Affirmed.*

The decree rendered by the court below is as follows:

"The cause entitled J. J. McLure, administrator of George W. Melton, was instituted by the administrator against M. A. Melton and others to facilitate the settlement of the estate

a mortgage on the property out of the assets of their testator. *Duvoll v. Wilson*, 9 Barb. 487.

In *Marling v. Marling*, 9 W. Va. 79, the court extensively reviews the authorities, and holds that *Ellis v. Nimmo*, Lloyd & G. 333, is approved by the weight of American authorities, and decides that a court of equity will effectuate a gift of lands by a father to his child.

Marshaling grantor's estate in favor of grantee.

In case of a voluntary settlement of real estate in favor of children, with covenants that it should remain to the proper use and for quiet enjoyment, where the grantor afterwards mortgaged the settled estate and died, the children were held entitled to throw the mortgages on the unsettled estate and as against the legatees to prove under the covenant against the settlor's assets for the damages sustained by breach of the covenant. *Hales v. Cox*, 32 Beav. 118.

Where a father made a voluntary settlement under seal on his sons with covenant to warrant and defend, and subsequently compromised an ejectment suit for the property by receiving a money consideration, the sons were permitted to maintain a bill to compel payment out of his assets after his death of the amount which he received from the compromise. *Williamson v. Codrington*, 1 Ves. Sr. 511.

Where a deed apparently voluntary, with cove-

of G. W. Melton, which was insolvent. Creditors of the estate were enjoined from proceeding against it save through that action, and were required to establish their demands in it. W. Holmes Hardin claims to be a creditor of the estate, and seeks by this petition to be allowed to establish his demand. The facts upon which petitioner supports his demands are as follows: On the 25th of November, 1867, C. D. Melton sold and conveyed to G. W. Melton a dwelling-house and land adjacent for a large sum of money. Notes were executed by G. W. Melton to C. D. Melton for the purchase price, and these notes secured by a mortgage of the premises. When the note which had the longest time to run matured C. D. and G. W. Melton had a settlement on 25th November, 1871. It was agreed that G. W. Melton should assume the payment of several judgments, which had been obtained against C. D. Melton prior to the conveyance of the house and land to G. W. Melton and which were liens upon the property, and which in the aggregate were about equal in amount to the aggregate sum due upon G. W. Melton's notes. Upon this understanding the notes and mortgage of G. W. Melton were canceled and given up to him. G. W. Melton, in pursuance of this agreement, paid all the judgments which were liens upon the land save one, known as the 'Wright judgment.' That judgment, at the time the others were paid, was in litigation, its validity as a lien being in controversy. Its validity as a lien was finally established. It was obtained 15th November, 1867. In the mean time the house and land had been conveyed by G. W. Melton to trustees, with warranty, in trust for his wife and children. G. W. Melton died insolvent, and had not paid the Wright judgment. The trustees who had the title to the property asked and obtained leave of the court to sell it with a view of making a more advantageous investment for the *cestui que trustent*. At the sale thus ordered the petitioner here,

nants of *seisin in fee* of the premises, charged the grantor's estate with an annuity upon breach of covenant a fund was set apart from the personal estate of the grantor to answer the annuity. *Giles v. Roe*, 2 Dickens, 570, citing *Whaley v. Norton*, 1 Vern. 433; *Matthew v. Hanbury*, 2 Vern. 187; *Anandale v. Harris*, 1 Eq. Cas. Abr. 31; *Priest v. Parrot*, 2 Ves. Jr. 160.

Damages for breach.

In contrast with the main case is the decision that, on the consideration of natural affection, damages may be recovered for a breach of the covenant of warranty in a deed, as a gift by way of advancement to the grantor's granddaughter; and that where a money consideration is expressed in the deed the damages will be limited to that amount with interest thereon. *Hanson v. Buckner*, 4 Dana, 261.

In case of a deed of settlement, after grantor's death, on his nephews and nieces in consideration of love and affection, with covenants for further assurance and a subsequent will of the same property to others after his death, a bill against the executors to compel performance of the covenant was dismissed (*Ward v. Audland*, 8 Sim. 571); and permission refused to prove the claim in an administration suit; but a verdict was returned against the executor for breach of the covenant. *Hervy v. Audland*, 14 Sim. 531.

H. P. F.

W. Holmes Hardin, became the purchaser for the sum of \$5,000. In a little more than a year after his purchase he sold to another for the sum of \$6,000. All this while the Wright judgment was in litigation, and, as before said, its validity and as a lien upon this house and land was finally established. All the time of these transfers this judgment had been of record in the register's office of Chester County, and upon the final determination of the contest as to it W. Holmes Hardin's vendee, James C. Hardin (who had it under a warranty deed from W. Holmes Hardin) was in possession. After further litigation, which need not be set out here, the Wright judgment was levied upon the house and land. W. Holmes Hardin was informed by his vendee that he rested upon his warranty; and because there was no further ground of resistance W. Holmes Hardin paid to the sheriff of Chester County the amount, principal, interest, and costs, of the Wright judgment, and thus made good his warranty to James C. Hardin. W. Holmes Hardin claims upon this state of facts that he is a creditor of the estate of G. W. Melton, and that he should be allowed to set up both the mortgage of G. W. Melton to C. D. Melton and the Wright judgment, which he has paid. The force of the mortgage of G. W. Melton to C. D. Melton related only to the house and land upon which it was a lien. To restore to it now all the force it ever had would not aid petitioner in the collection of a claim against G. W. Melton's estate, for it would not constitute a lien upon any property of that estate. The same may be said of the Wright judgment. That was a judgment against C. D. Melton, obtained in a proceeding to which G. W. Melton was not a party. The doctrine of subrogation cannot impart new and enlarged scope to instruments, but only prevent extinguishment, in support of an equity. It is the relevation to another's right; nor is the right enlarged by the transfer. If, therefore, the mortgage and judgment were both restored to their original vigor, they could have no relation to the estate of G. W. Melton. G. W. Melton promised to pay the Wright judgment, and reserved money due C. D. Melton with which to do so. This promise did not make him liable on the judgment. The ground of his liability was his promise. This promise was made in November, 1871, and of course has been long since barred by the Statute of Limitations. It is therefore ordered that the prayer of the petitioner be denied."

To this decree Hardin filed the following reasons for exception: "(1) Because his honor erred in holding that the petitioner had no right to prove the amount paid by him in satisfaction of the Wright judgment against the estate of George W. Melton, when the petitioner was the assignee of the covenant of warranty of George W. Melton against incumbrances and for quiet enjoyment, and said covenant was broken by the levy of the execution issued on said judgment on the Chester property and the payment of the same by the petitioner, and he was entitled to prove the same according to the rank of his said debt under the Statute. (2) Because, the case of *J. J. McClure, Administrator, v. M. A. Melton and Others*, being still before the referee, the fund still in court arising 18 L. R. A.

from the sale of the real estate or the intestate, the administrator not having accounted for his administration, and there being a large sum of money in his hands undistributed, it was error in his honor not to allow the petitioner to prove in this action the breach of the covenant of warranty of George W. Melton, of which the petitioner was the assignee, and his payment of the Wright judgment, as a debt against the estate of the said G. W. Melton. (3) Because his honor erred in not holding that when W. Holmes Hardin paid the Wright judgment he was entitled to be subrogated to all the rights which the estate of C. D. Melton had in the agreement between C. D. and G. W. Melton of November 25, 1871, and through that instrument to prove it as a judgment debt against the estate of George W. Melton. (4) Because, when W. Holmes Hardin paid the Wright judgment, he paid the unpaid part of the purchase money of the Chester real estate, on which C. D. Melton held a mortgage of G. W. Melton, and Hardin is entitled to be subrogated to all the rights of the former in said mortgage, and has a right to have it kept alive for his benefit, so that he may prove it against the estate of George W. Melton as a mortgage debt; and his honor erred in not so finding. (5) That his honor erred in holding that the petitioner's claim was in any sense barred by the Statute of Limitations."

Mr. S. P. Hamilton, for appellant:

Having paid the balance of the purchase money, we claim:

1. To be subrogated to all the right in the four sealed notes and mortgage held by the estate of C. D. Melton necessary to reimburse us for that part of the purchase money which we have been obliged to pay, and to be allowed to prove the amount before the referee as a mortgage debt.

2. If it is objected that the mortgaged property has been conveyed away, the mortgage and notes canceled, and the mortgage has no longer a lien on the Chester property in the hands of the purchaser, then the debt for the purchase money was never paid by G. W. Melton and we are entitled to prove it as a sealed-note creditor.

3. That having paid the Wright judgment, a debt which G. W. Melton promised to pay as part of the purchase money of the Chester property by the agreement of 1871, we are entitled to set it up as a judgment in the distribution of assets of the estate. That for such purpose we are entitled to have the equity which C. D. Melton would have to set the judgment up as part of the purchase money of the Chester property through the agreement of 1871.

Burrows v. McWhann, 1 Desaus. Eq. 409; *Sheldon*, Subrogation, p. 10; *Perkins v. Kershaw*, 1 Hill, Ch. 351. See *Eddy v. Traver*, 6 Paige, 521, 3 L. ed. 1186.

Subrogation has been exercised in behalf of a stranger who pays the debt of another, if it appears that it was intended as a purchase of the debt and not satisfaction.

Bispham, Eq. § 837, p. 314.

If C. D. Melton was alive or his administrator after his death had been compelled to pay the Wright judgment, his brother being dead

and insolvent, he could have disregarded the agreement of 1871, it being a promise of an inferior degree, it being a promise to pay a judgment, and through that the balance due on sealed notes and mortgage for the purchase money of the Chester property.

Fraser v. Hezt, 2 Strobb. Eq. 250; *Boulware v. Harrison*, 4 Rich. Eq. 317.

The Statute of Limitations did not begin to run until the Wright judgment, being the balance of the purchase money, was paid, December, 1888. In the case of a surety or guarantor paying the debt of the principal debtor, the right of action accrues from the time of payment.

Peters v. Barnhill, 1 Hill, L. 234.

Messrs. G. W. S. Hart, G. J. Patterson and J. & J. Hemphill, for respondents.

McIver, J., delivered the opinion of the court:

The principal case in which the petition of appellant has been filed was an action brought by the plaintiff, as administrator of George W. Melton, deceased, against his heirs and creditors, to marshal the assets of the estate of said George W. Melton, which is insolvent, and it was commenced on the 17th of July, 1877. On the 24th of August, 1877, an order was passed in said case enjoining all creditors of George W. Melton "from suing on said claims, or prosecuting their actions at law thereon against said administrator, until the further order of this court." On the 13th of October, 1877, another order was passed, whereby, among other things, all creditors were required to prove their demands before the clerk on or before the 15th of January, 1878; and on the 14th of November, 1881, A. G. Brice was substituted as referee in place of the clerk, who, after holding several references, made his report on the 1st of February, 1884, ascertaining the debts proved, and classifying them according to their legal priorities. To this report some of the creditors filed exceptions to the classifications adopted by the referee, and his report with the exceptions thereto came before his honor Judge Wallace, who, on the 20th of May, 1885, rendered judgment sustaining the exceptions, but in all other respects confirming the report of the referee. From that judgment some of the mortgage creditors appealed, and on the 22d of April, 1886, the supreme court rendered judgment affirming the judgment of Judge Wallace. 24 S. C. 559. The case was then carried by writ of error to the Supreme Court of the United States, where the writ of error was dismissed [133 U. S. 880, 34 L. ed. 660], and the mandate from that court, together with the remittitur from the supreme court of this State, was filed in the circuit court on the 4th of June, 1890. In the mean time the real estate of the said George W. Melton had been sold, and a considerable portion of the proceeds of such sale remain in the hands of the clerk; and it is conceded that there are assets yet in the hands of the administrator, who has not yet formally accounted.

On the 25th of June, 1890, the appellant filed his petition in the cause, praying for leave to come in and prove his alleged claim against the estate of George W. Melton. His claim is based upon the following allegations contained

in his petition: That Mrs. Wright, on the 15th of November, 1867, recovered a judgment against C. D. Melton, which became a lien on certain real estate in and adjoining the Town of Chester; that on the 25th of November, 1867, C. D. Melton conveyed said real estate to his brother, George W. Melton, with general warranty, and received from his brother four notes under seal, bearing that date, and secured by a mortgage of the premises; that when the last of these notes became payable, to wit, on the 25th of November, 1871, an agreement in writing not under seal, was entered into by the Melton brothers, whereby George W. Melton assumed the payment of certain specified judgments, including that in favor of Mrs. Wright, which had been previously obtained against C. D. Melton, and were liens upon said real estate, and thereupon the said C. D. Melton canceled and surrendered the said four notes, together with the mortgage to secure the payment of the same, to the said George W. Melton, but the record of said mortgage still remains uncanceled; that thereafter, to wit, in August, 1875, the said George W. Melton conveyed the said real estate, with the usual covenants of warranty, to certain trustees for the benefit of his wife and children; that in January, 1880, the said trustees, being duly authorized so to do, sold and conveyed the said real estate to the appellant, who bought in entire ignorance of the agreement above mentioned between the Melton brothers; that in April, 1881, the said appellant sold and conveyed the said real estate to James C. Hardin, with the usual covenants of warranty; that on the 18th of July, 1886, the Wright judgment, which had not been paid by George W. Melton in his lifetime or by anyone since his death, was levied upon the real estate in the possession of James C. Hardin, and the appellant, in exoneration of his covenant of warranty, having no defense to an action thereon, paid up the Wright judgment; wherefore the appellant claims that by the payment of said judgment he became the assignee of the covenant of warranty in the deed of George W. Melton to the said trustees; and that, having been compelled to pay the Wright judgment, which George W. Melton had undertaken to pay by his agreement of the 25th of November, 1871, the appellant stands as a surety to George W. Melton's estate, "and is entitled to set up said judgment in equity in his own favor in the marshaling of the assets of the estate of the intestate." Again, appellant claims that by the payment of the Wright judgment he in effect paid the balance of the purchase money due by George W. Melton for the said real estate, over which C. D. Melton held a mortgage, and appellant "is entitled to have the benefit of said mortgage as against the estate of George W. Melton, and to have leave to set it up as a mortgage debt against his estate, and to be subrogated to all the rights of the estate of C. D. Melton in said mortgage." To this petition the creditors of George W. Melton who have heretofore established their claims filed an answer, admitting all of the allegations of the petition except the following, which they deny: That appellant has become a creditor of the estate of George W. Melton; that appellant bought the real es-

tate "in entire ignorance of the agreement" set forth in the petition; that petitioner had no defense to an action on the covenant of warranty contained in his deed to James C. Hardin; and that appellant, by the payment of the Wright judgment, became an assignee of the covenant of warranty in the deed from George W. Melton to the trustees. They also plead the Statute of Limitations.

It is conceded that the deed from George W. Melton to the trustees was a voluntary deed, based upon the consideration of natural love and affection only; and we presume that the deed from the trustees to the appellant contained no warranty. The testimony adduced on the part of the appellant was that of Maj. Hamilton, who stated that he was the attorney of George W. Melton, and as such drew the deed to the trustees, as well as the proceedings under which the trustees obtained leave to sell, and conducted the sale made by them to appellant, and that at that time the Wright judgment was supposed by all parties to be no judgment and no lien upon the property sold, and that the agreement between the Melton brothers, of the 25th of November, 1871, was not known to witness or anyone engaged in the case until it was produced in evidence by W. A. Clark in 1894. G. W. S. Hart, a witness examined for respondents, testified that he, with his partner, were the attorneys of Mrs. Wright, and they first learned that George W. Melton had assumed the payment of the Wright judgment some time in the latter part of 1881 or early part of 1882, prior to July, 1882; but the appellant, it is admitted, had no personal knowledge of such assumption at the time he purchased. It appears from the statements made in the case that C. D. Melton died in December, 1875, and George W. Melton in July, 1876, both being insolvent. The case was heard by his honor Judge Wallace, who rendered judgment dismissing the petition, and from his judgment the petitioner appeals upon the several grounds set out in the record. Inasmuch as the decree of the circuit judge, together with appellant's exceptions thereto, should be incorporated in the report of the case, it is unnecessary for us to state them particularly here.

The fundamental inquiry in the case is whether the appellant has any such claim against the estate of George W. Melton as entitled him to the aid of the court in enforcing it. Whatever claim he may have is unquestionably based upon the fact that he has paid the Wright judgment, the payment of which was assumed by George W. Melton by the agreement of 25th of November, 1871; but, as such payment was not made for the purpose of relieving the estate of C. D. Melton, but solely for the purpose of relieving the property from the lien of said judgment, which the appellant had bought with notice of the judgment, and conveyed with warranty to another, in order to perform his covenant of warranty, it is difficult for us to understand what equity he has to be subrogated to the rights which the holder of that judgment or to the rights which C. D. Melton's estate may have had against the estate of George W. Melton. There was no privity whatsoever between the appellant and C. D. Melton. He was not a surety of C. D. Melton, and in no

way bound to pay said judgment for him. Indeed, practically, he paid no debt for which the estate of C. D. Melton was in equity and good conscience liable; for, though such estate was legally liable to pay such judgment, yet in equity and good conscience it was really payable out of the property which the appellant saw fit to buy with notice that it was subject to such lien. But, in addition to this, as the circuit judge well says, the judgment was against C. D. Melton and not against George W. Melton, who was never liable to pay the amount thereof as a judgment, but only liable by reason of his agreement of 25th of November, 1871, which was a mere simple contract obligation, and hence we do not see how it is possible, under any view of the case, for the Wright judgment to be set up as a judgment against the estate of George W. Melton.

As to appellant's claim to set up the mortgage originally given by George W. Melton to C. D. Melton to secure the payment of the purchase money of the Chester property, the same remark as that just made in reference to the Wright judgment may be made. That mortgage never was a lien on anything but the Chester property, and did not cover any other portion of the property belonging to the estate of George W. Melton; and hence it could not be proved as a mortgage debt against the assets of the estate of George W. Melton, under the principle decided in *McClure v. Melton*, 24 S. C. 559; but, if set up at all, it must take the same rank as the debt which it was given to secure, to wit, that of a sealed note.

It is necessary, therefore, to inquire whether the appellant can set up the sealed notes as a claim of that rank against the estate of George W. Melton. These notes were extinguished by the arrangement between the Melton brothers of the 25th of November, 1871, when they were canceled and surrendered to George W. Melton, and they cannot now constitute any legal cause of action against the estate of George W. Melton; and whatever equities C. D. Melton or his estate may have had, as intimated in the case of *Hardin v. Clark*, 32 S. C., at pages 495, 486, the appellant has no connection with, so far as we can see. He cannot claim as assignee of the covenant of warranty contained in the deed from C. D. Melton to George W. Melton, as was held in the case just cited, and we do not see what claim he could have against the estate of George W. Melton, as assignee of the covenant of warranty contained in the deed from George W. Melton to the trustees, for, that being a voluntary deed, and the measure of damages for breach of a covenant of warranty being fixed by statute at the amount of the purchase money paid, with interest from the time of the alienation, where there was nothing paid, nothing could have been recovered. If the trustees had been evicted they certainly could have recovered nothing from the estate of George W. Melton for the breach of the covenant of warranty contained in the voluntary deed under which they held; and the appellant, as their assignee, could have no higher rights than his assignors. If therefore, the appellant has any claim at all upon the estate of George W. Melton, it must arise from the agreement of 25th of November, 1871, whereby George W. Melton assumed the pay-

ment of the Wright judgment. But how can the appellant connect himself with that agreement? That was made for the benefit of C. D. Melton, and possibly might have inured to the benefit of the holder of the Wright judgment; but appellant is neither the assignee of C. D. Melton nor of the holder of the Wright judgment. It seems to us that the true position of the appellant is that of a purchaser of real estate under a quitclaim deed, without warranty, upon which there rested the lien of a judgment, of which he had not only constructive notice unquestionably, arising from the record, which would have been sufficient, but also, as it would seem, actual notice, if we are at liberty to refer to the decision in *Hardin v. Clark*, *supra*, offered in evidence in this case, at the time he purchased, and has seen fit to remove such lien by payment in order to protect himself against an action for breach of his covenant of warranty in his deed to his vendee. If this be so, then it is plain that he has no cause of action against the estate of George W. Melton; for, if so, then, in every case where a person who sells real estate covered by a judgment or other lien, of which his vendee has notice, and conveys the same without warranty, the vendor would be liable for any amount which the vendee might be called upon to pay for the purpose of removing such lien; and this could hardly be pretended, as it would destroy all distinctions between a quitclaim deed and a warranty deed. The fact that the vendor may have assumed the payment of such lien by a contract with a third person, with whom the vendee has not been able to connect himself cannot alter the case, as such third person might at any time he saw fit release the vendor from the performance of such contract. But, even if appellant could connect himself with the agreement of 25th of November, 1871, that would create a simple-contract obligation, which could not be enforced by action after the lapse of six years.—not four, as contended by one of the counsel for respondents, as the change in the statutory period was effected by

the Code, which was adopted 1st of March, 1870, and not by the Revised Statutes of 1872. So that it is clear that C. D. Melton or his administrator would have been barred of their action on such promise long before the petition in this case was filed, unless protected by the order of injunction; and the appellant, who certainly could not claim any higher rights, would be in like condition.

We must consider, then, the effect of the order of injunction, which was granted before the expiration of the six years. It will be observed that this order only restrained creditors from prosecuting their actions at law and did not prevent them from coming in and proving their demands in the case in which the order of injunction was granted. On the contrary, they were called upon to do so by a time fixed for that purpose.—15th of January, 1878. But the appellant not only failed to come in within six years from that date and present his demand, but he failed to do so within six years from the filing of the report on claims,—1st February, 1884; so that, even if appellant ever had any claim against the estate of George W. Melton, growing out of his promise to C. D. Melton to pay the Wright judgment, it was barred by the Statute before he filed his petition or presented his claim, which, according to what was held in *Warren v. Raymond*, 17 S. C., at pages 208, 204, must be regarded as the time when he commenced his action. The fact that the appellant filed his petition—commenced his action—within six years after he paid the judgment cannot affect the question, for, without considering the question whether he could have brought his action before making such payment, it is sufficient to say that he can claim no higher rights than C. D. Melton, and certainly he and his administrator were barred long before the appellant instituted this proceeding.

The judgment of this court is that *the judgment of the Circuit Court be affirmed.*

McGowan, J.: I concur.

MICHIGAN SUPREME COURT.

Noe ROUX, *Appt.*,

v.

BLODGETT & DAVIS LUMBER CO.

(..... Mich.....)

1. A servant does not, by continuing his work at the command of the superintendent of the mill, assume the risk of

injury from dangerous machinery which had, prior to the previous day, been enclosed, and which, upon his complaint, the superintendent promised to but did not re-enclose the previous night, although he promised in response to the servant's further complaint to fix it at noon, so as to prevent recovery for injuries received by coming in contact with the machinery during the forenoon.

2. The mere fact that a servant comes in

NOTE.—Jury should determine the question of negligence.

If there is any conflict in the testimony in a negligence case, either as to the defendant's negligence or the contributory negligence of the person killed or injured by such negligence, the case must go to the jury; but if, upon either one of these points, there be no conflict, then it becomes a question of law, and a verdict should be directed. *Mynning v. Detroit*, L. & N. R. Co. 7 West. Rep. 324, 64 Mich. 93; *Underhill v. Chicago & G. T. R. Co.* 81 Mich. 43.

The great weight of authority, both English and 13 L. R. A.

American, favors the proposition that the question of negligence should be submitted to the jury. Questions of this nature are properly for their determination. *Merritt v. Fitzgibbons*, 29 Hun. 634; *Hall v. Union Pac. R. Co.* 16 Fed. Rep. 744; *Terre Haute & I. R. Co. v. Jones*, 11 Ill. App. 322; *Milwaukee Nat. Bank v. City Bank*, 108 U. S. 668, 26 L. ed. 417; *Brann v. Chicago, R. I. & P. R. Co.* 53 Iowa, 695; *Bierbach v. Goodyear Rubber Co.* 14 Fed. Rep. 526, 15 Fed. Rep. 490; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32; *Davis v. Central Cong. Soc.* 129 Mass. 367; *Hunt v. Salem*, 121 Mass. 294; *Grand Rapids & I.*

contact with exposed machinery the danger of which is well known to him but the risk from which he has not assumed is not sufficient to show contributory negligence as matter of law if his work was in its immediate vicinity and required close attention, rapidity of action, and considerable moving about; but the question is for the jury.

(May 8, 1891.)

ERROR to the Circuit Court for Menominee County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are fully stated in the opinion.

Mr. H. O. Fairchild, with Mr. B. J. Brown, for plaintiff in error.

Messrs. Sawyer & Waite for defendant in error.

McGrath, J., delivered the opinion of the court:

This was case for negligence. The court below took the case from the jury on the ground that plaintiff was guilty of contributory negligence, and plaintiff appeals. Roux was employed in defendant's saw-mill, upon the band-saw. It was his duty to take the cants from the saw, and guide them over the rollers, which took them to the gang-saw. The logs were brought to the saw from the north end of the mill, and upon a carriage-way, which extended about thirty feet to the south from the saw. Immediately east of this carriage-way, and running parallel therewith, was a system of rollers upon which the cants fell as they were cut from the logs. The first two rollers were dead, and stood three feet and six feet, respectively, to the south of the saw, and then came an open space of four feet, and then a system of five live rollers, forming a kind of a table through which the rollers projected. The power was communicated to these rollers, on the easterly ends thereof, by means of bevel-

gear wheels running into each other on the horizontal shaft along-side of the table, several inches below the top of the rollers. This shaft was operated by an upright shaft, coming through the floor from below, on the top of which was a bevel-gear wheel, which worked into a similar one keyed to the horizontal shaft. The head sawyer's place was near the second dead roller, south of the saw, and plaintiff's usual place was in and upon a space between the second dead roller and the first live roller, and his duty was to bring the board or cant down upon the rollers, and guide it upon its journey to the wheel-skids, which carried it to the edger or gang-saw. These wheel-skids were on the easterly side of the rollers. The carriage which brought the logs to the saw passed back and forth with each cut in front of plaintiff, and to the west of the rollers. East of the rollers was an open space, about four feet wide, at the point where the accident occurred. When the board or cant struck the rollers it would be between plaintiff and the carriage-way. Up to the day before the accident the gearing referred to had been covered by boards adjusted upon hinges and brackets. This covering had been split up and destroyed by the action of the boards in falling upon it, and in being carried along its surface, leaving the gearing exposed; and on the day before the accident plaintiff called the attention of the mill superintendent to this condition of the gearing, and the latter promised to attend to it that night. But when plaintiff went to the mill the next morning nothing had been done, and he again called the superintendent's attention to the exposed and dangerous condition of the gearing, and the superintendent stated that he had not had time, but that he would fix it at noon; directing plaintiff to go to work, but to take care of himself till noon, and that it would then be fixed. At about 10 o'clock of the same day plaintiff had his leg crushed by having his clothing caught, and his leg drawn into the bevel-gear wheels, at the junction of the upright

R. Co. v. Martin, 41 Mich. 667; Fortune v. Missouri R. Co. 10 Mo. Apr. 252; Watkins v. Atlanta Ave. R. Co. 20 Hun, 237; Hanover R. Co. v. Coyle, 55 Pa. 396; Clark v. Eighth Ave. R. Co. 32 Barb. 657; O'Mara v. Hudson River R. Co. 38 N. Y. 445; Bills v. New York Cent. R. Co. 84 N. Y. 5; Central R. Co. v. Freeman, 66 Ga. 170; Garrett v. Chicago & N. W. R. Co. 36 Iowa, 121; Bierbach v. Goodyear Rubber Co. 14 Fed. Rep. 326, 15 Fed. Rep. 490; Sleeper v. Worcester & N. R. Co. 58 N. H. 520; Corcoran v. New York Elev. R. Co. 19 Hun, 368; Bell v. New York Cent. & H. R. Co. 29 Hun, 560; Mahar v. Grand Trunk R. Co. 19 Hun, 32; Thomas v. New York, 28 Hun, 110; Rexter v. Starin, 73 N. Y. 601; Philadelphia & H. R. Co. v. Long, 75 Pa. 257; Pittsburgh, C. & St. L. R. Co. v. Wright, 80 Ind. 182.

It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any. Beach, Contrib. Neg. 41, and cases cited.

The authorities cited go much farther than the text, and state the rule to be that everyone has a right to presume that others, owing a special duty to guard against danger, will perform that duty. Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

The question is one of some difficulty, and is not free from doubt. But in such cases the facts should be submitted to the jury. Palmer v. Harrison, 57 Mich. 183; Dundas v. Lansing, 75 Mich. 499.

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Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent, and impartial men might differ, such a case should be submitted to the jury. Lowell v. Watertown Twp. 58 Mich. 568; Carver v. Detroit & S. Plankroad Co. 61 Mich. 584; Harris v. Clinton Twp. 7 West. Rep. 666, 84 Mich. 447; Little v. Grand Rapids Street R. Co. 78 Mich. 205; Breeze v. Powers, 80 Mich. 172.

What is the test of contributory negligence.

The test of contributory negligence or want of due care is not found in the failure to exercise the best judgment or to use the wisest precaution, but allowance may be made for the influences ordinarily governing human action, as what would under some circumstances be want of reasonable care may not be such under others. Lent v. New York C. & H. R. R. Co. 120 N. Y. 467.

The contributory negligence which prevents recovery for an injury must be such as co-operates in causing the injury and without which the injury could not have happened. Lehigh Valley R. Co. v. Greiner, 4 Cent. Rep. 896, 113 Pa. 600; Fernandes v. Sacramento City R. Co. 52 Cal. 45; Ray, Negligence of Imposed Duties, Personal, 364.

shaft with the horizontal shaft. These wheels move towards each other, while the other wheels on the horizontal shaft at the rollers move from each other. When injured, plaintiff was engaged in righting a cant, which was two inches thick, somewhere from twelve to fourteen inches in width, and about twenty-four feet long, the southerly end of which had gotten off the rollers and into the carriage-way, and plaintiff was endeavoring from the east side of the rollers to get the plank back upon the rollers. It appeared from the testimony that plaintiff was required to work rapidly; that nothing could be done at the band-saw till this plank was out of the way; that in the mean time three or four men were standing idle; and that the work at the gang-saws depended upon the progress of the work at the band-saw, and that it was not unusual for cants to require adjustment upon the rollers. It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and by continuing his work he assumed the risk.

This rule of law is not applicable to the circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not one ordinarily incident to his employment. The danger was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. In view of the danger this very machinery had been covered up. Plaintiff, acting as a prudent man should, had, on the evening before, and again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger, and of plaintiff's exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was defendant's bounden duty, when notified, to re-cover this gearing. It was postponed to suit defendant's convenience, and not that of the plaintiff.

As was said in *Greene v. Minneapolis & St. L. R. Co.*, 81 Minn. 248: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it."

Mr. Cooley, in his work on Torts (sections 555, 559) says: "It has been often—and very justly—remarked, that a man may decline any exceptionally dangerous employment; but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks, which he is directed by the master to assume, are to be left to rest upon his shoulders merely because he did not take upon himself the responsibility of throwing up the employment, instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under

such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended." "It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for argument that the servant by continuing the employment engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may, and should, where practicable, come to an understanding between themselves regarding matters of this nature."

Deering on Negligence, § 196, says: "Where injury results not from anything that is incident to the employment, but from a temporary peril, to which he is exposed by the negligent positive acts of the employer, he can recover."

1 Shearman & Redfield on Negligence, § 209, says: The servant cannot avoid responsibility "if he continues to work for any considerable time, knowing these facts, without being induced by his master to believe that a change will be made, and without making any complaint of such defects, or calling the attention of his master to them." The doctrine laid down by these authors is supported by a long line of well-considered cases.

In *Greene v. Minneapolis & St. L. R. Co.*, supra, plaintiff was in the service of defendant as locomotive engineer on a train running between Minneapolis and Albert Lea. On reaching the former place in the morning with his train, upon examining his engine he discovered that the "chafing irons" between the engine and tender were partly broken off. He immediately reported the fact on the "repair-book" to the foreman of the round-house, whose duty it was to have the repairs made, and to direct what engine should go out. On returning in

the evening to go out with his train he found the engine out, but not repaired. On inquiring of the foreman why the repairs had not been made, the reply in substance was that he had not had time. On plaintiff suggesting that he did not like to take out this engine, that it was not safe, the foreman replied that he was short of engines to do the work of the road, and had no other to send out, and added: "Proceed with that, and you can get it fixed at Lea, if you have time; if not, I will remedy it when you get back." The plaintiff did so, and on the way collided with another train (for which he does not appear to be responsible), and in attempting to escape was caught between the engine and tender, the defects in the "chafing irons" causing the engine to override the tender, and close up the gangway through which he was attempting to escape.

In *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, plaintiff was working upon a jointer which was out of repair.

In *Clarke v. Holmes*, 7 Hurlst. & N. 937, plaintiff was employed to oil dangerous machinery. When he entered upon the service certain of the machinery was fenced, but the fencing became broken by accident.

In *Hough v. Texas & Pac. R. Co.*, 100 U. S. 213, 25 L. ed. 612, there was a defect in the locomotive which plaintiff had in charge. "There can be no doubt," says the court, "that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

In *East Tennessee, V. & G. R. Co. v. Duffield*, 12 Lea, 68, plaintiff was supplied with a defective hammer to drive railroad spikes. He testified: "Of course, I was obliged to see that the hammer was broken. Any man who wasn't blind could have seen the condition of the hammer. I knew when I saw it that it wouldn't do to drive spikes with, and that is why I spoke to the section boss about it."

In *Missouri Furnace Co. v. Abend*, 107 Ill. 44, a locomotive foot-board was defective, from which deceased fell, while oiling the engine.

In *Parody v. Chicago, M. & St. P. R. Co.*, 15 Fed. Rep. 205, the injury was occasioned by a defective draw-bar.

In *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, the court says: "Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not, of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one of fact for the jury." See also *Pieart v. Chicago, R. I. & P. R. Co.* (Iowa, 1891) 47 N. W. Rep. 1017; *Kane v. Northern Cent. R. Co.* 128 U. S. 91, 32 L. ed. 339; *District of Columbia v. McElligott*, 117 U. S. 621, 631, 29 L. ed. 946-949; *Gulveston, H. & 13 L. R. A.*

S. A. R. Co. v. Drew, 59 Tex. 13; *Patterson v. Pittsburgh & C. R. Co.* 76 Pa. 389; *Mehan v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 585; *Booth v. Boston & A. R. Co.* Id. 38; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572-578; *Greenleaf v. Dubuque & S. C. R. Co.* 33 Iowa, 58.

This principle has been recognized and approved by this court. In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, the servant was justified in obeying the orders of his superior. *Justice Cooley* (p. 212) says: "The risk was not fairly upon the servant's shoulders," and again: "We agree with the Supreme Court of Pennsylvania, that when a servant, in obedience to the orders of his superior, incurs the risks of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill the case is not to be regarded as one of concurring negligence,"—citing *Patterson v. Pittsburgh & C. R. Co.* 76 Pa. 389-394.

In *Sonobodu v. Ward*, 40 Mich. 420-422, the court, after laying down other general rules, says: "If the servant, with full knowledge of the facts, and understanding the risks occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and remains in the master's employ, then he voluntarily incurs such increased risks." See also *Lytle v. Chicago & W. M. R. Co.* 84 Mich. 289; *Jones v. Lake Shore & M. S. R. Co.*, 49 Mich. 573, recognizes the right of the servant to show that he did not consent or agree to the change or performance of extra duties, and that he did not freely and voluntarily enter upon a discharge of new duties imposed. The new duties in that case involved extra hazard.

It is insisted, however, that the dangerous condition and character of this machinery was known to plaintiff, and that he was guilty of concurring negligence in approaching it; that he did not exercise ordinary care, and might have gone around on the other side of the rollers, and thus have avoided the danger. Knowledge of the existence of a defect or danger, while it is evidence of contributory negligence, is not conclusive. In the cases already referred to the existence of the danger was known to plaintiff, and in all of them it is held that the question of defendant's contributory negligence is for the jury.

In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572-578, it is said: "Inattention which has led to a collision or a fall, if duly accounted for, or if excused, or occasioned by the nature of the employment, is no hindrance to a recovery when the injury is legally imputable to a defect without which the fall would not have occurred, or the collision would have been harmless. Thus attention might be prevented by the darkness of night, or by the duty to couple cars at a particular moment, or, as is contended in this case, to separate them. Knowledge is only one piece of evidence bearing on the question of negligence; and how much it should bear depends on all the circumstances, and is for the consideration of the jury."

In *Byerly v. Anamosa*, 79 Iowa, 204, held, that the question of plaintiff's contributory negligence in driving a horse along a street

with knowledge of conditions rendering it dangerous was for the jury, as such act was not *per se* negligence.

In *Harris v. Clinton Twp.*, 64 Mich. 447, 7 West. Rep. 666, the court says: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if plaintiff, by defendant's negligence, is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not, in the emergency, have pursued the course which ordinary prudence would have dictated."

In *Kane v. Northern Cent. R. Co.*, *supra*, the court says: "In determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position,—indeed, to all the circumstances of the particular occasion."

In *Greenleaf v. Dubuque & S. C. R. Co.*, *supra*, the court says: "If the service to be performed by Macy (the deceased) was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Snow v. Housatonic R. Co.*, 8 Allen, 441, the superstructure or roadbed between the tracks of the defendant's road where it crossed the highway at a point where the trains were made up, was such that it was necessary for the person whose duty it was to unshackle the cars or to fasten them together to pass and repass over the space covered with plank between the tracks frequently, and with rapidity, and with his attention in great degree diverted from the surface over which he passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. While engaged in that service in the usual and ordinary mode, plaintiff was thrown down by reason of the defect in the road. The court says: "As the plaintiff was in the discharge of his duty in placing himself in a perilous position,—a duty the performance of which was known to and sanctioned by the defendants,—the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him,—whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment; and on other considerations of like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a subject of evidence, and should have been submitted, with proper instructions, to the jury for their determination. Nor do we think that it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had pre-

vious knowledge of the defect in the road which caused the accident. *Reed v. Northfield*, 13 Pick. 98; *Smith v. Lowell*, 6 Allen, 40. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Malloy v. Walker Twp.*, 77 Mich. 448, the court says: "If it was the negligence of the defendant in not repairing the highway which placed the deceased and those under his charge in a precarious condition, no negligence could be imputed to the deceased if, acting upon that occasion, as it appeared to him to be, for the safety of himself and party in his charge, he did not take the precaution which, upon consideration, a more prudent man might have taken. At least it was a question for the jury, and fairly submitted." Nothing short of gross negligence on the part of the injuring party can relieve the injured party from the exercise of care. The promise made by defendant in this case did not absolve plaintiff from the exercise of reasonable care while about this dangerous machinery; but what shall constitute such care in a given case must necessarily depend upon all the facts and circumstances of that case. He is held to that degree of care which every prudent man is expected to employ under similar circumstances in carrying on the same kind of business. Here the gearing had been covered, because it was dangerous in its exposed condition, and because the employees of the mill, and this very plaintiff, were likely to come into contact with it. Plaintiff remonstrated, but he was directed to continue work which involved the probability of this contact. This is but a necessary inference from the plaintiff's complaint and the superintendent's reply. The performance of plaintiff's duty required him to go in the vicinity of this machinery. His work afforded very little opportunity for deliberation. It was necessary that he should act promptly. Hesitation was not expected of him, and the degree of care required of him with respect to his own personal safety must be measured to some extent by the exactions of his employment, by its demands upon his attention, and by his devotion to its duties. His diligence and zeal in his master's service should count in his favor, and not against him, in determining this question.

In *Harris v. Clinton Twp.*, *supra*, the court says: "Upon this issue there are two reasonable, but different, views which might be taken; and therefore the question should have been submitted to the jury. The facts that Soper knew the location of the highway; that it was crooked, and that there were no guides or barriers; that it was overflowed, and the water had raised since he last passed over it; and knew that some hazard was incurred in attempting to pass over it,—did not conclusively show that it was negligence in him to make the attempt. Of course, the increased hazard from the rising of the water called upon Soper to exercise increased caution, and may have been a circumstance which, in the opinion of

some persons, should have determined him not to make the attempt at all, but whether it was or not, in connection with the other facts, should have been left with the jury to determine." "Where there is a chance, upon the facts shown, for ordinary candid and intelligent men to arrive at different conclusions, the question of contributory negligence is to be determined by the jury. *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Luke v. Wheat Min. Co.* 71 Mich. 364, and *Teipel v. Hilsendegen*, 44 Mich. 461."

This is one of those cases where two reasonable and different views might be taken, and two men of equal candor might differ. In my judgment, the court below erred in taking the case from the jury, and in ruling that as a matter of law the plaintiff was guilty of contributory negligence.

The judgment will be reversed, and a new trial had, with costs of this court to plaintiff.

Grant, J., did not sit. The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Elias R. HUNNEWELL

v.

J. W. DUXBURY *et al.*

(.....Mass.....)

False statements in a certificate required by Stat. 1884, chap. 330, § 3, to be filed with the commissioner of corporations to enable a foreign corporation to do business in Massachusetts, will not render the persons signing it liable for deceit to one who, relying upon them, takes the corporation's notes and thereby suffers loss.

(September 2, 1891.)

A PPEAL by defendants from an order of the Superior Court for Suffolk County

NOTE.—*Proximate and remote cause of damage.*

It is an elementary rule governing both personal and corporate liability that only such damage can be recovered as is traceable directly to the wrongful act. "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and as therefore might have been expected." *Henry v. Southern Pac. R. Co.* 50 Cal. 183.

The general rule is that the party who commits a trespass or other wrongful act is liable only for the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Patten v. Chicago & N. W. R. Co.* 32 Wis. 524, 36 Wis. 413; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21; *Ward v. Vanderbilt*, 34 How. Pr. 144; *Eten v. Luyster*, 60 N. Y. 252; *Lane v. Atlantic Works*, 111 Mass. 126; *Hart v. Western R. Corp.* 13 Met. 99, 104; *Keenan v. Cavanaugh*, 44 Vt. 298; *Collard v. Southeastern R. Co.* 7 Hurlst. & N. 79; *Little v. Boston & M. R. Co.* 66 Me. 239; *Metallic Comp. Cast. Co. v. Fitchburg R. Co.* 109 Mass. 277; *Perley v. Eastern R. Co.* 98 Mass. 414; *Williams v. Vanderbilt*, 28 N. Y. 217; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69.

In the language of the Supreme Court of Pennsylvania, to visit upon the defendant all the consequences of his wrongful act "would set society on edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of his acts and the attending circumstances would dictate." *Fleming v. Beck*, 48 Pa. 300, 313; 1 Sedgw. Dam. § 113.

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overruling a demurrer to the second count in the declaration in an action brought to recover damages from defendants for deceit in making false representations which induced plaintiff to take certain worthless notes, and exceptions by them to rulings made during the trial of the action, which resulted in a verdict in favor of plaintiff. *Demurrer and exceptions sustained.*

The second count of the declaration alleged, in substance, that defendants were officers of a Maine corporation; that they signed and swore to a false statement or certificate therein representing that the corporation's capital stock of \$150,000 was all paid in, and that patents of the value of \$149,650 had been transferred to it, and caused the certificate to be filed with the commissioner of corporations; that plain-

The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact, infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. *Shearm. & Redf. Neg.* § 9.

The general rule is, that the damage to be recovered must be the natural and proximate consequence of the act complained of. *2 Greenl. Ev.* § 256.

It is not enough if it be the natural consequence; it must be both natural and proximate. *Richardson v. Dunn*, 8 C. B. N. S. 664.

To maintain an action for special damages, they must be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. *Crain v. Petrie*, 6 Hill, 522.

The negligent burning of a house, and the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated. The damages are too remote. *Ryan v. New York Cent. R. Co.* 35 N. Y. 210.

It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas v. Winchester*, 6 N. Y. 408, *Judge Ruggles* defines the damages for which a party is liable as those which are the natural or necessary consequences of his acts.

Subject discussed in *notes to Smethurst v. Independent Cong. Church Proprs. (Mass.)* 2 L. R. A. 686; *Erickson v. St. Paul & D. R. Co. (Minn.)* 5 L. R. A. 786; *Louisville, N. A. & C. R. Co. v. Lucas (Ind.)* 6 L. R. A. 194; *Read v. Nichols (N. Y.)* 7 L. R. A. 130; *Smith v. Kanawha County Ct. (W. Va.)* 8 L. R. A. 82.

tiff manufactured goods for the corporation for which he was asked to take its notes; that plaintiff caused an examination of the records in the commissioner's office to be made and thereby learned of the certificate and its contents; that, believing the same to be true, he accepted the notes; that the statements were false and the corporation was insolvent, and that plaintiff was unable to collect the amount of the notes.

The further facts appear in the opinion.

Mr. Charles R. Darling, with **Messrs. W. F. Slocum** and **W. S. Slocum**, for appellants:

A statement filed under the Act of 1884 referred to cannot be made the subject of a private action for damages for false representation against the signers of the statement.

A person making a representation is only accountable for its truth or honesty to the very person or persons whom he seeks to influence; no one else has a right to rely on the representation, and to allege its falsity as a wrong to him.

Cooley, Torts, 2d ed. *498; Kerr, Fraud & Mistake, 98; Brackett v. Griswold, 112 N. Y. 454.

Thus, a misrepresentation by A to B, as to A's solvency, gives no right of action to a third person to whom the representation is repeated without A's authority.

Rawlings v. Bean, 80 Mo. 614. See also *McCracken v. West*, 17 Ohio 16; *Harding v. Commercial Loan Co.* 84 Ill. 251; *Wells v. Cook*, 16 Ohio St. 67.

Such statements cannot be said to be public records; and no rights are given by the statute to the public to examine them, or to the information therein contained. It is a matter entirely between the corporation and the commissioner of corporations. This Statute is entirely different from those Acts which require officers of corporations to make detailed reports as to the condition of the corporation annually. It is at least doubtful whether there is any liability under the latter class of statutes, apart from the express provision referred to.

Brackett v. Griswold, *supra*; *Fogg v. Pew*, 10 Gray, 409; Pub. Stat. chap. 106, §§ 59, 60, cl. 5.

The statement under the Statute may be likened to testimony given by a witness in court. A bystander would not be entitled to rely on witness's statement in a subsequent transaction with him, and then allege its falsity as a fraud upon him.

See *Morris v. Talcott*, 96 N. Y. 100.

A further reason why a statement under the Statute should not be recognized as the foundation of an action against the officers of the corporation individually is that it is the company, and not the officers, that is required to file the statement.

See *Van Weel v. Winston*, 115 U. S. 228, 29 L. ed. 384.

The case at bar is to be distinguished from the following:

(1) Where officers of a corporation publish a prospectus with the intention of attracting subscribers. The purpose is to induce people to invest.

Peck v. Gurney, L. R. 6 H. L. 377; *Brackett v. Griswold*, 112 N. Y. 454, 471.

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(2) Statements to commercial agencies, which are made to obtain credit.

Macaulay v. McKinley, 99 N. Y. 353; *Long v. West*, 81 Kan. 298; *Bradley v. Poole*, 98 Mass. 169.

The rule by which a person is liable for representations made by him as of his own knowledge, without other evidence of fraud, is not properly applicable in this case.

That doctrine is substantially identical with the equitable doctrine which holds the mere falsity of a representation sufficient ground for relief without regard to fraud.

The equitable doctrine is limited to cases between contracting parties, *i. e.*, the principals in the contract; consequently, the doctrine in question should be similarly limited.

In equity a contract will be rescinded, or other similar relief granted, on account of a representation which is false in fact, however innocently made.

Wright v. Snoue, 2 DeG. & S. 321; *Rawlins v. Wickham*, 1 Giff. 355, 3 DeG. & S. 304; *New Brunswick & C. R. Co. v. Muggeridge*, 1 Drew. & S. 363; *Directors of Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Re Overend*, L. R. 8 Eq. 576; *Reese River S. Min. Co. v. Smith*, L. R. 4 H. L. 64; *Mathias v. Yetts*, 46 L. T. N. S. 497; *Newbigging v. Adam*, L. R. 84 Ch. Div. 582; *Torrance v. Bolton*, L. R. 8 Ch. App. 118; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 12, 13; *Smith v. Richards*, 38 U. S. 13 Pet. 26, 10 L. ed. 42; *McFerran v. Taylor*, 7 U. S. 3 Cranch, 270, 2 L. ed. 436; *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 659; *Doggett v. Emerson*, Id. 700; *Mason v. Crosby*, 2 Ware, 306; *Warner v. Daniels*, 1 Woodb. & M. 90; *Smith v. Babcock*, 2 Woodb. & M. 246; *Smith v. Mitchell*, 6 Ga. 458; *Frenzel v. Miller*, 37 Ind. 1; *Wilcox v. Iowa Wesleyan Univ.* 32 Iowa, 367; *Harding v. Randall*, 15 Me. 332; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Spurr v. Benedict*, 99 Mass. 463; *Converse v. Blumrich*, 14 Mich. 109; *Rimer v. Dugan*, 39 Miss. 477; *Glasscock v. Minor*, 11 Mo. 655; *Rosertelt v. Dale*, 2 Cow. 129; *Belknap v. Sealey*, 14 N. Y. 148; *Minor v. Medbury*, 6 Wis. 295.

In England this doctrine is supposed to be limited to rescission cases. But the distinction in the application of the doctrine, between claims for rescission and for damages is not well maintained in England, and is still less so in this country.

See *Newbigging v. Adam*, *supra*.

See also the doctrine as to compensation for misdescription or misrepresentation in sales of land (Story, Eq. Jur. § 779), and the application thereof in—

Hill v. Buckley, 17 Ves. Jr. 401; *Re Turner v. Skelton*, L. R. 13 Ch. Div. 130; *Kent v. Carcaud*, 17 Md. 291; *Marbury v. Stonestreet*, 1 Md. 147; *Mendenhall v. Steckel*, 47 Md. 458; *East v. Matheny*, 1 A. K. Marsh. 192; *Camp v. Norfleet*, 83 Va. 380; *Harrell v. Hill*, 19 Ark. 102, 115.

The decree may be in the alternative for rescission or damages, or for damages alone.

McFerran v. Taylor and *Warner v. Daniels*, *supra*; *McCormick v. Malin*, 5 Blackf. 509; *DuFlon v. Powers*, 14 Abb. Pr. N. S. 391; *Anderson v. Snyder*, 21 W. Va. 632; *Lockridge v. Foster*, 5 Ill. 569.

In suits to foreclose purchase-money mort-

gages, damages for innocent misrepresentations made by the vendor in the sale may be recovered by the vendee.

Frenzel v. Miller, supra; Estell v. Myers, 54 Miss. 174; *Swezey v. Collins*, 36 Iowa, 589.

In fact, the equitable doctrine has been adopted outright at law, as applicable to actions for damages between contracting parties in several States.

See *Bird v. Kleiner*, 41 Wis. 184; *Cotzhausen v. Simon*, 47 Wis. 103; *Davis v. Nuzum*, 72 Wis. 439; *Frenzel v. Miller, supra; Baughman v. Gould*, 45 Mich. 481; *Holcomb v. Noble*, 69 Mich. 396 (but see *Comstock v. Smith*, 20 Mich. 388; *Whitten v. Wright*, 34 Mich. 92; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Covell*, 29 Mich. 359; *Starkweather v. Benjamin*, 32 Mich. 305; *Nowlin v. Snow*, 40 Mich. 699); *Mulvey v. King*, 59 Ohio St. 491 (but see *Taylor v. Leith*, 26 Ohio St. 428; *Parmlee v. Adolph*, 28 Ohio St. 10; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283); *Sledge v. Scott*, 56 Ala. 202; *Davis v. Betz*, 66 Ala. 206, 210; *Tabor v. Peters*, 74 Ala. 90; *Brown v. Freeman*, 79 Ala. 406, 409; *Jordan v. Pickett*, 78 Ala. 331, 338 (but see *Barnett v. Stanton*, 2 Ala. 181, 187; *Munroe v. Pritchett*, 16 Ala. 785; *Atwood v. Wright*, 29 Ala. 846, 352; *Blackman v. Johnson*, 35 Ala. 252); *Lynch v. Mercantile Trust Co.* 18 Fed. Rep. 496; *Goodwin v. Robinson*, 80 Ark. 535; *Snyder v. Windley*, 1 N. J. L. 48; *Hogg v. Cardwell*, 4 Sneed, 151; *Waterbury v. Russell*, 8 Baxt. 159; *Crump v. United States Min. Co.* 7 Gratt. 352; *Pennock v. Tilford*, 17 Pa. 456; *Boyer v. Fenn*, 90 Pa. 359; *Babcock v. Case*, 61 Pa. 427.

The equitable doctrine does not extend to a case where the plaintiff did not contract with the defendant on the faith of the representation.

Smith v. Mariner, 5 Wis. 551, 577, 578.

The Massachusetts special doctrine ranges with the doctrine of the States last referred to. It is merely the equitable doctrine slightly disguised.

Hazard v. Irwin, 18 Pick. 95; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 151; *Milliken v. Thorndike*, 103 Mass. 382; *Litchfield v. Hutchinson*, 117 Mass. 195; *Savage v. Stevens*, 126 Mass. 207; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Loddell v. Baker*, 1 Met. 193, 201, per Wilde, J.; *Randall v. Hazelton*, 12 Allen, 412, 415, per Colt, J.; *Potts v. Chapin*, 133 Mass. 276, 280, per Field, J. See notes to *Pasley v. Freeman*, 2 Smith, Lead. Cas. 9th Am. ed. 1820; *Benjamin, Sales, Bennett's ed.* § 454 et seq.; *Joliffe v. Baker*, L. R. 11 Q. B. Div. 255; *Behn v. Burness*, 3 Best & S. 751; *Kennedy v. Panama, N. Z. & A. R. Mail Co.* L. R. 2 Q. B. 530.

See also the following Massachusetts cases requiring knowledge of falsity to be shown:

Tryon v. Whitmarsh, 1 Met. 1; *Pearson v. Howe*, 1 Allen, 207; *King v. Eagle Mills*, 10 Allen, 548; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 221; *Cooper v. Lovering*, 106 Mass. 77, per Ames, J.; *Tucker v. White*, 125 Mass. 344. Compare *Bennett v. Judson*, 21 N. Y. 238, and *Sharp v. New York*, 40 Barb. 257, with subsequent New York cases, as follows:

Weed v. Case, 55 Barb. 548; *Barrett v. Western*, 66 Barb. 205; *Craig v. Ward*, 3 Keyes, 387; 36 Barb. 377; *Marsh v. Falker*, 40 N. Y. 562, 13 L. R. A.

Chester v. Comstock, Id. 575, note, 6 Robt. 1; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, Id. 169; *Atkins v. Eliott*, Id. 753; *Wakeman v. Dalley*, 51 N. Y. 27.

The Massachusetts rule is stated in *Milliken v. Thorndike*, 103 Mass. 382, in a form which limits it to cases between contracting parties.

In actions of this character, i. e., actions for deceit against officers, promoters, etc., of corporations, moral fraud, actual as distinguished from constructive fraud, is in other jurisdictions required to be shown to maintain the action.

Taylor v. Ashton, 11 Mees. & W. 401; *Moore v. Burke*, 4 Fost. & F. 258, 278, 282, 284, 290, Cockburn, Ch. J.; *Shrewsbury v. Blount*, 2 Man. & G. 475; *Parker v. McQueen*, 32 U. C. Q. B. 273; *Derry v. Peek*, 61 L. T. N. S. 265; *Cowley v. Smyth*, 46 N. J. L. 380. See *Wakeman v. Dalley*, 51 N. Y. 27; *Beach v. Bemis*, 107 Mass. 498; *Bannister v. Alderman*, 111 Mass. 261; *Cole v. Cassidy*, 188 Mass. 437; *Bowker v. Deloy*, 2 New Eng. Rep. 229, 141 Mass. 815.

Mr. Fred McIntire, for appellee:

The penalty of personal liability for debts of the corporation, imposed by the statute relating to domestic corporations upon officers for making a false certificate, is not limited to debts in favor of persons who have been actually misled by the certificate, or the debts created after the certificate was filed.

Felker v. Standard Yarn Co. 148 Mass. 226. See also *Bradley v. Poole*, 98 Mass. 169; *Fogg v. Perc*, 10 Gray, 409, 415.

The representations need not be made directly to the plaintiff, or with the specific intent to induce the particular transaction.

Scott v. Dixon, 29 L. J. Exch. 62, note; *Peek v. Gurney*, L. R. 6 H. L. 377; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Bedford v. Bagshaw*, 4 Hurlst. & N. 538; *Clarke v. Dickson*, 6 C. B. N. S. 453; 2 Addison, Torts, Wood's 6th ed. § 736; *Loddell v. Baker*, 3 Met. 469; *Tryon v. Whitmarsh*, 1 Met. 1; *Kidney v. Stoddard*, 7 Met. 252; *Polhill v. Walter*, 3 Barn. & Ad. 114.

In an action of tort for fraudulent representations, the allegation of fraud is sustained by proof that the defendant represented, as of his own knowledge, material facts susceptible of knowledge, which were untrue.

Chatham Furnace Co. v. Moffatt, 147 Mass. 403, and cases cited; *Peek v. Derry*, L. R. 37 Ch. Div. 541; Article by Sir Frederick Pollock on *Derry v. Peek*, H. L. 5 L. Q. Rev. 410.

Barker, J., delivered the opinion of the court:

The action is tort for deceit in inducing the plaintiff to take notes of a corporation by false and fraudulent representations alleged to have been made to him by the defendants, that the capital stock of the corporation amounting to \$150,000 had been paid in, and that patents for electrical advertising devices of the value of \$149,650 had been transferred to it.

From the exceptions it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts. That it filed with the commissioner of corporations a certificate dated August 11, 1885, required by the Statute of 1884, chap. 330, § 3, signed by the defendants,

with a jurat stating that on that date they had severally made oath that the certificate was true to the best of their knowledge and belief. That before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records, and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under Stat. 1884, chap. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants or the corporation to the public or the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the Statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. Stat. 1829, § 90; Rev. Stat. chap. 38, § 28; Gen. Stat. chap. 60, § 30; Stat. 1870, chap. 224, § 38, cl. 5; Pub. Stat. chap. 106, § 60, cl. 5.

To hold that the Statute of 1884, chap. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate which is a condition of its admission the added liability of an action of deceit, is to read into the Statute what it does not contain.

If such an action lies it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced and have been suffered to influence him.

In *Bradley v. Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to recover.

Felker v. Standard Yarn Co., 148 Mass. 226, was an action under Pub. Stat. chap. 106, § 60, to enforce a liability explicitly declared by the Statute.

Nor is there any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: (1) those of officers, members or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares; (2) those persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers.

Bagshaw v. Seymour, 4 C. B. N. S. 873; *Watson v. Charlemont*, 8 Q. B. 856; *Bedford v. Bagshaw*, 4 Hurlst. & N. 537; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Jarrett v. Kennedy*, 6 C. B. 319; *Campbell v. Fleming*, 1 Ad. & El. 40; *Peck v. Derry*, L. R. 37 Ch. Div. 541, and 14 App. Cas. 337; *Angus v. Clifford* [1891] L. R. 2 Ch. Div. 449.

In these cases the representations were clearly addressed to the plaintiffs, among others, of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319; *Terwilliger v. Great Western U. Teleq. Co.* 59 Ill. 249; *Paddock v. Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pinsley v. Freeman*, 2 Smith, Lead. Cas. 9th Am. ed. 1820, are of the same character.

In the case at bar the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case and makes it unnecessary to consider the other questions raised at the trial.

Demurrer to the second count sustained. Exceptions sustained.

In *Bradley v. Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to recover.

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CONNECTICUT SUPREME COURT OF ERRORS.

James L. McCASKILL, *Appt.*,

v.

CONNECTICUT SAVINGS BANK.

(.... Conn.)

1. A savings bank pass-book is not a negotiable instrument, either by itself or in connection with an order signed by the depositor directing payment to a third person or bearer, nor can it be made so by contract. The account may be transferred but the assignee takes it subject to te equities and defenses between the original parties, in the absence of facts creating an estoppel.
2. The entry by a savings bank of a credit in a pass-book will not estop it from denying that a deposit was made as against an assignee of the account where the entry was procured by fraud and the bank made it without knowledge of the material facts or any intention that the representation should be acted on, especially where the assignee is not a bona fide holder.
3. A finding by the trial court upon a distinct issue of fact whether or not the assignee of a savings bank pass-book is a bona fide holder is conclusive.

(March 20, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to recover the amount credited on a savings bank pass-book which had been assigned to plaintiff. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. George D. Watrous and Edward G. Buckland, for appellant:

The ruling that the plaintiff was not the bona fide holder of book and order is a conclusion of law and is reviewable by this court.

White v. Brown, 14 How. Pr. 286; *Hamilton v. Vought*, 34 N. J. L. 192.

The question of *bona fides* and conversely of *mala fides* presupposes a duty which has been done or left undone. What duty rested upon the plaintiff in connection with the transfer of the pass-book to his possession is therefore a question of law.

Nolan v. New York, N. H. & H. R. R. Co. 1 New Eng. Rep. 826, 53 Conn. 471.

The finding that the plaintiff had "reason to believe" that Harrison's possession of the book is tainted with fraud or illegality, all the facts having been ascertained, is also a conclusion of law and likewise reviewable.

Burns v. Erben, 40 N. Y. 466; *Bulkeley v. Keteltas*, 6 N. Y. 387.

NOTE.—*Possession of bank pass-book not conclusive of right to draw deposit.*

Agreements between a savings bank and its depositors that the moneys intrusted to the bank shall be paid to anyone presenting the pass-book will not relieve the bank from the legal consequences of its failure to exercise reasonable precaution in paying the deposit to a party having possession of the pass-book. *Kinball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171.

And the bank, in making payment to one having no other evidence of right to receive it, must show some valid contract by virtue of which it was understood such a payment was authorized. *Smith v. Brooklyn Sav. Bank*, 1 Cent. Rep. 801, 101 N. Y. 58.

A rule of a savings bank, that payments made to any person producing the pass-book shall be valid does not relieve it from liability for negligent payment made thereon after it is informed of the death of the depositor; where another rule provides that upon such death the deposit shall be paid to the depositor's legal representative. *Farmer v. Manhattan Sav. Inst.* 39 N. Y. S. R. 523.

Where the officials of a savings bank, acting in good faith, duly pay to a party presenting its pass-book under circumstances in no wise calculated to engender suspicion, and where, in making such payment, there is present the exercise of reasonable care and diligence, their action will be protected and the payment held good. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Hayden v. Brooklyn Sav. Bank*, 15 Abb. N. S. 237; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 317.

Irrespective of any by-laws a bank would be protected by a payment made in good faith to the holder of the pass-book. *Sullivan v. Lewiston Sav. Inst.* 56 Me. 507; *Eaves v. People's Sav. Bank*, 27 Conn. 234; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; *Camp's App.* 36 Conn. 88, 4 Am. Rep. 39; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621.

The doctrine of the principal case has been previously vindicated by a decision in the New York Court of Appeals, which distinctly holds that the pass-book of a savings bank is not negotiable pa-

per, and that its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited and an agreement to repay them at such time and in such manner as the depositor shall direct. *Allen v. Williamsburgh Sav. Bank*, *supra*.

That as between the depositor and the bank, it may be shown that an entry in a pass-book is an error, and that the depositor is not entitled to receive the sum stated, or that it has been paid, or that it has been taken from the bank by legal process, can hardly be controverted. *Salem Bank v. Gloucester Bank*, 17 Mass. 129; *Chocheo Nat. Bank v. Haskell*, 51 N. H. 116; *Merchants Bank v. Marine Bank*, 3 Gill, 196; *Story, Ag.* § 115.

Where one receives credit on his pass-book for a check found afterwards not to be good, the entry may be canceled. *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 64.

Deposit may be transferred by assignment and the delivery of the pass-book.

A transfer of a deposit may be shown by a delivery of the bank-book to the grantee, accompanied by an assignment thereof. As there can be no manual delivery of the credit which the depositor has with the bank, the delivery of the book, which represents the deposit and is the only evidence of the contract together with the assignment, operates as a transfer of the existing fund, and is all the delivery of which the subject is capable. *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425.

Entry in pass-book may be regarded as an admission.

Ordinarily, whenever a deposit is made the amount and date thereof are entered by the cashier or teller in the pass-book of the depositor, and such entries when made by the proper officer bind the bank as admissions. In some cases it has been held that they become conclusive upon the bank like an account stated, when the bank-book is balanced. *Morse, Banks & Bankins*, 3d ed. § 291. See *note to Gifford v. Rutland Sav. Bank* (Vt.) 11 L. R. A. 794.

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If not, they are conclusions of facts from facts specially found, and thus are reviewable.

Tyler v. Waddingham, 8 L. R. A. 657, 58 Conn. 386; *Bennett v. New York, N. H. & H. R. R. Co.* 57 Conn. 425; *Dyson v. New York & N. E. R. Co.* Id. 23; *Atwood v. Partree*, 6 New Eng. Rep. 465, 56 Conn. 82; *Hayden v. Allyn*, 5 New Eng. Rep. 37, 55 Conn. 289; *Mead v. Noyes*, 44 Conn. 489.

Good faith rather than diligence is the standard by which a holder's right is determined, and diligence or want of it is immaterial, except so far as it legitimately tends to establish or rebut the claim of a bona fide possession of the paper.

Ladd v. Franklin, 37 Conn. 64; *Hamilton v. Vought*, 34 N. J. L. 192.

A certificate of deposit is negotiable.

Kilgore v. Bulkeley, 14 Conn. 383; *Miller v. Austen*, 54 U. S. 13 How. 228, 14 L. ed. 123; *Fell's Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 605.

Why, then, is not a pass-book?

The elements here present are sufficient to constitute an estoppel *in pais*, to wit:

1. A false representation.
2. Ignorance of the truth, the result of inexcusable negligence.

3. The plaintiff relying on the representation and being ignorant of the facts.

4. The representation having been made with the intention that it should be acted upon.

5. Plaintiff having been induced to act upon the representation to his prejudice.

7 Am. & Eng. Encyclop. Law. 12; *Preston v. Mann*, 25 Conn. 128; *McNeil v. Hill*, Woolw. 96; *Bank of Batavia v. New York, L. E. & W. R. Co.* 7 Cent. Rep. 822, 106 N. Y. 199; *Armour v. Michigan Cent. R. Co.* 65 N. Y. 122; *Roe v. Jerome*, 18 Conn. 188.

Even if the plaintiff had means of knowing the falsity of the matter, he was justified in acting upon the clear, positive representations contained in the pass-book.

Watson v. Atwood, 25 Conn. 320.

Of two innocent parties, he whose acts have caused the loss must bear it.

Armour v. Michigan Cent. R. Co. *supra*; *Blair v. Wait*, 69 N. Y. 116; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 47.

This doctrine of estoppel applies independently of the question of negotiability. It has grown up and has become firmly fixed in our law in the cases of transfers of stock, warehouse receipts, bills of lading, elevator receipts and non-negotiable notes. In every transaction where parties contemplate, or where usage supposes them to have contemplated, the possibility of transfer, this doctrine applies.

Pom. Rem. & Rem. Rights, § 160 *et seq.*; *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 275; *McNeil v. Hill*, *Bank of Batavia v. New York, L. E. & W. R. Co.* and *Armour v. Michigan Cent. R. Co.* *supra*; *New York, N. H. & H. R. R. Co. v. Schuyler*, 84 N. Y. 52; *Babcock v. People's Sav. Bank*, 118 Ind. 212; *Winton v. Hart*, 39 Conn. 20; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 829; *Joelyn v. St. Paul Distilling Co.* 44 Minn. 183.

Mr. C. R. Ingersoll, for appellee:

The deposit book of a savings-bank depositor is not a negotiable instrument in law.

Com. v. Reading Sav. Bank, 138 Mass. 16; 13 L. R. A.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 301, 101 N. Y. 60; *Haves v. People's Sav. Bank*, 27 Conn. 233; *Witte v. Vincenot*, 43 Cal. 325; *Moore v. Ulatr Bank*, 11 Ir. C. L. Rep. 512.

Negligence on the part of the Bank is not found. And negligence is a fact that must be found by the trial court.

Fiske v. Foreyth Dyeing L. & B. Co. 57 Conn. 118.

Mala fides, and not mere negligence, is necessary to invalidate the title to ordinary commercial negotiable paper. But the negligence is still proper evidence of the *mala fides*. And so all the circumstances of the taking enter into the settling of that conclusion of fact.

Credit Co. v. Howe Mach. Co. 54 Conn. 384; *Seybel v. National Currency Bank*, 54 N. Y. 283; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Potts v. Meyer*, 74 N. Y. 594; 2 Dan. Neg. Inst. § 777; 2 Parsons, Notes & Bills, 279; 1 Parsons, Notes & Bills, 258.

But this rule of *mala fides* is confined to negotiable paper. A party claiming an estoppel by negligence must prove himself to be free from negligence.

2 Story, Eq. § 1553 b; *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 221.

Loomis, J., delivered the opinion of the court:

Upon the trial of this case, and upon the facts contained in the finding, the plaintiff's contentions relative to five questions were overruled by the court, and furnish the only foundation for this appeal; but as four of the questions embrace only two subjects, the questions for our review may well be reduced to three, as follows: *First*. Is the Savings Bank pass-book, upon which the suit is predicated, a negotiable instrument? *Second*. Is the defendant Bank estopped from showing that the \$750 which appears on that book to the credit of Michael Harrison was in fact never deposited with the Bank, nor any part of it? *Third*. Did the court err in holding that the plaintiff was not a bona fide holder of the pass-book?

1. The first question we are constrained to answer in the negative. The pass-book was not negotiable by itself, nor by virtue of the written order signed by the pretended depositor directing payment to J. J. Stuart & Co. or bearer. In *Haves v. People's Sav. Bank*, 27 Conn. 239, the bank undertook to defend against the suit in favor of a depositor to recover the money deposited, upon the ground that the amount had been paid in good faith to a person who brought the original pass-book to the bank, accompanied with an order good on its face, though in fact forged. This court held that the forged power of attorney was no power, and that the presentation of the book itself had no greater effect, because it was not negotiable. There was not a very full discussion of this point, but the court held that the rights of the depositors would be very insecure if the pass-book was held negotiable. It may be suggested that, if the book was accompanied with a genuine order for the payment of the money, the rights of the depositor could not be affected, and that therefore the reasoning could not apply to the case at bar; but, if we concede that the rights of the particular depositor, who had given a genuine order to pay the money to

another, would not be rendered insecure by holding the instrument negotiable, yet it would seriously affect the rights of the depositors in their relation to each other and to the assets of the Bank. A reference to some decisions of this court in respect to these relations will render the point more clear. In *Coite v. Society for Savings*, 82 Conn. 173, it was held that savings banks were "incorporated agencies for receiving and loaning money on account of the owners; that they have no stock and no capital; and that they are merely places of deposit, where money can be left to remain or be taken out at the pleasure of the owner." In *Osborn v. Byrne*, 48 Conn. 155, it was held that "a savings bank is an agent for the depositors, receiving and loaning their money; and its losses are their losses, and are to be borne by them equally, according to their interest. The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank." In *Bunnell v. Collinsville Sav. Soc.*, 38 Conn. 203, the defendant bank having met with a loss equal to twenty-four per cent of the deposits, the directors reduced the amount to each depositor's credit in that proportion. In an action by a depositor to recover of the bank the amount so deducted, it was held that the defendant was merely the agent of the plaintiff to receive and hold his money, and that the loss was occasioned by his own act, through the instrumentality of his agent, and that he could not recover. Now, suppose in the last case the plaintiff, before or after the act of the directors reducing the amount of the deposits, had sold his book, and given the proper order to some bona fide purchaser for full value, and the latter had brought such a suit against the bank to recover the original deposit in full, could he recover any better than the original depositor? If he could, then the act of one depositor could injuriously affect the rights of all the others, for they would have to bear the additional reduction in consequence of paying one in full. It seems to us that no principle can be accepted which admits of such inequality and injustice, and it is contrary to the principles already adopted by this court in the decisions referred to.

In the case at bar, by reason of fraud, forgery, and falsehood, Harrison obtained two pass-books from the bank, upon which appeared credits amounting to \$1,250, when in truth nothing had been contributed to the funds of the Bank. If by assigning the books he made this fraud successful, the amount, of course, is virtually to be paid by the honest depositors. It is certain that Harrison, in his own name, could recover nothing at all in a suit against the Bank, for he contributed nothing to its deposits. We think he should not be allowed by assigning his book to convert nothing into something, but that the nature and purpose of savings banks, and the relation of depositors to each other, as well as their mutual security, all require the application of the principle that no depositor can convey to another any greater right in the funds of the Bank than he has himself, and that any defense on the part of the Bank which is good against the original depositor is equally good against his assignee, unless

there are facts to create an estoppel. The argument in behalf of the plaintiff, founded upon an assumed analogy between certificates of deposit issued by commercial banks and the pass-books issued by savings banks, is fallacious, for there is no such analogy. The two kinds of banks are created for widely different purposes. The former must have a capital of their own, and the purpose for which they exist is to facilitate commercial transactions over a wide territory; while the latter have no capital, and hold no relations to commerce, are neither adapted nor designed to aid commercial transactions, have a local and limited field for their operations, and hold no relation to any persons except their depositors, and those to whom the depositors' money has been loaned. The purpose of the certificate issued by a commercial bank is to enable the person receiving it to obtain credit in the public markets, and to carry his funds safely to remote places. On the other hand, the savings bank pass-book is not issued with any design to induce third persons to give credit to the holder, but its sole purpose is to put in a shape convenient for the depositor and the bank a statement of the accounts between them; and the order about which so much was said in argument is, in contemplation of the law, the mere appointment of some person as agent for the depositor to receive the money. In *Eaves v. People's Sav. Bank*, *supra*, it is well termed "a power of attorney." By this we do not, of course, intend to have it implied that the depositor cannot sell his right to the money. Like any other non-negotiable chose in action, it may be sold, subject to the equities and defenses between the original parties. But the plaintiff further contends that the book, with or without the order, was made negotiable by contract. We are not quite sure that we apprehend the force of this point as it lay in the mind of counsel. There was no transaction with anyone but Harrison, and by reason of his fraud that was no contract at all; and besides, as it is for the law to declare the negotiability of instruments, we do not see how the mere contract of the parties can be effectual to this end. In further confirmation of the result we have reached that the savings bank pass-book is not negotiable, we refer to the following well-considered cases: *Com. v. Reading Sav. Bank*, 133 Mass. 16; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 1 Cent. Rep. 801; *Witte v. Vincenot*, 48 Cal. 325.

In *Witte v. Vincenot* it was held that "the pass-book of a savings bank was an account kept between the bank and the depositor, . . . showing the business transactions of the parties with each other. . . . It is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect the account shown in the pass-book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, nor would the agreement of the parties to such account, that the account itself might be transferred to order, have any more effect upon the rights and remedies of any third party in the one case than in the other. . . . That a negotiable instrument may be transferred to order is clear; but it does not follow that every instrument which

may be transferred to order is thereby necessarily become a negotiable instrument. A collateral agreement between the parties that an instrument in writing, not negotiable, might be transferred by the holder to order, would not alter the character of the instrument itself."

2. We come now to the question whether, upon the facts that appear in the finding, the defendant is estopped from showing that the sum appearing on the book to the credit of Harrison was in fact never deposited. The precise claim of the plaintiff under this head is that the defendant was estopped by its negligence, which impliedly concedes that this is the one controlling fact to create the estoppel. But negligence on the part of the defendant is a fact not found by the court, and without such a finding there is no foundation at all for the plaintiff's claim. There was no specific duty resting upon the Bank which, being omitted, constituted negligence as matter of law. There are doubtless facts and circumstances which as evidence would tend to show negligence, but they failed to convince the trial court of the fact, and so they amount to nothing for the purposes of this review. This alone defeats the claim of estoppel; but there are other essential elements wholly wanting. The only representation on the part of the defendant was the entry contained in the pass-book, which was not made with knowledge of the material facts on the part of the defendant; nor was the party

to whom it was made ignorant of the truth. The pass-book was obtained from the Bank by gross fraud, and therefore it was not in law issued by the defendant Bank. And where representations have been procured by fraud, except under very peculiar circumstances,—such, for instance, as representations directly affecting the currency of negotiable paper,—there will be no estoppel upon the party making them, though made with the full intention that they should be acted upon. But here there was no such intention. *Bigelow, Estoppel*, 2d ed. 450; *Wilcox v. Howell*, 44 N. Y. 398; *Holden v. Putnam F. Ins. Co.* 46 N. Y. 1; *Calhoun v. Richardson*, 30 Conn. 210; *Sinnett v. Moles*, 38 Iowa, 25. Then, in addition to all these insuperable objections to the plaintiff's claim, we have the fact that the plaintiff himself was guilty of negligence, and is not a bona fide holder of the pass-book.

3. But here the plaintiff claims that the court erred in finding that the plaintiff was not a bona fide holder of the pass-book. The fact was distinctly alleged in the complaint that he was a bona fide holder, and denied in the answer, presenting a distinct issue of fact, which the court upon all the evidence found adversely to the plaintiff. We think the finding is conclusive on this point.

There was no error in the judgment complained of.

The other Judges concurred.

NORTH CAROLINA SUPREME COURT.

HORNTALL & Brother

v.

D. S. BURWELL *et al.*, *Appts.*

(.... N. C.)

1. A mortgagor's removal of personal property to another State, where it is seized and sold by his creditors on attachment, cannot affect the rights of the mortgagee whose mortgage was duly recorded in the State where the parties resided.

2. A judgment on attachment against a debtor who has brought mortgaged personally into the State is not binding on the mortgagee who is not a party, and whose mortgage is duly recorded in another State where the parties reside.

(October 20, 1891.)

APPEAL by defendants from a judgment of the Superior Court for Washington County overruling a demurrer to the complaint in an action brought by the mortgagees of certain

NOTE.—*Lien of chattel mortgage; removal of property to another State.*

If a mortgage on chattels is invalid when made, all of the requirements of the law having been complied with, and if the property is thereafter removed by the mortgagor into another State, the lien of the mortgage will not thereby be lost, but it may be enforced in the State where the property is found. If the mortgage lien is invalid when made, because of a failure to comply with the regulations prescribed by the State in which the property is then located, it will continue invalid after the removal of the property to another State. *Thomas, Chat. Mort.* §§ 320, 321.

In New York State it is held that where a contract in regard to personal property is made in another State, the law of such State as to its validity and effect is to govern here, and if valid there it is to be considered equally valid, and can be enforced here. *Etna Ins. Co. v. Aldrich*, 26 N. Y. 98. So, also, where a lien is valid in this State, and the property is temporarily removed to another State, 13 L. R. A.

a creditor cannot defeat the interest acquired under the same, by proceedings *in invitum* in another State. *Martin v. Hill*, 12 Barb. 631.

The rule last stated is also recognized by the decisions in other States. *Langworthy v. Little*, 12 Cush. 109; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 86.

The principle is well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wherever the property may be situated. *Hoyt v. Thompson*, 19 N. Y. 224.

The true rule is laid down in *Edgerly v. Bush*, 81 N. Y. 203, by Folger, Ch. J., as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

A mortgage valid in Connecticut, where the property was, and where the parties entered into the mortgage contract, protects the mortgagee in his right to any property covered thereby that may have been subsequently brought into the State of

personal property which had been removed from the State and sold under execution against the mortgagor, to recover its value from the purchaser at the execution sale. *Affirmed.*

The case sufficiently appears in the opinion. **Mr. B. B. Winborne** for appellants.

Messrs. C. L. Pettigrew and Pruden & Vann for appellees.

Shepherd, J., delivered the opinion of the court:

The principle embodied in the maxim *mobilia sequuntur personam* is generally recognized in all civilized countries, and it follows as a natural consequence, says Story (Conf. L. 383), that "the laws of the owner's domicile (or the *lex loci contractus*) should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos* or be *post mortem*." The authority of such laws, however, is admitted in other States, not *ex proprio vigore*, but *ex comitate*, and hence it is now very generally held that when they "clash with and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or the other of them must give way, those prevailing where the relief is sought must have the preference." *Olivier v. Townes*, 2 Mart. N. S. 93; 2 Kent, Com. 458; *Moye v. May*, 43 N. C. 131.

This is illustrated by the leading case first cited, where a ship sold in Virginia was before delivery attached by creditors at New Orleans. The court held the sale void as to the attaching creditors, because the law of the *situs* required an actual delivery to pass the title. So, in the case of *Green v. Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109, an attachment in Illinois was sustained as against the mortgage executed by the owner in New York, but not registered in Illinois, where the property was situated. The laws of that State provided that the mortgage should be "void as against third persons unless acknowledged and registered, and unless the property be delivered to and remain with the mortgagee." This principle, however, has no application to a case like ours, where the mortgage was executed and duly registered according to both the law of the domicile and the law of the *situs*. The

property was situated in this State, and the title of the mortgagees perfected here. This being so, we think it quite clear that the removal of the property to another State could not deprive the mortgagees of their rights. In support of this position there seems to be a *consensus* of judicial opinion. Even in Louisiana (whose courts were, perhaps, among the most prominent in giving effect to the law of the *situs*, as above explained) there has never been any doubt upon this question. On the contrary, in *Thuret v. Jenkins*, 7 Mart. (La.) 318, it was held that, where the title had passed, "the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it." The doctrine of this case has since been affirmed in *Southern Bank v. Wood*, 14 La. Ann. 564. To the same effect is *Langworthy v. Little*, 12 Cush. 109, where Shaw, Ch. J., says that "a party who obtains a good title to property, absolute, or qualified by the laws of a sister State, is entitled to maintain and enforce those rights in this State." The property was attached in Massachusetts as the property of the mortgagor, and the sheriff was held liable for its conversion. So in *Jones, Chat. Mort.*, 301, it is said that, "although the mortgage be not executed in conformity with the laws of the State to which the property is afterwards removed, if executed and recorded according to the laws of the State or country of its execution, it is effectual to hold the property in the State to which it is removed." So in *Ballard v. Winter*, 30 Conn. 17, the Supreme Court of Connecticut sustained an action of trover against one of its own citizens for suing out attachment proceedings against property which had been mortgaged according to the law of Massachusetts, but which had been subsequently removed to the former State. The court said: "By the general rules of law, title thus perfected in one State is respected in all other States and countries into which the property may come. . . . It would certainly be very inconvenient if such mortgages, fairly made in Massachusetts, should be held invalid in Connecticut in respect to movable property, which may be daily passing to and fro along the dividing lines between the States." This case is re-

New York. Aetna Ins. Co. v. Aldrich, 26 N. Y. 96, 97; *Hoyt v. Thompson*, 19 N. Y. 224; *Ferguson v. Clifford*, 37 N. H. 80; *Martin v. Hill*, 12 Barb. 681; *Story, Conf. L. § 244*; *Ockerman v. Cross*, 54 N. Y. 32; 2 Kent, Com. *458; *Langworthy v. Little*, 12 Cush. 109; *Edgerly v. Bush*, 81 N. Y. 199; *Jones v. Taylor*, 30 Vt. 42.

It is the general rule in reference to personal property that it has no locality, but follows the person of its owner, and that its disposition and transfer are governed by the law of his domicile, and that a voluntary conveyance, valid by the laws of the place where the owner resides, will operate as a transfer of property wherever situated. *Ockerman v. Cross*, 54 N. Y. 20.

So, an assignment, valid by the laws of the State where it is executed, cannot be allowed to operate to the disadvantage of creditors residing in another State, so far as property interests of the assignor, situate in the other State, are concerned. *Hoyt v. Thompson*, 5 N. Y. 320, 349; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 568, 10 L. ed. 297; 2 Kent, Com. 406; 4 Kent, Com. 408, 407; *Andrews v. Herriot*, 4 Cow. 510; 13 L. R. A.

Guillander v. Howell, 35 N. Y. 657; *Fox v. Adams*, 5 Me. 245; *Johnson v. Parker*, 4 Bush. 149; *Einer v. Deynoodt*, 39 Mo. 69; *Story, Conf. L. §§ 7, 244, 323, 327, 383, 384, 390*; *Hardmann v. Bowen*, 39 N. Y. 196; *Scott v. Guthrie*, 10 Bosw. 408; *Julland v. Rathbone*, 39 N. Y. 369; *Kelley v. Crapo*, 45 N. Y. 86, 94, 97; *Varnum v. Camp*, 13 N. J. L. 326; *Ingraham v. Geyer*, 13 Mass. 148; *Boyd v. Rockport Steam Cotton Mills*, 7 Gray, 406; *Burr. Assignments*, 262, 373; *Moore v. Bonnell*, 31 N. J. L. 90; *Walters v. Whitlock*, 9 Fla. 86.

As we have seen, the general rule is, that if the transfer or disposition of personal property is valid at the owner's domicile, where made, it is valid everywhere. This rule has its exceptions, when the laws of different jurisdictions are in conflict and particularly in cases where the *situs rei* at the time of the contract is in another State. *Varnum v. Camp*, 13 N. J. L. 326; *Moore v. Bonnell*, 31 N. J. L. 90; *Runyon v. Groshon*, 12 N. J. Eq. 87; *Bentley v. Whittemore*, 19 N. J. Eq. 482; *Frazier v. Fredericks*, 24 N. J. L. 162. See note to *Weinstein v. Freyer* (Ala.) 12 L. R. A. 700.

F. S. R.

ported in 12 Am. L. Reg. N. S. 759, and is highly approved by the annotator, who cites several authorities in its support. The same point was decided by the Supreme Court of the United States in *Bank of United States v. Lee*, 38 U. S. 13 Pet. 107, 10 L. ed. 81. There certain property, being in Virginia, was conveyed in trust to Richard Bland Lee, for the benefit of Mrs. Lee. The title passed according to the Virginia law, but, the property being subsequently removed to the District of Columbia, where under a prevailing Maryland statute, such a transfer would not be good except upon certain conditions, which had not been complied with, the court (Catron, J.), said that "the Statute had no reference to a case where the title had been vested by the laws of another State, but operates only on sales, mortgages, and gifts made in Maryland." The following authorities are also directly in point: *Hill*, Mortg. 412; *Keenan v. Stinson*, 32 Minn. 377; *Ferguson v. Clifford*, 37 N. H. 86; *Jones v. Taylor*, 30 Vt. 42; *Rhode Island Cent. Bank v. Danforth*, 14 Gray, 123; *Martin v. Hill*, 12 Barb. 681; *Kanaga v. Taylor*, 7 Ohio St. 134; *Wilson v. Carson*, 13 Md. 54; *Smith v. McLean*, 24 Iowa, 322; *Hicks v. Skinner*, 71 N. C. 539; *Barker v. Stacy*, 25 Miss. 477; *Feurt v. Rowell*, 62 Mo. 524.

The defendants, however, contend that they are protected by the sale under the attachment proceedings in the Virginia court. They rely upon the case of *Green v. Van Buskirk*, *supra*, and insist that under the Act of Congress full faith and credit must be given to the judgments of the courts of a sister State. It is true that the decision referred to was chiefly based upon that Statute, but it must be observed that the record of such an adjudication has only (we quote from the opinion) "the same faith and credit as it has in the state court from which it is taken," and that, "in order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence outside of the record the predicament of the property on which it operated." Such was the course pursued by the court in that case; and, as we have seen that the title to the property had not passed according to the law of the *situs*, the attachment proceedings were sustained. If, however, it had appeared that at the time of the execution of the mortgage in New York the property was also there, but had been afterwards removed to Illinois, it cannot be doubted that the decision would have been otherwise. Happily we have a case directly in point from the Supreme Court of Illinois—*Mumford v. Canty*, 50 Ill. 370. It is there distinctly held that, "where personal property was mortgaged in the State of Missouri, and permitted to remain with the mortgagor (contrary to the law of Illinois) after the maturity of the debt to secure which the mortgage was given, and, upon being subsequently brought into Illinois, was seized under an attachment in favor of a bona fide creditor of the mortgagor, the rights of the mortgagee [would] be determined by the law of Missouri;" and the mortgagee was permitted to recover the property of the purchaser. Here, then, we have an express decision as to the effect which is to be given to such a judgment in the State in which it is rendered, and it is only to this 18 L. R. A.

extent, and no further, that the judgment is conclusive in a sister State. To hold otherwise would go beyond what the Statute requires, and give the same effect to an attachment proceeding which generally follows a proceeding which is strictly and technically *in rem*. Such is not the law. An attachment proceeding, though often spoken of as a proceeding *in rem*, "cannot be admitted to come within the strict meaning of that term; the judgment is conclusive only upon the actual parties to the litigation and those in privity with them. . . . and they use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin." 2 Black, Judgm. § 801; *Duchess of Kingston's Case*, 3 Smith, Lead. Cas. 9th Am. ed. 2011; *Drake*, Attachm. 245. In his notes to the latter case, *Judge Hare* cites with entire approval the opinion of Hall, J., in *Woodruff v. Taylor*, 20 Vt. 65, in which it is said that the operation of such a proceeding "must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person having an independent and adverse claim to the goods," etc. Having shown, we think, that the title perfected here was not lost by the removal of the property to Virginia, and that the record of the judgment in the attachment proceedings is only to be respected in so far as effect is given to it in that State, we cannot but assume, in the absence of any decision to the contrary, that the same principle of comity so universally recognized and acted upon likewise prevails in Virginia, and that, even if these plaintiffs were suing in that jurisdiction, they would be permitted to recover. This would seem all the more reasonable, as we have extended this very comity to a citizen of our sister State in a case precisely similar to the one under consideration. *Anderson v. Doak*, 32 N. C. 295. There a slave, being in Virginia, was mortgaged by its owner, and the mortgage duly registered in Carroll County. It was never registered in this State, nor was it executed according to its laws. The slave came to this State, and was attached by a creditor of the mortgagor. In an action of trover, brought by the mortgagee against the sheriff, the plaintiff was permitted to recover. It will be noted that we have discussed this question as if the plaintiff were seeking redress in the courts of Virginia. If we have shown that, according to what appears to be the entire course of judicial opinion, they would be entitled to recover there, *a fortiori* can they recover in the courts of this State when they have acquired jurisdiction over the parties. To the foregoing authorities we will add a recent decision of the Court of Appeals of New York. In that case (*Edgerty v. Bush*, 81 N. Y. 199) B. executed to plaintiff a chattel mortgage upon a span of horses. Both parties were then residents of New York. B. subsequently took them to Canada, where they were sold by a regular trader dealing in horses, the purchaser buying in good faith. Under the laws of Canada property cannot be reclaimed from one so purchasing without refunding the price paid. Defendant, a resident of this

State, bought the horses in Canada from such purchaser, and they were left in Canada. Upon refusal of defendant to deliver them, the plaintiff sued for their conversion. The court held (Folger, *Ch. J.*, delivering an elaborate opinion) that the plaintiff was entitled to recover. We are of the opinion that his honor

very properly overruled the demurrer, but he should have given the defendant an opportunity to answer. Code, § 272; *Moore v. Hobbs*, 77 N. C. 65; *Bronson v. Wilmington N. C. L. Ins. Co.* 85 N. C. 411.

Affirmed.

KENTUCKY COURT OF APPEALS.

W. B. STULTS, *Appt.*,

v.

H. H. SALE.

(...Ky....)

Loss of his family will not terminate the legally acquired homestead exemption of one who continues to occupy the premises as a housekeeper, under statutes which were enacted from a spirit of liberality towards the debtor, as evidenced by the continuance of a wife's homestead exemption for the benefit of her husband after her death and other similar provisions.

(September 12, 1891.)

A PPEAL by plaintiff for a judgment of the Louisville Chancery Court in favor of defendant in an action brought to subject certain property to the payment of plaintiff's claim against defendant. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. A. C. Rucker and C. B. Seymour, for appellant:

One cannot be regarded as a bona fide housekeeper with a family, unless there are those living with him who not only bear a dependent relation to him, but whom he is under a natural or legal obligation to maintain.

Brooks v. Collins, 11 Bush, 625; *Carter v. Adams* (Ky.) 9 Ky. L. Rep. 91; *Riley v. Smith* (Ky.) 9 Ky. L. Rep. 616; *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 893.

In Kentucky there is a derivative homestead, which does not in any way depend upon the survivor being a housekeeper with a family.

Allensworth v. Kimbrough, 79 Ky. 334; *Ellis v. Davis*, *supra*.

But the case at bar is not a case of derivative homestead. The title was not in Mrs. Sale, but in appellee.

The claim that, as Sale once had a homestead exemption and had never abandoned the property, his exemption continued although he has ceased to have a family, cannot be sustained.

Cooper v. Cooper, 24 Ohio St. 488.

The Legislature has enacted a statute and provided to what class of people it shall apply; when a party ceases to belong to that class the Statute becomes inapplicable to him.

It never was the intention of our law that anything should be exempt for the benefit of the debtor. He is under moral as well as legal obligation to pay his debts; but for the benefit of his family exemptions are allowed him.

See *M'urray v. Shuck*, 6 Bush, 111; *Thorn v. Darlington*, 6 Bush, 449.

Messrs. Abbott & Rutledge for appellee.

Holt, Ch. J., delivered the opinion of the court:

This appeal presents a single, but hitherto undecided, question by this court. When the appellee, H. H. Sale, in 1864, first came into the occupancy of the property in contest, and in which he had a life estate, he was undoubtedly a bona fide housekeeper with a family. It then consisted of a wife and five children; and that he then acquired a homestead right in the property is beyond question. He has occupied it as a housekeeper ever since. In 1883, when this suit was brought upon a return of *nulla bona* to subject whatever property he had to the payment of the appellant's debt, his family had narrowed to one daughter, an invalid brother, and his mother-in-law; and since October, 1887, although a housekeeper in the property, he has, by reason of death and marriage, had no family whatever, within the legal meaning of that term, living with him. *Brooks v. Collins*, 11 Bush, 622. It is therefore claimed that it is not now exempt to him as a homestead, but it is liable to the appellant's

NOTE.—Homestead, how far defeated by loss of family.

A man's homestead once acquired is not lost or defeated by the death or absence of his wife and children. *Wilkinson v. Merrill* (Va.) 11 L. R. A. 632; *Kessler v. Draub*, 52 Tex. 575; *Taylor v. Boulware*, 17 Tex. 77; *Silloway v. Brown*, 12 Allen, 30; *Barney v. Leeds*, 51 N. H. 253; *Kimberl v. Willis*, 97 Ill. 494. *Contra*, *Cooper v. Cooper*, 24 Ohio St. 488.

Or by her abandonment of him. *Griffin v. Nichols*, 51 Mich. 575.

Thus a widower whose children have all married and moved away retains his homestead where he occupies one room and boards with the tenant. *Myers v. Ford*, 22 Wis. 139.

And a childless widower may have his homestead 13 L. R. A.

right continued. *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 893.

A divorce obtained by a wife does not destroy her husband's homestead right. *Byers v. Byers*, 21 Iowa, 268.

Even if she is given the custody of the children. *Woods v. Davis*, 34 Iowa, 264. *Contra*, *Arp v. Jacobs* (Wyo.) Oct. 13, 1891.

On removal of the wife and children after a limited divorce the same rule applies and the husband's homestead continues. *Doyle v. Coburn*, 6 Allen, 71.

This note does not include matters about derivative homesteads or the homestead right of a surviving husband or wife and children as such.

B. A. R.

debt. Our Statute exempts to the debtor as a homestead land worth not over \$1,000, if he be a bona fide housekeeper, with a family, of this Commonwealth. The nature of this right is not fixed by the Statute by name. He may sell the property, but is divested of the right to it if he permanently abandons it as his home. It may, perhaps, be said to be a qualified estate. It continues after his death, for his widow, during her occupancy of it, though there be no children. *Gay v. Hanks*, 81 Ky. 522.

The husband has the like right in the homestead of the deceased wife. This court has decided that where the right is thus derivative the having of a family is not necessary to its continuance. It is to the creation of the right at the outset in the husband or wife, but not to the continuance of it in the survivor. *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 893.

In this case, however, there is no derivative right of homestead. The property belongs to the husband, who is the debtor, and is claiming it as exempt to him as a homestead. Undoubtedly the having of a family was necessary to the creation of the right in him, but is it necessary to the continuance of it? While essential to its coming into existence, yet, when it has once vested in the debtor, does he lose it by death or the marriage of his children, leaving him alone, but still a housekeeper, in the occupancy of the property? The Statute makes no express mention in this respect. We must therefore look to its general scope and spirit for guidance, the right being the creature of it. It is urged with force that the homestead exemption is for the benefit of the family, and, therefore, where this family relation does not exist, there is no homestead exemption. In other words, the reason for the rule ceasing, the rule ceases. This is true as to the coming into existence of the homestead right; and it is no doubt also true that the primary object of the Statute was the protection of families from want, and the giving to them a shelter; yet the fact that the Statute gives the homestead of the deceased wife to the husband during his occupancy of it, although he has no family, shows that it was not intended to provide for the wife and children alone. He, in such a case does not become homeless. Can it well be supposed that the Legislature intended that, in the event of the death of the wife, owning the homestead, the benefit of it should continue to the husband during his occupancy, although he has no family, and yet that if he be the owner of it, and his wife and children die, or the latter marry and leave him, his right to the exemption ceases? If so, it is a singular state of case; and, if so, it is equally true of the wife, where she owns the homestead. In the event of the husband's death owning the homestead, she takes it as survivor, so long as she occupies it, although she has no family; but if she owns it, and her husband dies, there

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being no longer any family, her homestead right ceases. Why should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist as to his own property as is given to him in his wife's property after her death? Ought not his claim to a homestead in his own property, as against his own creditors, to be as much regarded as his claim to one in her property after her death? The construction here contended for by the creditor should not be given to a statute which was enacted from a spirit of liberality towards the debtor. The Massachusetts Statute of 1855 limited the homestead exemption to a "householder having a family." It continued it to the widow and children after his death, but contained no provision for its continuance to the husband after the death of his wife, and the departure of his children; but the supreme court of that State held that his right was not thereby lost, so long as he continued to occupy the property as his home, saying: "Any other construction would render a husband who had been deprived of his family by accident or disease, or by their desertion, without any fault of his, liable to be instantly turned out of his homestead by his creditors." *Silloway v. Brown*, 12 Allen, 30.

This case, and other somewhat kindred ones, are cited in section 72 of Thompson on Homesteads with apparent approval; and, while the Massachusetts Statute, as well as that of Illinois, denominates the right as "an estate of homestead," while our own merely exempts land worth \$1,000 as a homestead, yet the case last cited, as well as *Kimbrel v. Willis*, 97 Ill. 494, and *Kessler v. Draub*, 52 Tex. 575, are so far kindred to this one as to merit citation. True, the question is one of statutory construction, and the decisions in other States are of value only so far as their statutes are like our own; but, considering the entire Act, and the spirit which led to its enactment, it seems to us its only reasonable construction is that, while the having of a family is necessary to the creation of the homestead right, this is not necessary to its continuance. It is not necessary to inquire why this was made a necessary condition to its creation. The Statute in substance says so, but it does not provide that it is necessary to its continuance, and, in order to harmonize and render consistent and reasonable its other provisions, it should not, in our opinion, be so construed. Here the debtor was invested with the right. It existed when this suit was brought. He has done nothing to release or forfeit it; and, in our opinion, is still entitled to it, being yet a housekeeper in the property, although by misfortune he no longer has a family.

Judgment affirmed.

NEW YORK COURT OF APPEALS

Warren BRYANT *et al.*, Exrs., etc., of
Francis W. Tracy, Deceased, *Appts.*,
v.

Harriet F. Tracy THOMPSON, Impleaded,
etc., *Resp't.*

(.....N. Y.)

The right to appeal as a party "aggrieved" does not extend to executors who have obtained a judgment construing a will as to which of two parties is entitled to a certain bequest where the alleged claimants acquiesce in the decision.

(*Ruger, Ch. J., and Andrews and Gray, JJ., dissent.*)

(October 13, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of a Special Term for Erie County construing the will of Francis W. Tracy, deceased, and holding that defendant, Mrs. Thompson, was entitled to a benefit thereunder. *Dismissed.*

The facts are stated in the opinion.

Mr. John G. Milburn, for appellant:

The plaintiffs have the right to bring this appeal.

Bryant v. Thompson, 36 N. Y. S. R. 921.

The executors of a will have the right to bring an action of this nature. As to the personal property the executors are trustees, and only personal property is involved in this action.

Bowers v. Smith, 10 Paige, 193, 4 L. ed. 940; *Wager v. Wager*, 89 N. Y. 161; *Bailey v. Briggs*, 56 N. Y. 413; *Chipman v. Montgomery*, 63 N. Y. 231; *Dill v. Wiener*, 88 N. Y. 160.

The executors are "parties aggrieved" within the meaning of section 1294 of the Code of Civil Procedure.

Messrs. John E. Parsons and Charles Robinson Smith, with *Mr. H. B. Closson*, for respondent:

The expression "party aggrieved," used in the Statute, does not necessarily and in all cases mean a party who has a direct pecuniary interest in the question, in the sense that if one construction of the will be adopted, he gets a bequest, and if another, he does not.

People v. Jones, 110 N. Y. 509; *Bockes v. Hathorn*, 78 N. Y. 222; 2 Perry, Trusts, § 928.

Only parties aggrieved can appeal.

Code Civ. Proc. § 1294; *Banta v. Kent*, 4 N. Y. Week. Dig. 62; *Reid v. Vanderheyden*, 5 Cow. 719; *Steele v. White*, 2 Paige, 478, 2 L. ed. 995; *Colden v. Botts*, 12 Wend. 234; 2 Rumsey, Practice, 646; *Kellogg v. Israel*, 11 Paige, 147, 5 L. ed. 88; *Card v. Bird*, 10 Paige, 426, 4 L. ed. 1038; *Hyatt v. Dusenbury*, 8 Cent. Rep. 78, 106 N. Y. 663; *Ross v. Wigg*, 1 Cent. Rep. 292, 100 N. Y. 243; *Bush v. Rochester City Bank*, 48 N. Y. 659; *Hall v. Brooks*, 89 N. Y. 33; *Hoag v. Hatch*, 24 N. Y. S. R. 91.

The word "aggrieved," in the Statute, refers to a substantial grievance,—a denial to the party of some claim of right either of property or of person or the imposition upon him of some burden or obligation.

It is not the province of courts to decide abstract questions of law disconnected from the granting of actual relief.

Groo v. Garlock, 29 Hun, 598; *People v. Troy*, 82 N. Y. 575.

The plaintiffs brought this action for a construction of certain clauses in the will which affect only the two defendants, and they asked the instructions of the court.

They have obtained this relief, and received their instructions. Neither defendant complains. The plaintiffs are therefore not aggrieved.

Atkinson v. Manks, 1 Cow. 691.

NOTE.—*Right of administrator, executor, or trustee to appeal as party aggrieved from a decision as to rights of distributees or beneficiaries inter sese.*

The main case is in accordance with the weight of authority, which holds that executors, administrators and trustees are not aggrieved by a decision as to the rights of the beneficiaries among themselves. *Goldtree v. Thompson*, 83 Cal. 420; *Merrifield v. Longmire*, 86 Cal. 190; *Wright's Estate*, 49 Cal. 550; *Bates v. Ryberg*, 40 Cal. 465; *Re Dewar's Estate*, 10 Mont. 422.

An executor cannot appeal as such from a decree of settlement and distribution, although he is a legatee. *Re Marrey's Estate*, 65 Cal. 287.

And a trustee in insolvency cannot appeal from the allowance of a claim where the creditors interested acquiesce in the decision. *Salmon v. Piereson*, 8 Md. 297, distinguishing *Ellicott v. Ellicott*, 6 Gill & J. 35, where a trustee in chancery was allowed to appeal from a decree of distribution on the ground that in that case he was personally interested. But see *Marrey's Estate*, *supra*.

And a trustee to sell mortgaged property cannot appeal from an order directing the payment of a claim against the fund. *Stewart v. Codd*, 58 Md. 86.

By an application of the same principle an administrator is not entitled to file cross-interrogatories in a proceeding to determine who are the 13 L. R. A.

distributees and their rights as to each other. *Roach v. Coffey*, 73 Cal. 281.

An executor cannot appeal from the refusal to allow a claim of a creditor which he has not paid or become liable to pay. *Kellett v. Rathbun*, 4 Paige, 104, 3 L. ed. 362.

On the other hand, it has been held that a trustee is aggrieved by a decision denying a valid claim on the fund because he is a trustee for all the claimants. *Bockes v. Hathorn*, 78 N. Y. 222.

And in exact conflict with the principle laid down by the cases first cited above is a decision that it is the duty of an administrator to appeal if he has reasonable ground to believe there is error in a judgment and order of distribution. In this case the alleged error was in holding that conveyances to the intestate's sons were advancements and as the debts had all been paid only the distributees were interested. *Ruch v. Biery*, 9 West. Rep. 215, 110 Ind. 444.

In line with this is another decision that an administrator may appeal from an order of payment on the ground that it lays down a rule of apportionment which works injustice as between creditors of the estate. *Re McCune's Estate*, 76 Mo. 203.

An executor may appeal from an order setting aside a sale which he has made as authorized and required by the will. *Re Bagger's Estate*, 78 Iowa, 171.

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The right to appeal is limited to the extent of the grievance.

Hone v. Van Schaick, 7 Paige, 222, 3 L. ed. 182; *Cuyler v. Moreland*, 6 Paige, 278, 3 L. ed. 983; *Idley v. Bowen*, 11 Wend. 227; *Card v. Bird*, 10 Paige, 426, 4 L. ed. 1038; *Reid v. Vanderheyden*, 5 Cow. 719.

This is like a bill of interpleader, the plaintiffs being stakeholders and the defendants being the two claimants.

In such an action the plaintiff has no interest except to be rid of the thing, debt, or duty which the two defendants both claim. All that is material to him is a determination that the bill of interpleader has been properly filed.

Dorn v. Fox, 61 N. Y. 264; *Atkinson v. Manks*, 1 Cow. 691; 11 Am. & Eng. Encyclop. Law, pp. 494, 504, note 1; *Coyne v. Armstrong*, 77 Ill. 139; *Badeau v. Rogers*, 2 Paige, 209, 2 L. ed. 878.

An executor cannot appeal in behalf of one set of legatees or creditors as against another, where all are before the court.

Kellett v. Rathbun, 4 Paige, 102, 3 L. ed. 361; *Bates v. Ryberg*, 40 Cal. 463; *Wright's Estate*, 49 Cal. 550.

A trustee cannot appeal in behalf of one beneficiary as against others where all are before the court.

Salmon v. Pierson, 8 Md. 299; *Stewart v. Codd*, 58 Md. 86; *Boches v. Hathorn*, 78 N. Y. 222; *Hall v. Brooks*, 89 N. Y. 83.

O'Brien, J., delivered the opinion of the court:

The plaintiffs, as executors and trustees of the will of Francis W. Tracy, who died April 15, 1886, brought this action in order to procure a judicial construction of its provisions. The will and codicils dispose of a large estate, consisting of both real and personal property. Numerous large bequests were made to collateral relatives, and also to various public and private charitable institutions. The residuary estate was left to the widow. The only clause of the will with which we are concerned, in the decision of this appeal, is the one in which provision was made for the defendant Harriet F. Tracy, who is the only child and heir-at-law of the testator. At the time of his death she was an infant, nearly nineteen years of age, and since the commencement of this action, and about the month of April, 1890, she married one George Thompson. She is the daughter of a former wife, who obtained a divorce from the testator many years before his death. When very young, she and her mother separated from the testator, and took up their residence in the City of New York, while the deceased continued to reside in Buffalo, where he died. The relations between the deceased and his daughter and her maternal relatives had for many years been hostile. Her mother's maiden name was Robinson, and the child took that name, and is so designated in some parts of the case. The testator, by a codicil to his will bearing date August 19, 1879, provided a trust fund of \$100,000, the income of which was to be paid to his daughter during her life, the principal to be divided among her issue at her death. The form of the bequest was to the executors of his will in trust. The same codicil contained, however, the following provision:

"In case any beneficiary named in my said last will and testament, whether a devisee, legatee, or *cestui que trust* therein named, shall, in person or by another, contest the probate of my said last will and testament or any codicil thereto, or shall institute any proceedings of any kind with a view to avoid or annul my said last will and testament or any codicil thereto, or any provision in my said last will and testament or in any such codicil contained, then and in either case I do hereby revoke all provisions in my said last will and testament or in any codicil thereto contained in favor of the person or corporation contesting or seeking to avoid such last will and testament or codicil or provision. And if such contestant shall be my daughter, then I give, devise, and bequeath to my wife all the property which in and by such last will and testament and the codicils thereto is or shall be given to my executors in trust for my said daughter's benefit. If my wife shall be such contestant, then I give, devise, and bequeath to my executrix and executors all the property which is by my said last will and testament or any codicil thereto given to my wife, in trust for my daughter, upon the same trusts in every particular as are specified in the second article of this codicil." It seems that the testator contracted a second marriage, and the wife referred to in the provisions of the will, and who took the residuary estate, and with whom he lived up to the time of his death, is the wife of this marriage.

A few days after the death of the testator, his will, with the codicils, were presented to the surrogate of Erie County for probate, by the plaintiffs, and a citation was issued and served upon the daughter, the defendant in this action. Upon the return day of the citation the surrogate, of his own motion, appointed a special guardian for the daughter for the sole purpose of appearing and protecting her interest in the proceedings to prove the will. Subsequently, and after consultation with the defendant and her relatives in New York, and with counsel there, acting for them, the guardian interposed an answer before the surrogate, taking issue in the usual form with the allegations of the petition. The special guardian also retained counsel, and under the direction of the surrogate the proponents of the will were required to produce many witnesses before him for examination, and the trial continued during a number of days. It was contended in behalf of the special guardian that the testator did not possess testamentary capacity; and various witnesses, including servants of the deceased and also experts, were called to sustain that contention. The guardian, through his counsel, requested the surrogate to refuse probate to the will. In the month of November, 1886, the surrogate entered a decree admitting the will to probate, which among other things, contained this clause: "Pursuant to section 2623 of the Code of Civil Procedure, it is hereby stated that the probate of said will was contested." The daughter herself was present at the hearing, and was called and heard as a witness on behalf of the special guardian. After the entry of the decree admitting the will to probate, the widow executed, acknowledged, and filed with the surrogate a paper, under seal, which recited

that she was the residuary legatee and devisee of her late husband's will, which had been admitted to probate. The provision of the decree stating that it was contested, and of the will and codicil that the legacy, in case of such contest should be deemed revoked, were referred to. It then recited that she was desirous that all the provisions of her husband's will, respecting his daughter, should be observed, providing his reputation and capacity be not further questioned. It then stipulated that the executors (of whom she was one) shall not claim in any way that the right of the daughter to the provisions of the will for her benefit had been forfeited; that no effect should be given to the clause revoking the legacy in case of a contest by the legatee, but that the legacy should be deemed legal and valid, and the trust in favor of the daughter executed. The consideration for this agreement on the part of the widow was stated to be the omission of the daughter to appeal from the decree of the surrogate, and it was in terms conditioned that no such appeal should be taken, and that no action or proceeding of any nature should be brought by or in behalf of the daughter, or by any person claiming through or under her, to set aside the probate, or question the validity of the will or the testamentary capacity of her husband; and in case such appeal, action or proceeding should be brought or instituted, then the stipulation and agreement should be void and of no effect. The special guardian, however, appealed from the decree of the surrogate to the general term, where the decree was affirmed.

Two of the executors then brought this action to procure the judgment of the court as to the disposition of the \$100,000 which the daughter was to take by the provisions of the will. The widow declining to become a party plaintiff, was made a defendant, both individually and as executrix and trustee under the will. The daughter is the only other defendant, and no other question is raised by the pleadings. The complaint, after alleging the making of the will, its provisions, the death of the testator and the proceedings before the surrogate, stated that the daughter still claimed the legacy, but that the plaintiffs were advised that by reason of the clause above quoted, and the contest, the provisions of the clause revoking the gift upon certain contingencies became operative, and that the widow was entitled to the same. The relief asked was that the court give construction to the clauses of the will touching this legacy, and the fund mentioned therein, and that it determine the conflicting claims thereto, and define the rights and duties of the plaintiff concerning the same. The special term held that the contest before the surrogate, by and in the name of the special guardian, was not a contest by the daughter, in person or by another, within the meaning of the clause in the codicil expressing the conditions upon which the legacy should vest, and that she was entitled to the bequest. The general term affirmed the judgment, but upon the ground that, the daughter being an infant, and having merely submitted her rights to the court, the revoking clause was, as to her, an attempt to subvert the course of judicial proceedings, and to deprive the court of the right and duty imposed upon it by law, in all cases, to institute

of its own motion proper proceedings for the protection of infants, and that as to the daughter the condition was void as against public policy. It held that the contest must be deemed to have been made by the daughter, although the actual steps were taken by the guardian. *Bryant v. Thompson*, 37 N. Y. S. R. 431.

The widow allowed the judgment to pass without any answer or other opposition, and the only parties who have appealed to this court are the two executors who brought the action. The argument of the case was accompanied by a motion in this court to dismiss the appeal. The question is therefore raised whether the plaintiffs have such a standing in the case as enables them to bring the appeal. The plaintiffs clearly had the right to bring this action in order to procure a judicial determination of the question as to which of two claimants was entitled to the fund, and also to obtain the instructions of the court in regard to their duties under the will. They have obtained these instructions and this determination from the highest court of the State possessing original and general jurisdiction. There were two parties who had a pecuniary interest in the decision of the question involved in the case,—the daughter, who is satisfied with the result, as it is in her favor, and the widow, who does not appeal. The judgment rendered in the court to which the plaintiffs resorted in the first instance is a perfect protection to them in the disposition of the fund in accordance therewith, and in the performance of every duty growing out of the legacy to the daughter under the provisions of the will. This being true, what interest have the plaintiffs in the further prosecution of the action? They had an interest, and it was their duty, to procure a judicial determination of the questions presented by the facts alleged, but no interest or duty in obtaining a decision according to some view of the law that they may have themselves entertained, or have been advised by counsel. Appeals are not allowed to this court for the purpose of settling abstract questions, however interesting or important they may be to the general public or to the legal profession, but to correct errors injuriously affecting the rights of some party to the litigation. The plaintiffs are not concerned in the slightest degree in any legal sense, with the question whether the provision for the daughter be held for her or deemed revoked, under the other clause, and secured to the widow. The widow is not here complaining of the result in the courts below. Had she waived in writing, or in any other way binding upon her, the conditions of her stipulation touching the contest before the surrogate, after the general term had passed upon the question, it would amount to a settlement of the controversy between the only parties having a pecuniary interest in it which would prevent an appeal. Looking at the substance of things, and keeping in mind the relations which these two beneficiaries now hold to the case, we cannot see that the present appeal stands on grounds any different from what it would then. The widow, after the appeal to the general term from the decree of the surrogate, could have waived the conditions contained in her stipulation in regard to the effect of an appeal, as she had before renounced

the benefits of the clause revoking the legacy in case of the contest. She did not, it is true, waive these conditions expressly, but she failed when made a party to this action, to insist upon them; and it is not perceived that the plaintiffs have any interest in insisting, through an appeal to this court, upon a point which the real and only beneficiary has refused to raise for herself. The widow, as already observed, conditionally renounced the benefits of the revoking clause by her deed; and no one, we think, should be permitted to urge that this deed has become inoperative by reason of a breach of its conditions except herself, and that position she is not, it seems, inclined to take.

The plaintiffs are not seeking any benefit for themselves in the action. They have simply asked the judgment and advice of the court in regard to the disposition of property belonging to others, which is in their care and keeping. The court has given the judgment and advice prayed for, and the real beneficiaries do not complain. Whether the plaintiffs are entitled to be heard further in this court does not depend upon any inherent right which the plaintiffs, as suitors, have, but upon express statutory permission. *State v. Kings County*, 125 N. Y. 312.

The right of a party to have all disputes in which he has any interest determined according to judicial forms in a court possessing original jurisdiction is absolute, if indeed there are any such rights, in a strict sense. But, when he seeks to have the judgment reviewed in this court, he must be able to point to some statute giving him the right and conferring the jurisdiction. The only statute relied upon as securing to the plaintiff in this case the right to appeal is section 1294 of the Code of Civil Procedure, and under that section the right is limited to a party aggrieved. In this case the executors and trustees under a will, having asked the court for directions in regard to their duty and for a judgment as to which of two parties is entitled to a certain bequest, which directions and judgment are given and acquiesced in by both of the alleged claimants of the fund, the plaintiffs are not aggrieved, within the meaning of the Statute, by the judgment rendered. The question decided in the courts below and presented by the record is undoubtedly one of great interest and importance, and for that reason should not be passed upon by this court until brought here by some party

having an actual and practical, as distinguished from a mere theoretical, interest in the controversy. Cases can be and are cited by the learned counsel for the appellants in which this court has entertained appeals by executors and trustees under wills from judgments of this character. But it is believed that they are cases either in which the point was not raised at all, or, if raised, the appeal was not only by the trustees, as in this case, but by the beneficiaries, also, so that a motion to dismiss, as now before us in this case, if granted, would not dispose of the case, but would still leave the same questions to be determined upon the appeal of the other parties. If in this case the widow had contested the right of the daughter to receive the legacy, and claimed it for herself, under the clause providing for revocation, and had appealed to this court to maintain that position, and the appeal was before us, we would not then regard this motion as of much practical importance. This was the situation when the court was asked to dismiss the appeal in most if not all the cases of a similar character to which our attention has been directed. An appeal to this court does not lie unless the party appealing has an interest in the controversy. *People v. Lawrence*, 107 N. Y. 607, 10 Cent. Rep. 720; *Hyatt v. Dusenbury*, 106 N. Y. 663, 8 Cent. Rep. 78.

The case of *People v. Jones*, 110 N. Y. 509, is not contrary to these views. In that case the commissioners of the land office, representing the State, made a grant of land under water to an individual. Subsequently the determination of the commissioners in making the grant was reversed by the supreme court on certiorari, and the commissioners appealed to this court, where a motion to dismiss was denied. The order appealed from in that case in effect nullified the grant made by the State and the commissioners, as public officers representing the State, were in duty bound to defend the grant against the effect of an erroneous decision, and so were aggrieved.

We think that the plaintiffs have no interest in the question presented by the record in this case, and that the appeal should be dismissed, with costs to both parties payable out of the estate.

Earl, Finch, and Peckham, JJ., concur; **Ruger, Ch. J.**, and **Andrews and Gray, JJ.**, dissent.

WYOMING SUPREME COURT.

Re Leonard WRIGHT.

(....Wyo....)

A law changing the mode of procedure from indictment to information in cases of offenses already committed, is not *ex post facto*, and does not infringe any substantial right of the offenders.

(June 11, 1891.)

APPPLICATION for a writ of habeas corpus to obtain the release of petitioner from the 13 L. R. A.

custody of the sheriff of Laramie County. *Denied.*

The facts are stated in the opinion.

MENARS, Donzelmann & Van Orsdel, for petitioner:

It is a vested right, belonging to the petitioner, to have his case presented to a grand jury, and he cannot be deprived of such vested right by legislation subsequent to the date of the commission of the alleged crime.

Bill of Rights, § 85, Wyoming Const. art. 1; *Kring v. Missouri*, 107 U. S. 221, 228-235, 27 L. ed. 506, 508-511; *McCarthy v. State*, 1

Wash. 377; *Re Durbon*, 10 Mont. 147; *People v. Tisdale*, 57 Cal. 104.

A petition for a writ of habeas corpus is the proper remedy and mode of procedure when it draws in question the jurisdiction of the court under whose sentence the petitioner is deprived of his liberty.

People v. Neilson, 16 Hun. 214; *Re Eldred*, 46 Wis. 530; *Ex parte Farnham*, 3 Colo. 545.

Mr. Charles N. Potter, Atty-Gen., for the State.

Groesbeck, Ch. J., delivered the opinion of the court:

This is a hearing upon the demurrer to the answer and return of A. D. Kelley, sheriff of Laramie County, to the petition for the writ of habeas corpus, and to the writ. It is admitted that the demurrer raises all the questions involved, and that the decision upon it will dispose of the entire case. The answer and return of the sheriff show that the petitioner, Leonard Wright, is restrained of his liberty by the said sheriff in the jail of said Laramie County, under a sentence of the district court of said county, for the term of two years and six months, under his plea of guilty of an assault with an attempt to commit rape. The defendant was informed against by the county and prosecuting attorney of said county for the crime of rape, under the provisions of the law passed by the first Legislature of the State of Wyoming, approved January 10, 1891, entitled "An Act to Change and Regulate the Grand Jury System by Reducing the Number of Grand Jurors, Providing that a Grand Jury shall be Summoned only when Ordered by the Court, and Providing for the Prosecution by Information, and the Procedure thereunder." Sess. Laws Wyo. 1890-91, chap. 59, p. 213.

The offense is charged in the information as having occurred on the 16th day of December, A. D. 1890, nearly a month before the Act took effect; and the counsel for the petitioner claim that the petitioner, notwithstanding his plea of guilty, should be proceeded against by indictment instead of by information, as, prior to the passage of the Act above named, he could only have been accused by indictment. It is urged that the petitioner is held without due process of law, and that the law applying to the prosecution of offenses committed prior to its enactment is an *ex post facto* law, and in violation of section 35 of the Declaration of Rights (Const. Wyo. art. 1), which states that "no *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be made." The constitutional authority for the enactment of the Statute is found in said article, and reads as follows: "Sec. 9. The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the Legislature may change, regulate, or abolish the grand jury system." "Sec. 13. Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by an indictment, except in cases arising in the land or naval

forces, or in the militia, when in actual service in time of war or public danger."

The Act providing for prosecutions by informations, and under which the petitioner was accused, provides, among other things, that all crimes, misdemeanors, and offenses may be prosecuted in the court having jurisdiction thereof, either by indictment, as "hereinafter provided," or by information. It further provides that "no grand jury shall hereafter be summoned or required to attend at the sittings of any district court in this State, unless the same shall be ordered by a district court, or by the judge thereof, in the vacation or recess of said court, and the grand jury shall consist of twelve men, nine of whom must concur in the finding of an indictment." The Act was undoubtedly intended to apply to prosecutions of all offenses committed prior to the passage of the Act as well as to those committed thereafter. There is no repeal of existing laws, nor any saving clause providing that offenses committed prior to the passage of the Act shall be inquired of, prosecuted, and punished under laws existing at the time of the passage of the Act. It seems that the Legislature had determined to dispense with grand juries after the Act took effect, except when called by the court or judge thereof, following very closely the law of Michigan in this respect. The general right to substitute prosecutions by information in place of prosecutions by indictment is conceded, in view of the constitutional provisions in this State, and it is not claimed that this infringes any right of a defendant. Indeed, this has been so frequently settled that it is unnecessary to cite any authorities, but we cite a few, which have come immediately under our observation. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Re Lowrie*, 8 Colo. 499; *State v. Barnett*, 3 Kan. 250; *Rowan v. State*, 30 Wis. 129.

These cases dispose also of the question as to whether or not a proceeding by information is due process of law, and we do not consider it necessary to dwell longer on this point. We reach the vital question, which it is practically admitted is the only one before us, whether or not the petitioner has a right to complain now, after his plea of guilty has been entered, that he was not indicted by a grand jury. Notwithstanding the somewhat singular case presented to us, of a defendant, represented in every stage of the case by eminent counsel, waiting until he has withdrawn his plea of not guilty, after he has interposed his plea of guilty, after he has had ample time to raise all objections to the validity of the proceedings, now asking this court to release him from imprisonment under what he claims is a void sentence, we shall proceed to determine the question whether or not the District Court for Laramie County acquired jurisdiction of the case by the information filed therein, or whether the petitioner had a right to be indicted by the grand jury of said county.

The rules laid down for the determination of the question as to whether or not a law is *ex post facto* are found in the case of *Calder v. Bull*, 3 U. S. 3 Dall. 386, 1 L. ed. 648, and have been very generally adopted by the courts of this country. They define the following laws as *ex post facto*: (1) every law that makes

an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than when it was committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. *Mr. Justice Chase*, who delivered the opinion of the court, says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." Tested by these plain rules, there would be little difficulty in determining the question before us; but the courts have not contented themselves with this clear definition; and so it was held by *Mr. Justice Washington*, in his charge to the jury in a United States circuit court, that "an *ex post facto* law is one which in its operation makes that criminal which was not so at the time when the action was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *United States v. Hall*, 2 Wash. C. C. 366.

In the case of *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, this last definition was quoted with the evident approval of the learned justice delivering the opinion of the Supreme Court of the United States in that case, with a statement that the case was carried to the supreme court and the judgment affirmed, as reported in *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 8 L. ed. 162; but a careful investigation of the opinion in the case last cited will show that the charge of *Mr. Justice Washington* was not considered, or even touched upon, in the opinion of the court. It will be seen that the familiar definition of Blackstone found in his Commentaries (vol. 1, p. 46) has been much enlarged by modern decisions.

Blackstone thus defines the meaning of an "*ex post facto* law:" "When, after an action, indifferent in itself, is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." *Judge Cooley*, in his work on Constitutional Limitations (5th ed. p. 329), says: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused

of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained, and applied to past transactions, as doubtless would be any similar Statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right." This definition was accepted as most satisfactory in the case of *Robinson v. State*, 84 Ind. 452, where a statute, providing that, "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," was held not to be an *ex post facto* law. The court says: "The Statute is general, and applies to the trial of all criminal cases. It furnishes merely a rule of practice applicable alike to trials for offenses committed before and after its passage. It does not come within the constitutional inhibition of an *ex post facto* law." *Vide Ex parte Bellurum*, 66 Mo. 545. The celebrated case of *Kring v. Missouri*, *supra*, was a step further in the direction of enlarging the meaning and definition of an *ex post facto* law. *Kring* had pleaded guilty to murder in the second degree, and his conviction of this crime, under the law of Missouri in force at the time of the commission of the crime, was an acquittal of the crime of murder in the first degree. The Constitution of Missouri had been changed after the commission of the crime in such manner as to abrogate this provision. The Supreme Court of the United States, by a bare majority of the justices, held this constitutional provision to be an *ex post facto* law, and that it could not apply to offenses committed prior to the taking effect thereof. Counsel for the petitioner urge with great force the following language of *Mr. Justice Miller*, who delivered the opinion of the court, as a new definition of an *ex post facto* law: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not be held to be *ex post facto* because it relates to procedure, as it does, according to *Mr. Bishop*? And can any substantial right which the law gave the defendant, at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." The learned justice who delivered this opinion did not seem to be satisfied with the definition, as he restates the definition in the case of *Re Medley*, 134 U. S. 160, 33 L. ed. 835, as follows: "The term '*ex post facto* law,' as found in the provision of the Constitution of the United States, to wit, that 'no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,' has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed (*Calder v. Bull*, 3 U. S. 8 Dall. 386, 390, 1 L. ed. 648, 650; *Kring v. Missouri*, 107 U. S. 221,

27 L. ed. 506; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162), or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."

This is a material change in the definition given in the case of *Kring v. Missouri*, and it now remains to be seen whether or not the situation of the accused has been altered to his disadvantage. We do not see that it has. How does the change in the accusing tribunal take away any substantial rights of the accused? He admits himself, by his solemn plea of guilty, to be rightfully accused of a grade of the offense with which he is charged, and this presumably by the advice of his counsel, after due time has been given to him to plead, and after he has deliberately withdrawn his plea of not guilty. Should he now be heard to complain that a grand jury of sixteen men, as required by the law in force at the time of the commission of the offense, might not have indicted him? He admits his guilt, and after conviction and sentence says that he was not properly accused. This is a travesty upon justice, and illustrates the absurdity of the proposition laid down by some of the courts. It has, however, been recently held by the Supreme Court of Montana, in the case of *State v. Ah Jim*, 9 Mont. 167, that the constitutional provision there reducing the number of grand jurors from sixteen to seven, five of whom must concur in the finding of an indictment, is self-executing; and the court quotes with approval the following cases to show that such provisions apply to offenses committed before the passage of a law, and are not *ex post facto* in their nature or effect: *Cooley*, Const. Lam. 272, 331, 332; *People v. Mortimer*, 46 Cal. 114; *Bishop*, Stat. Crimes, §§ 178, 180.

In the California case (*People v. Mortimer*, *supra*), it was held that "it is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard the right of the Legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed;" and the Missouri case was noticed in this opinion of the Montana court. So, then, it was held that the reduction in the number of the accusing body did not invade any substantial right of the defendant. If the broad definition of *Mr. Justice Miller* in the *Kring Case*, apparently modified in the case of *Re Medley*, *supra*, was followed, it would seem that such a change in the number of the grand jury might be the loss of a substantial right to the accused. If the defendant has an unalterable right to be accused by indictment, it would seem that he has a right to be presented by twelve men out of sixteen, if such law existed at the time of the commission of the offense; and that if a reduction in the number of the grand jury is not a change in his substantial rights, to his disadvantage, the abolition of the accusing body itself would not be. He has been presented by a sworn officer, and, under our law, an official

under bond, and the information must have been sworn to, as the law requires it. It was held in the case of *Marion v. State*, 20 Neb. 233, that although a law in force at the time of the commission of an offense (murder) provided that juries should be the judges of the law, and was repealed before the trial, it was competent to make the judge, instead of the jury, judge of the law of the case as the Legislature could make such a change, and that such a law was not *ex post facto*. The court adhered to its definition of an "*ex post facto* law" made in the case of *Marion v. State*, 16 Neb. 849, which is nearly in line with the definitions given heretofore, and says: "The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former Code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the court sits in that capacity, and is the judge of the law. No vested right of the plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged." *Com. v. Phillips*, 11 Pick. 28.

Now, certainly, here was a change in the powers of the trial jury. They were stripped of the right to act as judges of the law, and the court was clothed with that power, and yet this was held to be no infraction of the rights of the defendant. In the case of *People v. Tisdale*, 57 Cal. 104, a case upon which the counsel for the petitioner greatly rely, and which they state to be the only case directly in point, found after the utmost diligence, the court said: "The real and only question is whether an information presented after the repeal of a law, which required that a person who violated it should be proceeded against by indictment, can be sustained for an offense committed before the repeal." That court held that the law was not intended to be retrospective, like ours. It also held that a constitutional guaranty such as existed at the time the respondents were charged with the violation of a Statute could not be taken away by any Act of the Legislature. This seems to be the view taken by the Supreme Court of Washington, in the case of *McCarty v. State*, 1 Wash. 377. In this case the offense occurred before the admission of the State into the Union, and the court there held that the guaranty of the Constitution of the United States was in force at the time of the commission of the offense, and could not be taken away, and that the defendant was entitled to be presented by a grand jury. This was held evidently with much hesitation, as the court announces on the petition for a rehearing that in view of the public importance of the question, and in view of the fact that the case was submitted without oral argument on the part of the State, it would not be bound by the opinion rendered on the constitutional questions involved. The situation of the petitioner here is different. The Constitution of Wyoming was in force five months before the offense was committed, and the only constitutional guaranty which was given to the defendant, except as to the passage

of an *ex post facto* law, was that, "until otherwise provided by law, no person shall for a felony be proceeded against criminally, otherwise than by indictment, except," etc. It has been otherwise provided by law, and the defendant has not been deprived of any constitutional guaranty. The framers of our Constitution did not mean to follow the language of the Federal Constitution that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of public danger." The intention appears plainly in our Constitution that there should be no constitutional guaranty of a presentment or indictment of a grand jury, and that nothing should impede the right of the Legislature to change, regulate, or abolish the grand jury system.

We cannot refrain from alluding to one provision of the law before us. It is provided in Kansas and in Michigan, by statute, that no information shall be filed until a preliminary examination has been had, unless such examination be waived, except in cases of fugitives from justice. This safe rule was enlarged so that a prosecuting attorney may file an information when he is satisfied that a crime has been committed. This is a dangerous power to lodge in the hands of a prosecuting officer, for he may keep a prisoner, unable to give bail, in durance, without a preliminary examination, until the next term of court, which may be months ahead. The law makes provision for preliminary examinations, and the accused ought to have this hearing, or an opportunity for it, where he can introduce witnesses in his behalf,—a privilege not accorded to him before a grand jury, one of the strong arguments for dispensing with that *ex parte* tribunal. We do not now intimate how we would decide this matter if properly before us, but we deem it proper to call attention to it, so that under the new practice there may be no excuse for following a dangerous method of procedure. We are forcibly impressed with one fact that crops out in the examination of this question. In the States of Michigan, Kansas, and Wisconsin, the ordinary method of accusation in criminal cases is by information, and has been for years. In Kansas and Michigan, and probably in Wisconsin, no provision was made as to offenses committed prior to the passage of the law pro-

viding for prosecutions by means of information, and yet not a single case has been found where the question raised here has been presented to the court of last resort in any of these States, although such cases must have arisen. It is a strong presumption that such prosecutions as to past offenses were universally conceded to be legal, although the Constitutions of these States surely contain the familiar provision that "no *ex post facto* law shall ever be passed." Even if such a clause does not appear there, it is in the Federal Constitution, and this is as much an inhibition upon the Legislature of the States as if it had been incorporated in the State Constitution. *Ex parte Bethurum*, 66 Mo. 545. We do not favor the practice of looking into the constitutionality of a statute in habeas corpus proceedings. In the States of Michigan, Missouri, Nebraska, Texas, and Iowa, in habeas corpus, the courts will not look beyond the judgment and re-examine the charges on which it was rendered, or pronounce the judgment an absolute nullity, on the ground that the constitutionality of the Statute under which the conviction took place, or upon which the indictment was based, is controverted. That question, it is said, must be tested on appeal, writ of error, or trial in the appropriate court. *Church, Habeas Corpus*, § 370, and the cases there cited. But the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, has established a different doctrine; and this seems now to be the rule in habeas corpus, as the learned author of the work above cited states: "But we apprehend the true rule to be that when a prisoner alleges that the law under which he was convicted and sentenced is unconstitutional, or has been repealed before the trial and judgment, he may have these matters passed upon by the highest judicial tribunals, whether the attack upon the judgment be collateral, as by habeas corpus, or direct, as by appeal or writ of error." *Church, Habeas Corpus*, § 370.

We do not see that the law of this State providing for prosecutions by information is *ex post facto* in its nature, nor that it has infringed any of the substantial rights of the petitioner, nor that he has lost any constitutional guaranty; and, entertaining these views, *the demurrer to the answer and to the return of the sheriff must be overruled, and the petitioner remanded to the custody of the sheriff of Larimer County.*

Conaway and Merrell, JJ., concur.

COLORADO SUPREME COURT.

Re John CUMMINS.

(.....Colo.....)

The illegal purpose of a person from whom money is obtained by false pretenses is no defense to an indictment against the person thus obtaining it.

(October 5, 1891.)

APPPLICATION for a writ of habeas corpus to procure petitioner's release from the Las Animas County jail to which he had been committed in default of bail for his appearance to answer the charge of obtaining money by false pretenses. *Petitioner remanded.*

NOTE.—As stated in the opinion, delivered in the principal case, the authorities bearing upon the question involved cannot be reconciled. It is pertinent to remark that Mr. Bishop's views are republished in 13 L. R. A.

published by the Wisconsin Supreme Court in the course of a singularly exhaustive opinion, in which the few cases discussing the subject are carefully reviewed. The conclusion reached is in the fol-

Statement by **Hayt, J.:**

In June, 1891, petitioner was examined before a justice of the peace in and for Las Animas County under four separate and distinct charges of obtaining money under false pretenses. As a result of such examinations he was required in each case to give bond for his appearance at the next succeeding term of the district court to be held in Las Animas County to answer such charges, or, upon a failure so to do, to be committed to the common jail of the county to await the action of the grand jury. The petitioner failing to furnish bond, warrants of commitment were issued, upon which he was incarcerated in the county jail. Thereupon he made application to the honorable J. C. Gunter, judge of the Third Judicial District, to be discharged upon a writ of habeas corpus. After a full hearing upon such application the prisoner was remanded to custody. It appeared, however, from the complaint, as well as by the evidence, that the money which he had obtained by the alleged false pretenses was paid in each instance by the prosecuting witnesses, respectively, in the furtherance of an illegal purpose to obtain by fraud valuable coal lands from the United States. The application is now renewed in this court.

Measrs. Dixon & Dixon for petitioner.

Mr. H. B. Babb, with *Mr. J. H. Maupin*, *Atty-Gen.*, *contra.*

The statute says: "If any person or persons shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons, any chose in action, money, goods, wares, chattels, effects, or other valuable thing whatsoever, with intent to cheat or defraud any such person or persons of the same, every person so offending shall be deemed a cheat, and upon conviction shall be fined," etc. *Sess. Laws 1889*, p. 111.

In statutory construction words must be given their most usual signification and plainest meaning.

Sutherland, Stat. Const. §§ 237, 238, and cases cited.

The authorities are in hopeless conflict, the courts of New York and Wisconsin holding that the law was not intended to protect any person who is *particeps criminis* with the accused, and the courts of Pennsylvania and Massachusetts holding that such a defense cannot be sustained.

See *McCord v. People*, 46 N. Y. 470; *People v. Stetson*, 4 Barb. 157; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 720; and *contra*, *Com. v. Henry*, 22 Pa. 253; *Com. v. Morrill*, 8 Cush. 571.

The New York cases are based upon the proposition that "neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices."

But criminal suits are designed for the punishment of offenses against public right, and are conducted in the name of the State or crown.

Wharton, Cr. L. § 1; *Bishop*, Cr. L. § 32, and citations; *Cooley*, Torts, 1st ed. p. 6; *Rector v. State*, 6 Ark. 187; *People v. Ontario County Suprs.* 4 Denio, 260. See also dissenting opinion of *Peckam, J.*, in *McCord v. People*, *supra*.

The authorities relied upon by petitioners proceed on the theory that the injured party, and not the public, is concerned with the punishment of offenders, in accordance with some of the preamble of the Act of 30 Geo. II, chap. 24, from which the Statutes are supposed to have been copied.

People v. Clough, 17 Wend. 351.

That theory may be correct in England, but in America the prosecution is instituted and conducted by an officer of the State, and in theory the injured party has no more interest in the punishment of the offense than any other citizen.

Cooley, Torts, 1st ed. p. 87, and authorities cited. See also *Young v. King*, 3 T. R. 98; *Reg. v. Henderson*, 1 Car. & M. 328; *Reg. v. Ball*, Id. 249.

This proceeding cannot be perverted so as to make it perform the functions of either a writ of error, a grand jury, or the proceeding of a trial court; and this court has no jurisdiction, in this proceeding, to review the magistrate's judgment.

Freeman, Judgm. 3d ed. §§ 619-622; *Griffin v. State*, 5 Tex. App. 457; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Bird*, 19 Cal. 130; *Re Bogart*, 2 Sawy. 396; *Brown*, Jur. §§ 18a, 105.

The rule that judgments cannot thus be collaterally attacked applies to judgments rendered by all inferior courts.

Freeman, Judgm. 3d ed. § 524, and cases cited: *Brown*, Jur. §§ 20, 20a; *People v. Cassels*, 5 Hill, 187; *State v. Towle*, 42 N. H. 540; *Bell v. Raymond*, 18 Conn. 100; *Shoemaker v. Brown*, 10 Kan. 388; *Comstock v. Crawford*, 70 U. S. 3 Wall. 396, 18 L. ed. 34.

Hayt, J., delivered the opinion of the court:

If two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, which the latter parts with in furtherance of the illegal purpose, will a prosecution lie against the former for obtaining the money under false pretenses? This is the substantial question presented upon the record. Counsel for petitioner contend that it will not, while the affirmative is assumed by the attorney-general. The authorities bearing upon the question cannot be reconciled. In the leading cases of *Com. v. Henry*, 22 Pa. 253, and *McCord v. People*, 46 N. Y. 470, exactly opposite conclusions were reached upon facts that are quite similar. In the former case it was alleged in the indictment

following language: "After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases is supported by the better reasons, as well as by the weight of authority, and it is our duty to adopt it. We do so with hesitation, because able judges and courts have held a different rule; and with reluctance, because

the acts of the defendants were outrageous and indefensible, and richly merit punishment. But it is far better that they should escape than that sound legal rules should be disregarded to meet the supposed exigencies of a particular case." *State v. Crowley*, 41 Wis. 271.

F. S. R.

ment that the defendant, intending to defraud the prosecutor, falsely asserted to him, and also to another person, who communicated it to him, that he had a legal warrant for the arrest of the daughter of the prosecutor for an offense punishable by a fine and imprisonment, and that he threatened to arrest her, by means of which representation he obtained from the prosecutor property of the value of \$100. The trial court having quashed the indictment, its judgment was reversed by the supreme court and the indictment declared sufficient. In the case of *McCord v. People*, *supra*, the indictment charged the defendant with having falsely and fraudulently represented that he had a warrant for one Miller, and that Miller, believing said false representations, was induced to and did deliver to the defendant a gold watch and diamond ring. In this case it was held that, as the property had been voluntarily surrendered as an inducement to the officer to violate the law and disregard his official duties, the indictment could not be sustained; the court declaring that the Statute against obtaining money by false pretenses was designed to protect only those who for an honest purpose are induced by false or fraudulent representation to give credit, or part with their property, and not to protect those who do this for an unworthy or illegal purpose. The opinion of the court in this case is quite brief, while Peckham, J., filed an able and exhaustive dissenting opinion. In support of the majority opinion two cases are cited by the court, viz., *People v. Williams*, 4 Hill, 9; *People v. Stetson*, 4 Barb. 151. An examination of the former case shows it to be no authority upon the question presented here; the decision being simply to the effect that a false representation, to be within the Statute, must be such as is calculated to mislead persons of ordinary prudence and caution,—a conclusion not generally accepted elsewhere. 2 Bishop, Cr. L. § 433.

In *People v. Stetson*, *supra*, it seems, however, to have been determined that, if the owner in parting with his property, etc., was himself guilty of a crime, the indictment, under the statute, could not be sustained; and a similar conclusion was reached in *State v. Crowley*, 41 Wis. 271, in which case the information charged a conspiracy on the part of several defendants to defraud the prosecutor of his money, and, the proof showing that the conspiracy charged was in connection with an unlawful enterprise, in which the prosecutor and the defendants were *particeps criminis*, it was held that a conviction was not warranted. It appeared, also, that, had the prosecutor exercised common prudence and caution, he could not have been misled by the false pretenses by

which he was induced to part with his money. In opposition to this doctrine, and in line with the Pennsylvania decision, we find *Com. v. Morrill*, 8 Cush. 571. Mr. Bishop, reviewing the different conclusions, says: "Another doctrine sustained in New York is that where, if the false pretenses were true, the person parting with his goods would be guilty of a crime therein, or where he actually commits an offense in parting with them, the indictment for the cheat cannot be maintained. On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretense. 'Supposing,' said Dewey, J., 'it should appear that [the individual defrauded] had also violated the Statute, that would not justify the defendants. If the other party had also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.' And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisdiction into a system of laws to which it is alien." 2 Bishop, Cr. L. 7th ed. § 469.

Finding this conflict in the authorities, we are left free to decide the question propounded solely upon principle. In our opinion, the conclusion reached by Mr. Bishop is supported by the better reasons. The primary object of punishment is the suppression of crime; and, where both the prosecutor and defendant have violated the law, it is better that both be punished than the crime of one should be used to shield the other. When the plaintiff in a civil action is shown to have been guilty of a wrong in the particular matter about which he complains, he cannot ordinarily recover. But there is little chance to apply this rule to criminal prosecutions conducted by the State; the person defrauded being at most a prosecuting witness in the case, and not a party to the proceeding. The language of our Statute is plain. The false pretenses charged in this case are embraced within its express terms, and we are not in favor of sanctioning a rule that will permit offenders to escape by showing that another should also be punished.

The petitioner's application to be discharged will therefore be denied, and the prisoner remanded.

CALIFORNIA SUPREME COURT.

PACIFIC R. CO. *et al.*
v.

W. P. WADE.

(.....Cal.....)

The amount to be paid for the joint use of a street railway track in the hands of 18 L. R. A.

a receiver may be determined by the court on a petition where the statutes give the right to such use on payment of one half the cost of construction, and there is no right to a jury on the ground that it involves the exercise of the right of eminent domain.

(September 30, 1891.)

APPPLICATION for a writ of prohibition to prevent the court having charge of petitioner's road from allowing the Los Angeles Consolidated Electric Railroad Company to use part of petitioner's road, and from determining the compensation to be paid petitioner for such use. *Application denied.*

The facts are fully stated in the opinion.

Messrs. Houghton, Silent & Campbell, with *Mr. S. C. Hubbell*, for petitioner.

Messrs. Dom & Dom, S. C. Denson, and W. S. Goodfellow, with *Messrs. John D. Pope and Chapman & Hendrick*, *contra*.

Paterson, J., delivered the opinion of the court:

The Pacific Railway Company is the owner of a street railroad, operated by means of a wire cable, for the carriage of persons in the City of Los Angeles. On January 20, 1891, Edward W. Russell commenced an action against said Company, its stockholders, and a large number of creditors, alleging, among other matters, that he was a judgment creditor; that the Company was indebted in large sums to divers persons, without means or revenue to pay the same, except by the operation of its railroad system, and the proceeds thereof were wholly insufficient; that suits had been brought and many attachment suits would follow, unless steps be taken to prevent the same, and the operation of the road would be suspended; that to protect all parties a receiver was necessary; wherefore plaintiff prayed for the appointment of a receiver, to take charge of and control the property of said Company, and, if necessary, to sell the same for the payment of the debts. On the day the complaint was filed J. F. Crank was appointed receiver, with directions to take charge of the street railways owned by and under the control of the Pacific Railway Company, together with all its real and personal property and to manage and conduct the business thereof, and from time to time render his accounts. Crank qualified and took possession, and has ever since continued to operate the road under the order of the court. On January 26, 1891, the Los Angeles Consolidated Electric Railway Company presented to the superior court a petition in said cause, setting forth that the petitioner had entered upon the construction of its line of road, as authorized by certain ordinances, and in the further prosecution of its work it was necessary that it should intersect the tracks of the Pacific Railway Company, and run along the same for a distance of three blocks; and praying an order authorizing it to operate over and on said tracks for said distance, and directing the receiver to grant all necessary facilities therefor, and for a further order fixing the amount of compensation which petitioner should pay for the right to use the tracks as aforesaid. At the time fixed for hearing, the petitioners herein appeared, and objected to any proceedings being taken, on the ground that the court had no authority to grant the relief asked. The court overruled the objection, and decided that it had jurisdiction to determine the amount of damages which would be occasioned by making the connections referred to in the petition, and continued the matter for hearing to July 16, 1891. Thereupon petitioners applied to this court for an al-

ternative writ of prohibition, which was granted. In response to the order to show cause why he should not be restrained from any further proceedings in said matter the judge filed an answer, admitting the facts stated, and alleging that the order appointing the receiver was made on motion of the plaintiff in the action, and with the consent of the defendants therein; that on February 13, 1891, the plaintiff Russell filed a petition setting forth that there was some doubt whether the order appointing the receiver was sufficient of itself to vest in him the title to the property, especially the real property, so as to enable him to exercise all the powers and perform all the duties which the exigencies of the case might require, and asking for an order directing the Pacific Railway Company to assign its property to the receiver; that the order was made as prayed for, with the consent of the Pacific Railway Company.

Section 499 of the Civil Code provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." The petitioner contends that, as the ordinances granting the franchises do not provide how compensation shall be ascertained, the electric company must proceed under the provisions of subdivision 6 of section 465, Civil Code. That section is a part of the chapter on the enumeration of the powers of every railroad corporation, and provides that "every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections, and grant facilities therefor; and, if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in title 7, pt. 3, Code of Civil Procedure." But title 7, pt. 3, prescribes rules for the assessment of compensation and damages (§ 1248, Code Civ. Proc.) inconsistent with the measure of compensation established by section 499, Civil Code, and the latter must control, as it relates particularly to street railroads. What counsel for the petitioner means to claim, doubtless, is that the procedure prescribed by title 7 must be followed; that there must be an effort to agree with the cable company as to the amount to be paid; and, upon disagreement, an action against the receiver in the manner and form required by the title on eminent domain, including a trial by jury, if the defendant insist upon it.

The question to be determined is simply whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, viz., one half of the cost of the construction of the tracks and appurtenances used by the companies jointly, or whether the electric company must treat with the cable company, and, upon failure to agree as to the amount to be paid, bring an ac-

tion therefor against the receiver, with the permission of the court. There are none of the elements of an ordinary condemnation proceeding involved in the litigation. There is no private property to be taken for public use,—no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. "The maintenance of horse railroads and running of cars upon the public streets of the City of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street." *Market St. R. Co. v. Central R. Co.* 51 Cal. 586. The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public. The material placed in the street, it is true, is still the property of the cable company; but it was placed where it is with full knowledge on the part of the company that the latter would have no exclusive right to its use, so long as it should remain in the street. The right of the public to drive vehicles over and upon its road, and the right of the mayor and council to grant to another street-car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, entered into its contract with the city as fully, under the provisions of section 499, Civil Code, then in force, as if the condition had been expressly stated in the grant; and, as the cable company took its franchise with the understanding—in effect an express stipulation—that any other company authorized by the mayor and council might use the track jointly with itself, it cannot now be heard to say that such a taking is without its consent, and is a taking of private property for public use, which can be done only by proceedings under the Statute relating to eminent domain. The grant to the cable company was made to facilitate, not to abridge, the public use of the street; and, the subsequent franchise having been granted to the electric company in accordance with the provisions of the Statute, it cannot be said to be a taking of the property of the cable company for any higher or different purpose than that to which it had already been devoted. Civil Code, §§ 497-499; *Omanibus R. Co. v. Baldwin*, 57 Cal. 178; *Jersey City & H. H. R. Co. v. Jersey City & B. R. Co.* 21 N. J. Eq. 556; *Kineman St. R. Co. v. Broadway & N. St. R. Co.* 36 Ohio St. 239; *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 138; *People v. Kerr*, 37 Barb. 357; *Chicago & W. J. R. Co. v. Dunbar*, 100 Ill. 188; *St. Louis R. Co. v. Southern R. Co.* (Mo.) 15 S. W. Rep. 1013, 16 S. W. Rep. 960.

If it be true that the grant of the franchise to the electric company gave to it an absolute right, under the Statute (§ 499, Civil Code), to use the tracks of the cable company upon payment of one half of the cost of construction of the tracks and appurtenances, used jointly by

the companies, and that there is no question as to the right of eminent domain involved in the matter before us, the question whether the respondent has the right to fix the amount of damages or compensation to be paid by the electric company is a simple one. The property of the cable company is *in custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims and compromise with debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may change the rates agreed upon prior to his appointment between the company he represents and another railroad corporation. Code Civ. Proc. § 568; *Beach, Receivers*, §§ 268, 335, 360, 406; *Gluck & B. Receivers*, pp. 106, 107, 181, 140, 241; *Re New Jersey & N. Y. R. Co.* 29 N. J. Eq. 67; *Wiswall v. Sampson*, 55 U. S. 14 How. 65, 14 L. ed. 328; *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586.

In the case before us the electric company has the right, under the Statute and its franchise, to use the tracks of the cable company upon payment of one half of the cost of the construction thereof. The only question to be determined is, What is the amount due the cable company? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be determined in the same way. As to the manner of determining such question there has been some discordance of opinion among judges, but, so far as we have investigated the subject, there has been no conflict of decision. The cases all hold that, while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver. *Re Merrill*, 54 Vt. 200; *Redfield, Railways*, 6th ed. 878, 380; *High, Receiver*, §§ 189, 255, 256; *Mills, Em. Dom.* § 75; *Olyphant v. St. Louis, O. & Steel Co.* 28 Fed. Rep. 729; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 28 Fed. Rep. 871.

Any party deeming himself aggrieved by the judgment of the court has the right of appeal. *Detroit First Nat. Bank v. Barnum*

Wire & L. Works, 58 Mich. 315; *Porter v. Kingman*, 126 Mass. 141.

It is claimed by petitioner that this view of the case deprives it of the right to have the question of compensation determined by a jury,—a right which is guaranteed to it by the Constitution, art. 1, § 14; but, as it is not a case involving the exercise of the right of eminent domain,—is not a taking of private property for public use,—the contention is without merit.

In *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, the court, speaking to a similar objection, said: "The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right.

... But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. . . . The new and changed condition of things which is presented

by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets." See also *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843.

It is unnecessary, in view of what has been said, to consider the questions raised by respondent, whether prohibition is the proper remedy, and whether the petitioner is competent to invoke it. The question as to whether the East & West Los Angeles Railroad Company sold or leased its tracks on Washington Street to the petitioner is a matter to be considered by the superior court on the hearing of the petition, and is not the subject of inquiry in this proceeding. *Bishop v. Los Angeles Co. Super. Ct.* 87 Cal. 233. The respondent declares in his answer filed herein that "neither the said court nor the judge thereof ruled or intimated that he had any power to fix the compensation or authorize the connection with any railway tracks not belonging to the Pacific Railway Company, or any property not in the custody and control of the court."

The application is denied, and the alternative writ is discharged.

We concur: **De Haven, J.; Sharpstein, J.; Harrison, J.; Garoutte, J.**

IOWA SUPREME COURT.

W. R. EMERICK

v.

David EMERICK, *Appt.*

(.....Iowa.....)

An aged person is not of unsound mind so as to require a guardian of his estate merely because he has not sufficient strength of mind and ability to transact his busi-

ness, affairs with "ordinary care and prudence" if he is capable of transacting the ordinary business involved in taking care of his property, and understands the nature and effect of what he does, and can exercise his will concerning it with discretion, notwithstanding the influence of others.

(October 13, 1891.)

A PPEAL by defendant from a judgment of the District Court for Mills County ap-

NOTE.—*Mere mental weakness will not justify the appointment of a guardian.*

The unsoundness of mind which will justify the action of the court must be more than mere debility (*Ex parte Cranmer*, 12 Ves. Jr. 445), or impairment of memory. *Re Holmes*, 4 Russ. 182.

It is held in New Jersey that not every imbecility of mind is intended, but that the mind must be so unsound that it cannot apply its faculties, in their weakened and impaired state, to the management of the person's affairs, and the government of himself (*Re Collins*, 18 N. J. Eq. 255), and at the same time that it is enough if such incapacity of mind arises from any cause, whether it be age, disease, affliction, or intemperance. *Perrine's Case*, 41 N. J. Eq. 411.

Mental incapacity.

It is not every case of mental weakness or imbecility which will authorize the court of chancery to exercise the power of appointing a committee of the person and estate; but to justify the exercise of such a power the mind of the individual must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Re Morgan*, 7 Paige, 236, 4 L. ed. 138.

To authorize the appointment of a committee of the person and estate of one proceeded against as a 18 L. R. A.

lunatic or person of unsound mind, if he be not a lunatic, the unsoundness of mind is the essential thing, and must be established as an independent proposition, and his incapacity must be the result of such mental unsoundness. To sustain such proceedings, the fact must be clearly established, that the party proceeded against is of unsound mind. *Re Shaul*, 40 How. Pr. 204.

An early Massachusetts case decides that an inquisition by the selectmen that one is *non compos*, and an appointment of a guardian for that cause, are not justified by evidence that the person is old and has become less careful of his property. *Darling v. Bennett*, 8 Mass. 129.

Even where the facts proved show that the senses and physical powers are much impaired, and that the mental faculties are somewhat weakened, all this would fail to show anything that would amount to unsoundness so as to make him incapable of managing his affairs. He may be so weak and infirm as to be easily influenced or imposed upon, which would be a reason for setting aside any instruments or transactions executed under the effect of such influence, but this does not amount to unsoundness, such as to take from him the control of himself and his property. The presumption of law is not against the soundness of mind of a person one hundred years of age. *Re Collins*, 18 N. J. Eq. 253.

pointing a guardian of his estate on the ground that he was of unsound mind. *Reversed.*

Statement by Robinson, J.:

Plaintiff seeks to have appointed a guardian of the estate of defendant on the alleged ground that he is of unsound mind, and is not possessed of the judgment necessary for the management of his estate. The cause was tried to a jury, which found that defendant was of unsound mind. A judgment was rendered on the verdict, and defendant appeals.

Messrs. Scott Lewis and H. C. Watkins, for appellant:

The definition which the court gave to the jury is of too high a character and fixes too high a standard as to what constitutes in law a person of unsound mind, and is not the true test.

■ Smith v. Hickenbottom, 57 Iowa, 788; **Seerley v. Sater**, 68 Iowa, 375.

Messrs. Shirley Gilliland, T. L. Genung and E. B. Woodruff for appellee.

Robinson, J., delivered the opinion of the court:

This proceeding was instituted under section 2272 of the Code. The petition alleges that defendant owns and has the management of an estate of 557 acres of land, situated in Mills County, of the value of about \$20,000; that he is old and infirm, and of unsound mind, and is not possessed of the judgment necessarily required for the management of his estate; that he has become possessed of the delusion that he can make large sums of money in the real-estate business in Nebraska, and for the purpose of engaging in such business he has contracted to sell his real estate for four or five thousand dollars less than it is worth; that his wife exerts an undue influence over him, to the detriment of himself and his property; that by reason of his infirmities of mind and

body, and the undue influence of his wife, he has been attempting to dispose of his property in various ways, and place it under the control of his wife or her friends; and that he has not sufficient mind to resist her undue influence. Defendant admits the ownership of the land as claimed by plaintiff, but denies that he is of unsound mind, and that he is subject to undue influence. The defendant was seventy-nine years old at the time of the trial in the district court. Two years before that time his wife died, and a year and a half after her death he married his present wife. She was active in bringing about the marriage, and some of the evidence tends to show that she became a party to it for mercenary reasons, and that she attempts to influence improperly her husband against his children, of whom plaintiff is one. There is evidence to show that defendant is easily influenced to become surety for irresponsible persons, and that he has incurred losses by so doing. He admits having contracted to sell his land for \$25 per acre, but it is not certain that it is worth much, if any, more than that amount. The evidence as to his mental capacity was conflicting, and, had the jury found that he was of sound mind, the verdict would not have been without support in the evidence. That being the condition of the case, the court charged the jury, in substance and effect, that a person of sound mind is one who exercises ordinary understanding and ability in the transaction of business, and that, if defendant was not possessed of "sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then, in law, he will be deemed of unsound mind." The question presented for our determination is whether the test of mental unsoundness given by the court is correct.

Section 2272 of the Code provides for the appointment of a guardian of the property and minor children of a "person of unsound mind." The Statute is silent as to what shall constitute

In Perrine's Case, 41 N. J. Eq. 409, 411, *Chancellor Runyon* said that it is enough to warrant the interference of the court, if, from any cause, a person has become incapable of managing his own affairs; and he referred for support to *Lord Eldon*, in *Gibson v. Jeyes*, 6 Ves. Jr. 266, and *Chancellor Kent*, in *Re Barker*, 2 Johns. Ch. 222, 1 L. ed. 358. But in these cases the attention of the judges was turned more to the source and nature of the mental imbecility than to its extent, and they must not be understood as holding that weakness of mind which does not amount to idiocy, or lunacy, or unsoundness of mind, and does not deprive a man of the power of governing himself, would justify a court in placing him and his estate under guardianship. The opinions of *Lord Lyndhurst*, in *Re Holmes*, 4 Russ. 182, and of *Chancellor Walworth*, in *Re Morgan*, 7 Paige, 236, 14 L. ed. 138, indicate that such is not the law. *Lord Eldon* himself, in *Sherwood v. Sanderson*, 19 Ves. Jr. 280, 286, declared that, if the jury merely find the incapacity of the party to manage his affairs, and will not infer from that and other circumstances, unsoundness of mind though the party may live where he is exposed to ruin every instant, yet upon that finding the commission cannot go on.

If a court can see that there were no equitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it would not interfere merely because one 18 L. R. A.

party possessed very much less intelligence than the other, nor because the transaction is not one which the court in all respects approves. *Ball v. Mannin*, 3 Bligh, N. S. 1; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Lewis v. Pead*, 1 Ves. Jr. 19; *Pitt v. Barker*, 1 Sim. 1, 4 Russ. 507; *Clark v. Maipaa*, 81 Beav. 80; *Frideaux v. Lonsdale*, 1 De G. J. & S. 433; *Harrison v. Guest*, 6 De G. M. & G. 424, 8 H. L. Cas. 481; *Stone v. Wilbern*, 88 Ill. 106; *Pickrell v. Moras*, 97 Ill. 220; *Graham v. Castor*, 55 Ind. 559; *Mulloy v. Ingalls*, 4 Neb. 115; *Cowee v. Cornell*, 75 N. Y. 91, 99, 100; *Paine v. Roberts*, 82 N. C. 451; *Willem v. Dunn*, 93 Ill. 511; *Beverley v. Walden*, 20 Gratt. 147; *Mann v. Betterly*, 21 Vt. 326; *Howe v. Howe*, 99 Mass. 88; *Ex parte Allen*, 15 Mass. 58; *Stiner v. Stiner*, 58 Barb. 643; *Hyer v. Little*, 20 N. J. Eq. 443; *Lozear v. Shields*, 23 N. J. Eq. 509; *Altman v. Stout*, 42 Pa. 114; *Dean v. Fuller*, 40 Pa. 474; *Graham v. Panoost*, 31 Pa. 89; *Nace v. Boyer*, Id. 99; *Greer v. Greers*, 9 Gratt. 330, 332; *Rippy v. Gand*, 39 N. C. 443; *Thomas v. Sheppard*, 2 McCord, Eq. 36; *Oldham v. Oldham*, 58 N. C. 89; *Graham v. Little*, 56 N. C. 152; *Long v. Long*, 9 Md. 343; *Prewett v. Coopwood*, 30 Miss. 369; *Killian v. Badgett*, 27 Ark. 166; *Darnell v. Rowland*, 30 Ind. 342; *Wray v. Wray*, 38 Ind. 126; *Gratz v. Cohen*, 52 U. S. 11 How. 19, 13 L. ed. 579, 586; *Harding v. Handy*, 24 U. S. 11 Wheat. 103, 6 L. ed. 429; 2 Pom. Eq. Jur. § 947, note 3. See notes to *Pharis v. Gere* (N. Y.) 1 L. R. A. 270, and *Howard v. Howard* (Ky.) 1 L. R. A. 610. F. S. R.

the unsoundness which it contemplates, but it is clear that it relates to the capacity of the person affected to transact business. The protection of property is one of the main objects of such statutes as that under consideration, and the test of the unsoundness in question is largely the incompetency of the person to manage property in a rational manner. 1 Wharton & S. Medical Jurisp. § 108. A person may be so weak and infirm as to be easily influenced in such manner that the transactions had under the effect of such influence will be set aside, and yet not be so unsound of mind as to warrant the appointment of a guardian of his property. *Id.* § 104. The unsoundness of mind which will justify such an appointment must be more than mere debility or impairment of memory. It must be such as to deprive the person affected of ability to manage his estate. *Re Lindsey*, 48 N. J. Eq. 9.

The fact that a person, by reason of age, ignorance, and feeble condition of mind and body, is unfit to manage his estate judiciously will not authorize the appointment of a guardian of his property. *Com. v. Reeves*, 140 Pa. 258. "Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life." 2 Kent, Com. 609. "Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence." 1 Parsons, Cont. 387. "The law does not assume to measure the different degrees of power of the human intellect, or to distinguish between them where the power of thought and reason exists." *Somers v. Pumphrey*, 24 Ind. 245.

In *Davren v. White*, 42 N. J. Eq. 569, there was evidence to show that the person whose act was in question lacked mental capacity. But the court held that the test in such cases is, "Did the person whose act is brought in judgment possess sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act or the business he was transacting?" "Although the mind of an individual may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business, if he understand the nature of the business in which he is engaged, and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid." *English v. Porter*, 109 Ill. 291. In *Fiscus v. Turner*, 125 Ind. 46, a rule was approved as follows: "Unsoundness of mind is where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life." A court of equity will not ordinarily set aside a transaction on the ground of

mere weakness of understanding, or liability to be sometimes deceived and duped, on the part of one of the parties to it. Such party must be, in a legal sense, of unsound mind. *Henderson v. McGregor*, 30 Wis. 80.

Some of the authorities cited refer to the mental capacity which is sufficient to enable a person to enter into a valid contract. Cases may arise where a person competent to make such a contract is so subject to an improper influence, or is so affected by some delusion, or is so liable to be controlled to his prejudice by some other cause, that he should be deprived of the right to manage his property; but ordinarily a person who has sufficient mental capacity to make a valid agreement in regard to his property, and to manage it with reasonable care, unaffected by another's will, should be permitted to retain it. It is manifest that there may be such a degree of mental capacity less than that possessed by persons of ordinary understanding and ability. The deficiency may be due to ignorance, or a want of shrewdness, or to other causes which do not denote unsoundness of mind. If a person may be deprived of the control of his property, because he does not exercise ordinary understanding, ability, and prudence in managing it, large numbers of people who now display a reasonable degree of care and judgment in accumulating, keeping, and disposing of property may be deprived of the right to do so, because the business skill and ability they manifest is not quite equal to that commonly exercised. We do not think such a rule as that should prevail.

In *Seerley v. Sater*, 68 Iowa, 376, it was said that "a person of unsound mind is one incapable of transacting the particular business in hand." The question to be determined in this case was whether defendant was capable of managing his estate, not whether he was capable of managing it as well as such estates are commonly managed. No general rule can be given which will be alike applicable to all cases, but each must be determined largely by its own facts and the conditions which control it. In this case, if defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business, and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind, within the meaning of the Statute, and should not be deprived of the control of his property. The charge of the district court required a higher degree of mental capacity than that, and is to that extent erroneous. Other questions are discussed by counsel, but, as they are not likely to arise on another trial, need not be determined.

For the reasons indicated the judgment of the District Court is reversed.

MICHIGAN SUPREME COURT.

William J. SHIELDS *et al.*

v.

John C. JACOB *et al.*, Election Commissioners
for the City of Detroit.

(....Mich....)

1. The name of the political party sufficiently appears at the head of a ticket where it is combined in a vignette, without repeating the name in a separate heading.

2. The regularity of either of the tickets nominated by the separate divisions of a split convention cannot be determined by election commissioners in preparing ballots, but they must print thereon the names of both sets of candidates and give for each set the party name as certified by the committee presenting it, without addition or distinctive designation.

(October 30, 1891.)

APPPLICATION for a writ of mandamus to compel the election commissioners for the City of Detroit to print a certain ticket upon the official ballots which they were about to prepare for use at a coming election. *Granted.*

The case sufficiently appears in the opinion.

Messrs. Don M. Dickinson, J. Logan Chipman and George V. N. Lothrop,
with *Mr. Alfred Russell*, for petitioners.

Messrs. John J. Speed and Charles S. McDonald for respondents.

Per Curiam :

The petition of the relators sets forth the appointment of the respondents as election commissioners of the City of Detroit on the 6th day of October inst.; and also of the calling of the Democratic city convention for the nomination of city officers; the holding of such convention and the proceedings had thereat; and the fact that such convention divided, and two tickets were nominated,—one of them headed by William G. Thompson for mayor, and the other by John Miner, also for mayor; that the committee of that branch of the Democratic party supporting John Miner for mayor prepared a ticket consisting of the officers nominated by the convention, and also a vignette consisting of a right arm holding a flag, upon which was printed the words, "Regular Democratic Ticket," duly certified by them, which was presented to each member of the board of election commissioners, with a request that it be printed upon the ballots to be voted at the election to be held on the 3d day of November prox. They further set up that the election commissioners refuse to say whether they will print such tickets or not, but, from rumors and reports, they believe it is the intention of the election commissioners not to print such ticket upon the ballot authorized by law to be voted; that they have inquired of such commissioners whether they intend to print such ticket, and such commissioners have refused to give any answer to such inquiry. They ask for a mandamus to be directed to the members

of the board of election commissioners, commanding them to "organize, and proceed to prepare, and cause to be printed, ballots bearing upon them, as the regular Democratic ticket, the ticket and candidates and vignette embraced in the certificate of relators hereinbefore set forth;" and that the said John Christ Jacob, Joseph T. Lowry, and Augustus G. Kronberg, board of election commissioners of the City of Detroit, be commanded to place upon the ballot for the municipal election to be held in the City of Detroit on November 3, 1891, in a regular and due form, the list of candidates for mayor and city offices, named and embraced in the certificate hereinbefore referred to. The board of election commissioners have answered the petition, stating that they met on the 26th day of October, and organized as a board, and elected as chairman John Christ Jacob, and G. Henrion as secretary; that at such session they directed the secretary to insert in the daily newspapers a notice that the board of election commissioners for the City of Detroit would be in session at the city clerk's office in the city hall on Tuesday and Wednesday, October 27 and 28, 1891, at noon on said days, for the purpose of receiving from the chairmen of the several political organizations the names of the persons nominated to the several city and ward offices to be filled at the coming charter election, and that the proof copy of the ballot which is to be prepared by said board of election commissioners would be open for the inspection of the chairman of each of the political organizations on Saturday and Monday, October 31 and November 2, at the office of the city clerk in the city hall. It sets forth that the notices were published in certain papers, naming them. It also states that at a session of the board held on October 27 there was filed with said board a certificate, a copy of which, signed by William J. Shields as chairman, is set forth in said petition; that prior to said meeting of October 27 there was not at any time presented to said board any certificate from any committee of any political party setting forth the names of candidates for office to be voted for at the next charter election to be held in said city; that on receiving said certificate said board directed its secretary to place such certificate on file, and to notify William Cosgrove, the secretary named in said certificate, that said certificate was informal, for the reason that it did not designate the name of a party or political organization which the said chairman and secretary represented. They deny that they had, as individuals or as a board, expressed any intention as to their individual action, or any opinion as to how the said board should determine any question which might arise as to the printing upon the election ballots the names of the candidates mentioned in said certificate, and for the reason that they desired to avoid discussion with or the importunities of personal or political friends in relation to the printing of said tickets; and they admit that when approached they each declined, excepting when acting as a board, to express any such opinion or determination. They deny that as a board of election

■ NOTE.—See note to next case.

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commissioners, or as individuals, a majority of said board, or either of them, claimed the right to decide as to the tickets, one of which is headed by John Miner as a candidate for mayor, and the other by William G. Thompson as a candidate for said office, as to which one was nominated by the regularly called convention of any party, or to decide which was the regularly called convention, as between the convention which nominated the ticket headed by said Miner and the convention which nominated the ticket headed by Thompson. They also deny the allegations in the petition impugning their good faith and honesty as members of said board. They further answer, and aver that, "they have not as a board, excepting as hereinbefore stated, acted upon or determined as to the printing of said names on said ballots, but respondents aver that at a meeting of their board held on the 28th day of October, 1891, said board by resolution determined to print, on the official ballot which they are to prepare, all the names of candidates for any and all of the several city, ward and precinct offices, which have been nominated by the regularly called convention of the several political parties, and which shall be duly certified to said board by the respective chairman and secretary of said organizations, and, unless otherwise ordered by your honorable court, it is the intention of respondents to print the names of all the candidates on the so-called Miner and Thompson Democratic ticket. Respondents also determined to print on the official ballot any vignette which the various political organizations may designate, provided said party supply respondents with a sufficient number of cuts in time to enable them to use the same."

In closing their said answer, respondents state as follows: "These respondents respectfully submit themselves to the order of the court, and they pray, if any order be made herein, that they may be advised thereby whether they are required by law to determine which of the list of candidates nominated as aforesaid they should cause to be printed on the ballots prepared by them, or whether they should print on said ballots both of said lists of candidates; and they pray to be further advised if the same name of a party shall be certified by both of two committees, whether the names so certified shall be printed without further addition or distinctive designation."

We are clearly of the opinion that the board of election commissioners was in error in supposing that the notice sent by Mr. Shields, and

served upon them, was defective for the reason that it did not designate the name of a party or political organization which the said chairman or secretary represented. The vignette, which was a part of the certificate and notice served upon the board, combined within it the name of the party or political organization which they represented, and, where the name of the party is combined with the vignette, it is not necessary to put another heading below it. The petition shows that the call for a convention of the Democratic party of the City of Detroit resulted in two nominating conventions; and we are of opinion that each of the tickets nominated at such convention containing the names of the persons nominated by such conventions, with the vignette and heading, if any is furnished by the committee of such conventions, should be printed upon the ballot. We do not consider that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party; but that it is the duty of said board to print and place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed; and that it is their duty, further, if the same name of a party shall be certified by each of two committees, that the name so certified shall be printed without further addition or distinctive designation than such as is contained in the certificates furnished. And, inasmuch as the respondents request that they may be advised therein upon the points stated in their answer, the order for mandamus will issue, commanding them to print upon the ballots to be prepared by them the ticket so furnished to them by the committee of the convention who placed in nomination John Miner for mayor, and also the vignette furnished them by the committee, and that the tickets so printed by them shall contain the name of each of the candidates nominated for the respective offices by said convention in the form substantially prescribed by the Statute, with the name which the committee certify to them as the distinctive name of the party, without further addition or distinctive designation. As the answer denies any design to avoid the law or their duty as election commissioners, no costs will be awarded against them.

CALIFORNIA SUPREME COURT.

Thomas RUTLEDGE, *Appt.*,

v.

R. F. CRAWFORD, *Resp't.*

(.....Cal.....)

1. A ballot having on its back "an offset" or faint impression of the printing on a

similar ticket will not be rejected under Pol. Code, § 1206, as bearing any device, etc., designed to distinguish it, without proof that the impression was the result of design.

2. The presumption is that an "offset" or faint impression of printing on the back of a ballot, or a grease stain or small piece of sealing wax thereon, was the result of accident.

NOTE.—Marks or devices to distinguish ballots.

In Mississippi, where the statute expressly declares that "any device or mark" by which a ticket may be distinguished shall make it invalid, the 18 L. R. A.

courts hold that they cannot determine the materiality of any such device or mark but that it is necessarily fatal. *Steele v. Calhoun*, 61 Miss. 556; *Oglesby v. Sigman*, 58 Miss. 502.

3. A small piece of sealing wax or a small grease stain on the back of a ballot will not prevent counting it, unless it is shown not to be accidental.
4. A ticket having the names of two candidates for judge and one for senator, arranged and numbered in consecutive order, cannot be counted for another candidate for judge whose name is written on the line for and in the place of the name of the senatorial candidate, which was erased.
5. The use of an indelible pencil in erasing and substituting the name of a candidate on a ballot is within the spirit of and a

substantial compliance with a statute which requires it to be done with "a lead-pencil or common writing ink" in order to permit the ballot to be counted.

6. Red ink is common writing ink within the meaning of such a statute.
7. Erasing the name of a candidate will not prevent counting a ballot for him under the California statute, unless another is substituted or the words "no vote" written thereon after his name.
8. The failure of a contestant to file a statement sufficient to show his own eligibility to a disputed office will not prevent

In the last case the mark seems to have been merely a plain line as a border.

So a space less than that fixed by statute between the names on the ticket will make them void. *Perkins v. Carraway*, 59 Miss. 222.

But in most States the rule is less strict. Thus the word "judiciary" on the backs of judicial ballots of one candidate only does not render them void under a statute which prevents distinguishing marks. *State v. Barden*, 10 L. R. A. 155, 77 Wis. 401.

The word "for" before the name of each office does not invalidate a ballot under a statute prohibiting any words other than the official indorsement and the names of the candidates and the political party. *Fields v. Osborne* (Conn.) 12 L. R. A. 551.

But the words "and *ex officio* registrar of births, marriages and deaths" added to the office of town clerk, invalidate the ballot under that statute. *Ibid.*

So will the substitution of the word "citizen" for the name of the political party by which ballots are issued. *Ibid.*

And substituting the words "for assemblyman" instead of "for member of assembly" or the words "for superior judge" instead of "for judge of the superior court," and the omission of the word "senatorial" from "9th senatorial district" do not constitute distinguishing marks which will make the ballot invalid. *Coffey v. Edmonds*, 58 Cal. 526.

And where the name of the party is not required by statute the words "Democratic ticket," at the head of a ballot and "people's party" in the middle of it will not invalidate it. *Williams v. State*, 69 Tex. 369.

Neither at a presidential election will the words "election ticket" and the names of the candidates for president and vice-president and the counties where the electors reside. *Owens v. State*, 64 Tex. 500.

Marking the voter's number on ballots when given out by the officer makes them void under a statute prohibiting marks by which they can be identified. *Woodward v. Sarsons*, L. R. 10 C. P. 88.

So will the repetition in writing of the candidate's name printed thereon. *Ibid.*

So will the signature of the voter written thereon. *Ibid.*

But the use of two or three crosses instead of one, or of a peculiar form of the cross-mark, or of an additional mark, or of an oblique mark for a cross, or the placing of the cross-mark on the wrong side of the name of a candidate, will not invalidate the ballot without evidence of intent to distinguish it. *Ibid.*

And under a similar statute the words "Erase the clause you do not favor" will not vitiate a ballot which offers a choice of propositions. *Applegate v. Egan*, 74 Mo. 258.

The discoloration of a ballot from the use of ink by the voter in scratching the ballot is not a distinguishing mark which will make it invalid. *Wyman v. Lemon*, 51 Cal. 273.

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Nor will printing which shows through on the back of the ballot constitute such distinguishing mark. *State v. Adams*, 65 Ind. 393.

Nor will a sticker or paster containing the name of a candidate make such a distinguishing device. *Quinn v. Markoe*, 37 Minn. 439.

But ballots with eagles on, cast at an election of a religious corporation where a by-law authorized by law prohibits anything thereon but names, are void. *Com. v. Woelper*, 3 Serg. & R. 22.

Color, size, and shape of ballots.

Ballots on colored paper have been held void under a statute which requires them to be printed on plain white paper without mark or designation. *State v. McKinnon*, 8 Or. 493.

But a later case in the same State, while not deciding whether the former case should be followed on similar facts, holds that such ballots are not void when they are printed on tinted paper selected for the purpose and furnished by the secretary of state. *State v. Wolf*, 17 Or. 119.

A similar rule is applied in California to ballots furnished by an officer where there were variations from the statutory requirements as to size, printing, and paper. *Kirk v. Rhoads*, 46 Cal. 395.

And under the Colorado statute which prohibits printing or distributing ballots on other than plain white paper, but does not expressly prohibit voting or counting them, ballots printed on pale yellow paper, which was the nearest like that required that could be found and used because the regular tickets had not come, were held valid. *Kellogg v. Hickman*, 12 Colo. 256.

And white paper tinged with blue with ruled lines was held a sufficient compliance with the Statute requiring the use of white paper without marks intended to distinguish the ballots, in the absence of evidence that such paper was used with intent to distinguish the ballots. *People v. Kilduff*, 15 Ill. 492.

Making tickets of diamond shape does not of itself amount to a "device" to distinguish them where the shape is not prescribed by statute. *State v. Phillips*, 63 Tex. 390.

Marks on the inside of ticket.

Under a statute which provides for tickets "without any distinguishing mark or other embellishment thereon," but permitting the voter to write his name on the back thereof, marks on the inside of a ticket, such as a party name for a heading, do not make the tickets void. *Drutner v. State*, 29 Ind. 308; *Stanley v. Manly*, 35 Ind. 275; *Müllholland v. Bryant*, 39 Ind. 363.

But in Mississippi it is held that the prohibition of "any device or mark by which one ticket may be distinguished" from another applies to marks on the inside as well as on the outside of a ballot. *Steele v. Calhoun*, 61 Miss. 556; *Oglesby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 59 Miss. 222.

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relief to the extent of annulling the certificate of election of the opposing candidate who has been illegally declared elected.

9. An amendment of the statement of a contestant of an election may be made to show his eligibility after the cause has been remanded from an appellate court.

(October 8, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for Sonoma County in favor of defendant in an action brought to contest defendant's right to act as one of the superior court judges for that county. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. T. J. Geary*, with *Mr. A. P. Ware*, for appellant.

Messrs. C. S. Farvuar and *J. A. Barham* for respondent.

De Haven, J., delivered the opinion of the court:

The parties to this action were opposing candidates for the office of superior judge of Sonoma County at the general election of 1890. The respondent, Crawford, received a certificate of election, and this is an action contesting his right thereto. As a result of the trial and recount in the superior court, it appearing that the defendant received one vote more than the plaintiff, the court, on motion of defendant, granted a nonsuit and dismissed the proceedings. The contestant appeals from this judgment, and claims that the court erred in counting certain ballots for the respondent, and in refusing to count others for the appellant.

1. Two ballots, regular on their face, and with the appellant's name printed thereon for judge of the superior court, were not counted by the court for the reason that there was on the back of each a faint type impression of a portion of the face of a similar ticket. The impression is known among printers as an "off-set," and, if there is too much ink upon the type used, is produced when one sheet is placed face downward upon the back of another, which has preceded it from the press. In our opinion the court erred in its refusal to count these ballots for appellant.

Section 1206 of the Political Code Provides: "When a ballot found in any ballot-box bears upon the outside thereof any impression, device, color or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected." Prior to the adoption of the Code, it was the usual practice to have the tickets of the different political parties of a different color or weight or size, so that an observer at the polls could see at a glance and detect which party ticket was deposited by the voter. It was to prevent this, and secure to the citizen absolute secrecy for his ballot, that the section above quoted, and others of the same Code, were enacted, prescribing for ballots, uniformity of paper, color and size; and, in order to justify the rejection of a ballot under this section, it must appear that such "impression, device, color or thing," on the outside thereof, was intended to distinguish it from other legal ballots (*Wyman v. Lemon*, 51 Cal. 273); and the court is not 18 L. R. A.

authorized to find such design when it is just as reasonable to attribute the appearance of the ticket to accident as design. It is not doubted, as was argued here, that tickets may be marked as these were for the purpose of distinguishing them from other ballots, and to be furnished only to a certain class of voters. But in the absence of any proof tending to show this, the presumption must be that such impression was the result of accident, and not intended, and therefore within neither the letter nor spirit of this section, or section 1207 of the same Code, which provides that when a ballot bears upon it any impression, device, color or thing intended to designate or impart knowledge of the person who voted it, it must be rejected.

2. What is said in the preceding paragraph will apply with equal force to the two ballots not counted for appellant, one of which had upon its back a very small piece of red sealing wax, and the other a small stain, as if made by a drop of oil, or something of that nature. It is far more reasonable to suppose that the wax was accidentally placed upon the ticket by the officers of election in sealing the package in which it was returned than to believe that it was designedly placed there as a distinguishing mark before its deposit in the ballot-box; and as to the other, the mark or discoloration is of that character that the most natural conclusion in relation to it is that it was due to some accidental cause, and was not intended to distinguish the ballot or impart knowledge of the person who voted it.

3. The court erred in counting ballot marked "Exhibit 37" as a vote for the respondent. The ticket, so far as necessary to be set out, is as follows:

"18. Judge of the Superior Court, Thomas Rutledge.

"19. Judge of the Superior Court, J. W. Oates.

"20. State Senator, Tenth District, Robert Howe,"

—with the name "Robert Howe" erased and that of the respondent written opposite, or in line with it. We do not see how this ticket can be read as a vote for respondent for the office of judge of the superior court. A ballot is to be construed as any other writing; and, while a resort to parol evidence of extrinsic circumstance may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown that the intention of the voter was anything different from what plainly appears upon the face of the ballot. *People v. Seaman*, 5 Denio, 409.

And when the ballot intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently because the court may believe that the voter made a mistake in preparing his ticket. Voting for a person to fill an office for which he is not a candidate may be the result of mistake, or it may be merely the frivolous exercise of the right of suffrage; but, no matter whether such action may be attributed to folly or mistake, the ballot is the only expression of the voter's will, and it must be counted according to its legal effect. The intention of the voter, as it appears upon the face of this ballot, was to vote for respondent for state senator, and not

for judge of the superior court, and it should be so counted.

4. Upon certain ballots the printed name of the respondent was erased with an indelible pencil, and the name of the appellant written opposite thereto with the same kind of pencil. The court refused to count the same for appellant, but did count such ballots as votes for respondent. The respondent insists that the rulings of the court in relation to the counting of these ballots are justified by section 1204 of the Political Code. That section declares: "When upon a ballot found in any ballot-box a name has been erased and another substituted therefor, in any other manner than by the use of a lead-pencil or common writing ink, the substituted name must be rejected, and the name erased, if it can be ascertained from an inspection of the ballot, must be counted." There was evidence introduced tending to show that indelible pencils are not in fact lead-pencils, nor commonly known as such by merchants selling them. The question is thus presented whether a voter must follow the very letter of this section of the Code in preparing his ticket, or have his vote for a particular candidate rejected. We think it very clear that such is not the purpose or the meaning of that section. The Code commissioners, in their note to this section, say: "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name and not be distinguishable until time brings out the impression; also, to prevent the use of pasters, the use of which is subject to two objections: *first*, their liability to come off; *second*, their liability to be fraudulently taken off." This object of the law—and it is apparent that the Legislature could have had no other in view—is attained if the erasure and substitution are made in such a manner as to present at the time and retain the same general appearance as if made by a lead-pencil or common writing ink. This section, in declaring that erasures and change of names shall not be made "in any other manner than by the use of a lead-pencil or common writing ink," really means that the erasure and substitution shall not be made in any other style or form, or with any different effect, than would be produced by the use of a lead-pencil or common writing ink. The law looks only to matters of substance, and does not waste its energies in pursuit of shadows; and if the appearance of having been made with a lead-pencil is produced by the use of an indelible pencil, there is a substantial compliance with the statute, although such a pencil may not, strictly speaking, be known as a lead-pencil. Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet it is one of the great maxims of interpretation to keep strictly in view the general scope, object and purpose of the law, rather than its mere letter. "He who considers merely the letter of an instrument goes but skin deep into its meaning," Broom, *Legal Maxims*, 611. "A rigid and literal meaning would, in many cases, defeat the very object of the Statute, and would 18 L. R. A.

exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. . . . And the intention is to govern, although such construction may not in all respects agree with the letter of the Statute." *Tracy v. Troy & B. R. Co.* 38 N. Y. 437.

5. The court erred in counting ballot No. 8 as a vote for the respondent. Upon this ticket the printed name of respondent was erased with red ink, and that of J. W. Oates written in place of it, also in red ink. The respondent contends that red ink is not common ink within the meaning of the Statute. We cannot say that it is not such an ink; and its use is not within the mischief which it is the object of the law to prevent.

6. Upon several ballots the name of appellant was erased and no name substituted therefor, and the words "No vote" were not written after the name erased. These were counted as votes for appellant. The court was correct in this ruling. The Statute, in order to guard against fraudulent erasures, has provided this as the only way in which the voter can manifest his intention to erase a name, when he does not substitute another; and under such circumstances the erasure is not complete unless followed by these words. There is no valid constitutional objection to this requirement. It does not prescribe any educational qualification for the voter, nor require him to disclose the secrecy of his ballot, as contended.

7. The statement or complaint filed by appellant in this proceeding does not allege that he possesses the qualifications required by the Constitution of this State, to make him eligible to the office of judge of the superior court, and it is claimed by respondent that the statement is therefore fatally defective, and for that reason the judgment dismissing the proceeding should be affirmed. It is true that in order to entitle appellant to the full relief asked for, to wit, a judgment that he was elected instead of respondent, the statement should have alleged facts showing that he was eligible. But the statement is not fatally defective if it states a case for any relief. *Perri v. Beaumont* (Cal.) 27 Pac. Rep. 584. And we think that it does. It is alleged that the appellant is an elector of the County of Sonoma; and, such being the case, he was authorized to commence this proceeding, and upon proof of facts alleged in his statement, was entitled to a judgment annulling the election of defendant. As the case must be remanded for a new trial, the court below should, upon application, permit the appellant to amend his statement so as to allege the necessary facts showing his eligibility to be chosen to the office, the election to which is in controversy here. *Perri v. Beaumont, supra*.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

We concur: **Beatty, Ch. J.; Garoutte, J.; Harrison, J.; Sharpstein, J.; Paterson, J.**

UTAH SUPREME COURT.

John ROBINSON, *Resp't.*,

v.

OREGON SHORT LINE & UTAH NORTH-
ERN R. CO., *Appl.*

(.....Utah.....)

1. **A common hand-car** standing on the ground beside a railroad track is not a thing dangerous in and of itself, which a railroad company is required to guard or lock.
2. **It is not negligence to leave a common hand-car**, weighing from six hundred to seven hundred pounds, six feet from a railroad track and four or five feet below it, a mile from the thickly settled part of a city and a quarter of a mile from the nearest house, and let it remain there over Sunday, unlocked and unguarded so as to render its owners liable in damages for the death of a boy eleven years old, who, while riding on it with other boys who had replaced it on the track, fell off and was run over and killed.

(September 12, 1931.)

NOTE.—Trespass and unwarrantable interference in its relation to negligence.

It is difficult to see how a liability can be incurred where the defendant corporation had done nothing directly to produce the injury, and where there was an unauthorized interference with or invasion of its rights. It is true that cases may be found where a different doctrine seems to be upheld, as in *Lynch v. Nurdin*, 1 Q. B. 29, where an infant entered into a cart standing in the street and was injured, the owner was held liable. But there is a clear distinction between such a case, where the infant was lawfully in the highway, which it has the right to travel and use, and where the blameable carelessness of the defendant tempted the child to amuse himself with an empty cart and a deserted horse, and the case at bar where he is palpably invading the premises of another as a mere trespasser. In the latter case a party is without the protection of the law except in special cases. The owner of land may dig an excavation in his own premises, not substantially adjoining a public highway, and no action lies against him by one who has strayed off the highway and fallen into the excavation. *Hardcastle v. South Yorkshire R. Co.* 4 Hurlst. & N. 67; *Hounsell v. Smith*, 29 L. J. C. P. 206; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Nicholson v. Erie R. Co.* 41 N. Y. 526.

But a different rule prevails when the pit dug is so near the highway that a person in using the same with ordinary caution may fall in. See *Beck v. Carter*, 68 N. Y. 233, where the authorities are reviewed.

Within well-recognized legal principles.

The deceased being a trespasser, defendant would not be liable for his death (*Wharton*, Neg. § 506; *Kohn v. Lovett*, 44 Ga. 251; *Murray v. McLean*, 57 Ill. 378; *Hargreaves v. Deacon*, 25 Mich. 6; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129; and the Supreme Court of Pennsylvania has asserted that an entry upon the land of an unfenced railroad company stood upon the same footing with an entry into a bedroom. *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 375. See *New York & E. R. Co. v. Skinner*, 19 Pa. 301.

In all cases, where a recovery has been sustained against a party not immediately connected with the 13 L. R. A.

APPEAL by defendant from a judgment of the District Court for Salt Lake County, in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Williams & Van Cott, for appellant:

If the instrument in and of itself is dangerous, then the defendant is liable in case it is left near a public place and young children are injured by reason of the same. Generally speaking, a machine dangerous in and of itself would be one that does injury when being tampered with in its then present condition and without changing its locality to an entirely different one so as to be most advantageous to do injury.

See *Roddy v. Missouri Pac. R. Co.* 12 L. R. A. 749, 104 Mo. 234.

This principle of liability is the one recognized by the authorities.

Chicago & A. R. Co. v. McLaughlin, 47 Ill.

injury, the negligent act was in itself positively unlawful, or recklessly dangerous. *Lynch v. Nurdin*, 1 Q. B. 29, has not been followed, nor is it regarded as authority. *Hartfield v. Roper*, 21 Wend. 615; *Tonawanda R. Co. v. Munger*, 5 Denio, 267, 4 N. Y. 360.

Effects of an act of negligence imminently dangerous.

Had the act of the defendant corporation been one imminently dangerous to the lives of others, the decision in the principal case would doubtless have been in favor of the plaintiff, within the principle of the familiar rule stated by *Sutherland on Damages*, vol. 2, p. 435: "Where an act of negligence is imminently dangerous to the lives of others the guilty party is liable to the one injured by the negligence, whether there be a contract between them violated by that negligence or not." The principle is illustrated by the case of *Thomas v. Winchester*, 6 N. Y. 397. That was a case in which a dealer in drugs had carelessly labeled a poison as harmless medicine, and sent it, so labeled, into the market. It was held that the dealer was liable to any person who might be injured by the use of the drug. In considering what articles can be regarded imminently dangerous, the same court, in *Loop v. Litchfield*, 42 N. Y. 357, says: "They are instruments and articles in their nature calculated to do injury to mankind, and are generally intended to accomplish that purpose; they are essentially and in their elements instruments of danger." *Roddy v. Missouri Pac. R. Co.* 12 L. R. A. 748, 104 Mo. 234.

In *Longmire v. Hollday*, 6 Eng. L. & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former instance, the party guilty of the negligence is liable to the party injured; in the latter, the negligent party is liable only when his negligence is a breach of contract, express or implied.

It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion it is perfectly harmless, and when in motion it is not essentially dangerous. *Roddy v. Missouri Pac. R. Co.* 12 L. R. A. 748, 104 Mo. 234; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 255; *Gurley v. Missouri Pac. R. Co.* 12 West. Rep. 330, 93 Mo. 445.

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265; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 414; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; Patterson, *Railway Accident Law*, pp. 184-188; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258; 2 Wood, *Railway Law*, p. 1296; *Central Branch U. P. R. Co. v. Henigh*, 28 Kan. 347.

The boys in this case were trespassers. They were not upon the public street or sidewalk or upon their own premises, but they went way off to a place where they would clearly become trespassers by going upon the appellant's property where the appellant would owe them no duty, so that the sole question would be brought home. Was a car of this kind down by the side of the track, not in a public place and not dangerous of itself, such an instrument that the appellant was bound to anticipate that boys could lift the same upon the track and be injured in consequence thereof?

See *McEachern v. Boston & M. R. Co.* 150 Mass. 515, and cases cited; *Daniels v. New York & N. E. R. Co.* (Mass.) ante, p. 248.

The son of the respondent was guilty of contributory negligence in the premises. An infant is held to care according to his age and understanding. Appellant should not be charged with greater care in looking after a boy of this age than he would be capable of exercising towards himself.

Masser v. Chicago, R. I. & P. R. Co. 68 Iowa, 602; 1 Shearm. & Redf. Neg. p. 108.

Messrs. Sutherland & Judd for respondent.

Anderson, J., delivered the opinion of the court:

This action is brought by the plaintiff to recover damages for the death of his son, aged between eleven and twelve years, alleged to have been caused by the negligence of the defendant. There was a verdict and judgment in favor of the plaintiff for \$4,000, and the defendant brings this appeal from the judgment, and from the order of the court overruling a motion for a new trial.

The complaint alleged that on October 11, 1890, the defendant left a hand-car upon one of the tracks of its road within the limits of Salt Lake City, and permitted it to remain there until the evening of October 12, without being in any way guarded or locked, and that on the last-named date plaintiff's son was attracted to the hand-car, and got on the same with other boys, and while riding down a grade lost his balance, and fell from the car and was killed. The answer of the defendant denied each and every allegation of the complaint. The evidence showed that the defendant was constructing yards and side tracks near the north limits of Salt Lake City. That on Saturday, October 11, 1890, there was a set of hands at work there, and that about noon of that day they quit work, and started back to the city on a hand-car; that on account of snow having fallen on the rails, and an ascending grade, they were unable to propel the car; that they set the car off the track, left it unlocked, and came back to the city on foot; that the car weighed between six and seven hundred pounds and required four men to lift it from the track, that at the point where they put the hand-car off the track the track is four or five feet above

the level of the ground, and they placed it so that the edge of the car would be about six feet from the rail; that the place where they left the car is about a mile from the thickly settled portions of the city, and that there are no houses nearer than a quarter of a mile, and that the ground is swampy and wet, and is not used nor suitable for a play-ground for children; that either that afternoon or on Sunday morning some boys placed the car back on the track. On Sunday forenoon a number of boys were playing with the hand-car by running around on the side tracks or switches, and about 8 o'clock in the afternoon they were joined by plaintiff's son and other boys, when they pushed the car up an ascending grade, and all got on, and started down the grade, and when a high rate of speed had been attained the son of plaintiff either jumped or fell off in front of the car, and was run over and killed. Some of the plaintiff's witnesses who were on the car at the time of the accident testified that the deceased jumped off, while others say they thought he lost his balance, and fell off. The ages of the boys, as far as it appears in the evidence, ranged from eleven to fifteen years. In the opinion of the witnesses the car was running at the time of the accident at a rate of twenty-five miles an hour, and the distance within which they stopped it, according to the testimony, was from ten to seventy-five feet from where the accident happened. James Morris, a witness for plaintiff, testified that he was fifteen years old; that he was one of the boys on the car when Robinson was killed; that after the accident they took the car off the track; and left it where the other boys told him they got it. He further testified that he, with other boys, had used the car before, with the permission of the "boss," eight or ten times, when the men were there working; but the boss never gave them permission to take the cars and ride on them when the men were not there.

The defendant contends that no negligence on its part was shown, and that the evidence is not sufficient to support the verdict. A hand-car, weighing six or seven hundred pounds, standing on the ground a quarter of a mile outside the settled limits of the city, is not of itself dangerous; and boys of sufficient age and strength to lift it up an embankment four or five feet high and place it upon the track are old enough to fully understand and appreciate whatever danger there is in running upon the track. The deceased and the other boys had no right to be upon the defendant's track meddling with its property. They were technically trespassers, and the defendant owed them no duty, as in the case of passengers or employes. If the boys who took this car and placed it on the track had found a common wagon standing beside the road and had hauled it to the top of a hill, removed or raised the tongue, and all gotten in and let it run down the hill at such a reckless rate of speed as to cause one of their number to become so alarmed as to jump or fall out and get killed; or if they had gone on a neighbor's premises without permission, and while there had taken a sled belonging to him, and engaged in the amusement called "coasting," and while so engaged one of them had fallen off and been run over and killed,—it would scarcely be contended that the owner

of the wagon or sled would be liable in damages for the injury; and yet in principle those cases would differ but little, if any, from the one under consideration.

The case of *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745, cited by plaintiff, was a case where a turn-table was left unfastened, and a small child was injured while it was being turned around. The court charged the jury in that case that, "if the turn-table in question, in its construction and the manner in which it was left, was not dangerous in its nature, the defendants were not liable for negligence;" and this instruction was approved by the Supreme Court of the United States. A machine, to be dangerous in and of

itself, must be of such a character that it can only be handled with safety by persons of mature years and experience. But we think a common hand-car, standing on the ground beside a railroad track, is not a thing dangerous in and of itself, which the railroad company is required to guard or lock. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 365; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 414.

We think that to leave the hand-car where it was left in this case, under the circumstances, was not negligence, and that the verdict is unsupported by the evidence.

The cause is reversed and remanded, and a new trial ordered.

Blackburn and Miner, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY BAR, *ex rel.* Samuel FESSENDEN *et al.*,

v.

Howard W. TAYLOR, *Appt.*

(.....Conn.....)

1. Attorneys preferring charges against another attorney of unprofessional conduct, for the purpose of having him disbarred, need not show that they constitute a committee appointed by the bar association of the county for that purpose either to establish their right to institute the proceeding, or to give the court jurisdiction.

2. The record in an action against an attorney to recover money out of which he was charged with defrauding plaintiff, which resulted in a judgment against him, is admissible in a proceeding by members of the bar, based on the transaction out of which such action arose, to procure his disbarment for unprofessional conduct, especially where the complaint averred

the existence of such record, which the answer denied.

3. The absolute disbarment of an attorney is justified where he, upon receiving an unenforceable claim against his own client, caused a complaint to be served in the name of another attorney and then advised his client to settle, falsely telling him, with full knowledge of the facts, that the claim was good and could be collected out of his property.

(January 7, 1891.)

APPPEAL by defendant from a judgment of the Superior Court for Fairfield County disbarring him from practice as an attorney. *Affirmed.*

The facts are fully stated in the opinion.

Mr. H. S. Sanford for appellant.

Messrs. Samuel Fessenden, John C. Chamberlain and George W. Wheeler, for appellees:

The courts have been steadfast in their pro-

NOTE.—Disbarment of attorneys.

An attorney is an officer of the court admitted to practice under its rules, amenable to it, and liable to have such relations sundered upon satisfactory evidence of dishonest professional conduct, habits of general immorality, or any such single act of crime or vice as may show him unfitted for the trusts and confidence reposed in him as such. *Percy's Case*, 36 N. Y. 651; *Hawk*, P. C. 212; *Bryant's Case*, 24 N. H. 155; *Ex parte Brounsall*, 2 Cowp. 829; 12 Geo. I. chap. 29; 4 Henry IV. chap. 18; *Case of Austin*, 5 Rawle, 204; *Com. v. District Ct. Judges of Phila.* 5 Watts & S. 272; *Dicken's Case*, 67 Pa. 189; *Mill's Case*, 1 Mich. 382.

He has a right to an opportunity to appear and answer in his own behalf before a final judgment against him; but any notice, rule, or summons does not require the technical nicety in its allegations, nor the exactness of proof, of a criminal proceeding. *Penobscot County Bar v. Kimball*, 64 Me. 140; *Leigh's Case*, 1 Munf. 481.

It is an inherent power with every court to disbar an attorney for unprofessional conduct, and in a series of decisions the following reasons have been assigned: ignorance of the law (*Bryant's Case*, 24 N. H. 149); drawing check on a bank in which the attorney had no deposit (*Bank of New York v. Stryker*, 1 Wheel. C. C. 380); improperly disclosing information received (*People v. Barker*, 56 Ill. 299); false representations in the form of affidavits by which the court was induced improvidently to grant an order (*Re Houghton*, 67 Cal. 511); grossly abusive language to or in the presence of the presiding judge (2 Dowl. Pr. 110); for unfaithful conduct as the trustee of an express trust acting under the appointment of the court. *People v. Appleton*, 105 Ill. 474.

In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered, if he chooses, in his presence, by witnesses subject to cross-examination. *Re an Attorney*, 88 N. Y. 164.

Where an attorney employed by a husband to bring a divorce suit enters into collusion with the wife to manufacture evidence, which if not wholly untrue is deceptive, and thus to enable the husband to procure a divorce, this is an act of professional misconduct which authorizes an order disbarring the attorney. *Re Gale*, 75 N. Y. 533.

Where, after the examination of the evidence, it is evident, in view of the respondent's positive denial and explanation, that the evidence is not sufficient to justify his degradation and punishment, and where it further appears that the proceeding was penal in its nature, a motion to disbar should be dismissed. *Re an Attorney*, 1 Hun. 321.

Under a very recent decision by the supreme court of the State of New York, it appears that while by a special statutory enactment attorneys and counselors are declared to be judicial offi-

tection of the integrity of the bar, and have uniformly held that gross violation of the confidence of a client is good ground for disbarment.

Strout v. Proctor, 71 Me. 288; *Re Martin*, 6 Beav. 337; *Furlin v. Sook*, 26 Kan. 397; *Goodwin v. Gosnell*, 2 Coll. C. C. 457; *Re Wool*, 36 Mich. 300; *State v. Burr*, 19 Neb. 593; *Re Peterson*, 3 Paige, 510, 3 L. ed. 252; *People v. Goodrich*, 79 Ill. 148. See note to *State v. Kike*, 95 Am. Dec. 340, 12 Fla. 278.

In the absence of specific provision to the contrary, the power of removal is commensurate with the power of appointment.

Penobscot County Bar v. Kimball, 64 Me. 147; *Ex parte Garland*, 71 U. S. 4 Wall. 378, 18 L. ed. 370; *Re Austin*, 5 Rawle, 203.

Andrews, Ch. J., delivered the opinion of the court:

The appellant was an attorney-at-law residing at Danbury, and practicing in Fairfield County. He was displaced from being an attorney by an order of the superior court in that county made on the 13th day of May, 1890. From that order he has appealed to this court. Section 784 of the General Statutes provides as follows: "The superior court may admit and cause to be sworn as attorneys such persons as are qualified therefor, agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court in this State, except in his own cause; and said judges may establish rules relative to the admission, qualifications, practice, and removal of attorneys." Section 785 provides that "attorneys admitted by the superior court shall be attorneys of all courts, and shall be subject to the rules and orders of the courts before which they act, which may fine them for transgressing any such rule or order, not exceeding one hundred dollars for any offense, and may suspend or displace them for just cause." As is seen from these sections, the superior court alone has power to admit persons to be attorneys-at-law, and the persons so admitted are attorneys in all

the courts of the State. Any other court than the superior court may fine an attorney for transgressing its rules, and doubtless has the power to forbid him from appearing before it; but only the superior court can make an order of total suspension or displacement. In the absence of specific provisions to the contrary, the power of removal is, from its nature, commensurate with the power of appointment. There is no statute authorizing an appeal from an order by the superior court suspending or displacing an attorney; nor, so far as we are able to learn, is there any usage permitting it. Such orders have been made many times in the superior court, and this is the first instance in which any attempt has been made to take an appeal from one of them to the court of errors. Such an order, although it is a judicial act, has in it so much that is of a discretionary nature as to suggest great difficulties in an appeal. It is a discretion, too, that ought to be exercised with great moderation and care. But sometimes it must be exercised, and no other tribunal can decide in a case of removal from the bar with the same measure of information as the court itself. A revising tribunal, if there be such a one, would feel the delicacy of interposing its authority, and do so only in a plain case. In this case all objection to the appeal is expressly waived, and apparently with the approval of the judge of the superior court who made the order. We have therefore concluded to examine it.

The case is this: Certain attorneys practicing in Fairfield County, describing themselves to be a committee of the bar of that county, made a presentment to the superior court in that county, in the form of a complaint, therein charging the appellant with fraud and with other unprofessional conduct; and that he had been sued by Margaret and David Sprague, who claimed to have been his clients, and that in a matter concerning which they had asked and followed his professional advice he had defrauded them out of a large sum of money; that a trial had been had before the superior court in that county at a former session, and a

which unfits him for association with the fair and honorable men of the profession, such unfitness, the result of habitual practices, may be made the subject of inquiry by the court and expulsion from the bar. But an act merely discreditable, but not infamous, while it would lose a member of the bar the favor and countenance of the high-minded men of the profession, cannot of itself give jurisdiction to the court to take judicial cognizance of it, and expel him from his office. *Dickens' Case*, 6 Pa. 169, 5 Am. Rep. 420.

The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But it is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And it has been said that a removal from the bar should never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired. See *Bradley v. Fisher*, 80 U. S. 13 Wall. 335, 20 L. ed. 646; *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366; *Ex parte Burr*, 22 U. S. 9 Wheat. 529, 6 L. ed. 152; 1 Wait, Act. & Def. 473.

It is well settled that attorneys and counselors-at-law should be classified and designated as judicial officers. They are subject at all times to removal or suspension for a just cause shown, and when charged with deceit, malpractice, or misdemeanor, they should be given an opportunity to defend. The office of attorney and counselor becomes vacant upon the conviction of the incumbent of an infamous crime. *Re Niles*, 48 How. Pr. 246.

The doctrine of *Austin's Case*, 5 Rawle, 191, is, that the power of the court may be exercised against attorneys-at-law, either for a contempt which is an offense against the court itself, or for unfitness which disqualifies the attorney from filling the office properly. If an attorney should, by a series of unprofessional acts, form a character 13 L. R. A.

13 L. R. A.

judgment rendered in favor of the said Spragues to recover of the appellant the sum of \$2,288.75 for such fraud. A copy of the entire record in that case, the complaint, pleadings, finding of facts, and judgment, was attached to and made a part of the presentment so made by them. Upon that presentment the superior court made an order of notice to the appellant, requiring him to appear on a day named to make answer thereto. On the day so named the appellant did appear with counsel, made an answer denying all the material allegations of the presentment, and was fully heard. At the hearing the attorneys who had preferred the charges appeared to prosecute them. They offered a duly certified copy of the record, a copy of which had been set out in and made a part of their charges, and also the testimony of witnesses to prove the charges they had made, and also the truth of the things averred in the complaint of the said Daniel and Margaret Sprague. The appellant was also fully heard in his exculpation. All the evidence he offered was received without objection, and the matter was argued at length in his behalf by counsel. The court made a finding of facts, and rendered a judgment that the appellant be disbarred and forever prohibited from practicing law before the courts of this State.

At the commencement of the hearing the committee who had made the charges proposed to offer evidence of their appointment as a committee of the Bar, and for that purpose had the records of the Bar in court, and so stated. The court ruled that such evidence was not required, but that the court would recognize the persons named, they being known to the court as members of the Bar, as proper persons to prefer the charges and to present the matter therein contained to the court. This ruling was objected to, and is the first reason of appeal. There is no force to the objection. While it would have been well enough, perhaps, to have received that record, it would have been wholly without significance. It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the Bar to do that which it was their duty to do without any appointment could give them no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice was for the court itself. *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552.

The appellant also objected to the record of the case brought by Daniel and Margaret Sprague against him being read, and further objected to the finding of the facts therein as not being a part of the record. It is to be observed that the finding of the facts in that case is made a part of the record by the order of the judge who heard the cause. There has been among the statutes of the State ever since 1864 a provision that a finding of facts may be made a part of the record by such an order. Acts 1864, chap. 49, p. 67. This provision may be

found in the Revision of 1875, at page 444, § 9. It is in substance reproduced in the Practice Act (Acts 1879, p. 489, § 30), and is now section 1111 of the General Statutes of 1888. The objection to the record as a whole is that it was between other parties,—*res inter alios acta*. This objection has in it a tinge of sophistry. It turns aside from the purposes for which the hearing was had. It was an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit. Neither the whole Bar of Fairfield County nor its committee were parties to an action in any proper sense. They were not prosecuting any matter of their own. They were not plaintiffs. They were performing their sworn duty to the court by bringing to its knowledge the misdoings of one of its agents. But if that committee be regarded as a party, and applying the strictest technical rule, the record was admissible. One of the averments of the complaint was the existence of a certain record. That averment was denied. On such an issue the plaintiffs might surely offer the best possible evidence there could be of the truth of their allegations. The existence of such a record as was averred in the complaint was proved by the production of a copy. For that purpose the whole record was admissible. And it does not appear to have been offered or used for any other purpose. The court seems to have been careful to limit it to its proper effect. All the other parts of the case were proved by other and appropriate evidence.

It is true that the charges contained in the present complaint are substantially the same as those contained in the Sprague complaint. They go over the same ground, and their truth or falsity was involved in this investigation. To prove them the evidence of witnesses was offered and received, and the finding of the court in this case is based exclusively on their testimony. But these charges did not contain the whole issue. The ultimate question lay beyond them. The real question was whether or not the appellant was a fit person to be longer allowed the privileges of being an attorney. And on that question the fact of the existence of such a record would be legitimate and cogent evidence.

The last reason of appeal is that the court erred in rendering a judgment of disbarment, instead of suspension only for a reasonable and stated period. Examined somewhat more in detail, the record shows that prior to January, 1886, the appellant had had such professional relations with Margaret and Daniel Sprague that he believed they would come to him for professional advice and assistance if they should have any law business. In that month he engaged to collect a judgment rendered in the Supreme Court in Dutchess County, in the State of New York, against the said Daniel Sprague, and owned by one Emeline Kent, for the amount of \$1,849.82, with interest thereon from and after 1874. The appellant was authorized to settle for \$1,000 net to the owner of the judgment, and was to receive for his own services all he could obtain over \$1,000, up to \$1,500, and one third of the amount collected in excess of the latter sum. Daniel and Margaret Sprague were husband and wife. Daniel had no property; Margaret had some

property. In order to deceive the Spragues, and to cause them to believe, if they should come to him for advice or assistance, that he was not employed to collect the judgment, the appellant drew up and caused to be issued by another attorney a complaint against Daniel and Margaret Sprague in favor of the said Emeline Kent, to recover the amount due on the judgment. Upon this complaint the property of Margaret Sprague was attached. As soon as it was served the Spragues came to the appellant, and retained him as their counsel. He accepted that employment. He went to Dutchess County, and there learned that Margaret Sprague was not liable on the judgment. On his return he falsely stated to Mr. and Mrs. Sprague that she was liable on it, and that her property could be taken for it in the suit that had been served on them, and advised them to settle that suit on the most favorable terms they could. Relying on that advice they did settle, the said Margaret paying of her own money the sum of \$1,875 in settlement, of which sum the appellant received the stipulated proportion. The appellant knew that from the time of her employment of him as aforesaid until the settlement of the suit the said Margaret relied upon him as her counsel, and believed him to be acting solely in her interest and behalf. He was, however, at that time acting for and in behalf of said Emeline Kent, plaintiff in the suit, which the Spragues did not know. It is hardly possible to characterize such conduct by an attorney-at-law in measured terms. That it was a gross violation of the attorney's oath is only a moderate statement. That it manifested a low condition of moral sensibility is true, and that it showed

the appellant to be utterly wanting in the qualities which would entitle him to public confidence is also true. It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts himself in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the wit of man has been turned that may not become the subject of his inquiries. Then, of course, he must be specially skilled in the books and rules of his own profession. And he must have prudence, and tact to use his learning, and foresight, and industry, and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these great faculties, if once the practice becomes to him a mere "brawl for hire," or a system of legalized plunder where craft and not conscience is the rule, and where falsehood and not truth is the means by which to gain his ends, then he has forfeited all right to be an officer in any court of justice, or to be numbered among the members of an honorable profession.

There is no error in the judgment complained of.

The other Judges concurred.

MICHIGAN SUPREME COURT.

Daniel LOVEJOY *et al.*

v.

Jacob MICHELS, *Appt.*

(.....Mich.....)

1. The price fixed by a combination of manufacturers with sole reference to their own interests will not govern in determining

what a purchaser from one of them should pay for goods which he ordered and received, without any agreement as to price.

2. Argumentative comment on the evidence in the charge to the jury, the obvious tendency of which is to convey the Judge's impression regarding the testimony and to give direction to the verdict, is erroneous.

(October 16, 1891.)

NOTE.—Nature of monopolies; price fixed by an illegal combination is void.

A monopoly is a menace to the public. Its object and direct tendency are to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that it has in fact reduced the prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of a combination to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Alger v. Thacher*, 19 Pick. 51; *Stanton v. Allen*, 5 Denio, 434; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 672; *Hooker v. Vandewater*, 4 Denio, 349; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 188; *Craft v. McConoughy*, 79 Ill. 346; *Hannah v. Fife*, 27 Mich. 172.

Such a combination to effect such a purpose is inimical to the interests of the public, and all contracts designed to effect such an end are contrary 18 L. R. A.

to public policy, and therefore illegal. This is too well settled by adjudicated cases to be questioned at this day. *People v. Fisher*, 14 Wend. 9; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Saratoga County Bank v. King*, 44 N. Y. 87.

Modern adjudications have declared that all agreements tending to monopoly, or restraint of trade, or that have for their primary intent the destruction of competitive business and a consequent increase of price in the market value of commodities, are injurious to the commercial interests of the country, are contrary to public policy, and, therefore void. *Anderson v. Jett*, 89 Ky. —; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 569; *Hooker v. Vandewater*, 4 Denio, 349; *People v. Chicago G. Trust Co.* 41 Alb. L. J. 68; *Leonard v. Poole*, 4 L. R. A. 728, 114 N. Y. 371; *Stanton v. Allen*, 5 Denio, 434; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Clancey v. Onondaga F. S. Mfg. Co.* 62 Barb. 395; *People v. Fisher*, 14 Wend. 9-19; *Watson v. Harlem & N. Y. Nav. Co.* 52 How. Pr. 343; *Cent-*

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiffs in an action brought to recover the value of certain knives, which had been sold and delivered to defendant without any agreement as to price, in which defendant claimed that the price charged and recovered was too high. *Reversed.*

The facts are stated in the opinions.

Messrs. Conely, Maybury & Lucking, for appellant:

The court erred in that it clearly and distinctly indicated to the jury its opinion of the facts of the case, and the verdict which it thought ought to be rendered, and in making an attack upon the credibility of the defendant.

Wheeler v. Wallace, 53 Mich. 355; *Richards v. Fuller*, 88 Mich. 658; *People v. Gastro*, 75

Mich. 182; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51; *People v. Lyons*, 49 Mich. 82; *People v. Colerick*, 87 Mich. 362; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Hayes v. Homer*, 36 Mich. 376; *Perrott v. Shearer*, 17 Mich. 54; *Blackwood v. Brown*, 82 Mich. 107; *Davis v. Gerber*, 69 Mich. 246.

It was error to charge the jury: "It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not."

The indisputable facts were such that any disinterested person would at once pronounce the association an institution having for its sole end, aim, and object the crushing out of competition and the maintaining of prices.

See *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632.

tral Ohio Salt Co. v. Guthrie, 35 Ohio St. 672; *Colles v. Trow City D. Co.* 11 Hun. 397; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 182; *Craft v. McConoughy*, 79 Ill. 336; *Santa Clara Valley, M. & L. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211; *Ray v. Mackin*, 100 Ill. 246; *Hilton v. Eckersley*, 6 El. & Bl. 47; *People v. Stephens*, 71 N. Y. 545; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *Central R. Co. v. Collins*, 40 Ga. 582; *Saratoga County Bank v. King*, 44 N. Y. 87; *The Case of Monopolies*, 11 Coke, 84b; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; *Raymond v. Leavitt*, 46 Mich. 447.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, five coal companies entered into an agreement to divide two coal regions of which they had the control, to appoint a committee to take charge of their interests, which was to decide all questions, and appoint a general agent, through whom the coal mined was to be delivered. Each corporation was to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct; and the committee was empowered to adjust prices and freights and enter into agreements with other companies, by which the companies might sell their coal themselves only to the extent of their proportion, and at prices adjusted by the committee, and the agent to suspend shipments by either, beyond their proportion, the prices to be averaged and payments made to those in arrear by those in excess, and neither to sell coal otherwise than as agreed upon. This agreement was held by the court to be void, and incapable of being carried into effect. It was held to contemplate a business arrangement injurious to trade and commerce, and for that reason incapable of being legally supported. See *People v. North River Sugar Ref. Co.* 5 L. R. A. 886, 54 Hun. 354.

As to the illegality of contracts in restraint of trade, see *notes to Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 466; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *Carroll v. Giles* (S. C.) 4 L. R. A. 154; *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 38; *Gulf, C. & S. F. R. Co. v. State* (Tex.) 1 L. R. A. 849; *Lealie v. Lorillard* (N. Y.) 1 L. R. A. 456.

Market price, how determined.

The market price of a merchantable commodity may be determined as well by offers to sell, made by dealers in the ordinary course of business, as by actual sale, and statements of dealers in answer to inquiries as to price are competent evidence. *Harrison v. Glover*, 72 N. Y. 451.

The meaning of "market price," of "value of an article," is the price at which such articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale. This is the general

meaning of the expression. *Goodwin v. United States*, 2 Wash. C. C. 493.

The "actual market value" is the price which the owner or producer of the goods is willing to receive for them, if they are sold in the ordinary course of trade—the prices which the purchaser must pay to get them. *Re 8109 Cases of Champagne*, 1 Ben. 241.

In *Lush v. Druse*, 4 Wend. 314, the witness, who testified as to the market price, had inquired of merchants dealing in the article, and examined their books, thus giving the source of his knowledge.

In *Blydenburgh v. Welsh*, Baldw. 381, 340, it was said: "To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market price? Men sometimes put fantastical prices upon their property."

In *Trout v. Kennedy*, 47 Pa. 308, Strong, J., said: "If at any particular time there be no market demand for an article, it is not, of course, on that account of no value."

In *James v. Muir*, 38 Mich. 223, 227, Campbell, J., said: "In the present case it is sufficient to say that according to *Acobal v. Levy* [10 Bing. 376] there is, at least, no implication of a promise to pay at what may happen to be the market rate, which may not be always as there held, a reasonable rate." 1 Benjamin, Sales, Corbin's ed. § 86, note.

An offer to purchase may be some evidence of price. *Hotchkiss v. Germania F. Ins. Co.* 5 Hun. 90; *Terry v. McNeil*, 58 Barb. 241; *Whelan v. Lynch*, 60 N. Y. 469, 474.

A price-list, stating the price at which a manufacturer will sell, or statements of dealers in answer to inquiries, is competent evidence of the market-price of a marketable commodity, and is a common way of ascertaining or establishing a market-price. *Lush v. Druse*, 4 Wend. 314; *Cluquot's Champagne*, 70 U. S. 3 Wall. 114, 13 L. ed. 116.

If nothing has been said as to price, when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth; and where there is a conflict in the evidence as to the price agreed upon, the real value of the article may be shown. 1 Benjamin, Sales, Kerr's ed. § 90; *Hillenbrand v. Wittkemper*, 79 Ind. 180; *Johnson v. Harder*, 45 Iowa, 677; *Norris v. Spofford*, 127 Mass. 85; *Brewer v. Housatonic R. Co.* 107 Mass. 277; *Saunders v. Clark*, 106 Mass. 331; *Parker v. Coburn*, 10 Allen, 82; *Rennell v. Kimball*, 5 Allen, 366; *Bradbury v. Dwight*, 3 Met. 31.

A market value signifies a price established by public sales, or sales in the way of ordinary business, as of merchandise. *Murray v. Stanton*, 90 Mass. 345.

F. S. R.

In case the jury found the association to be unlawful, and the price to be fixed arbitrarily by them, then in arriving at the true market value, they might consider all the evidence in the case, including the market value, both before and after the time in question, and all other items of information as to value which were admitted in evidence.

2 Sutherland, Dam. 374.

Messrs. Bowen, Douglas & Whiting, for appellee.

McGrath, J., delivered the following opinion:

Defendant is a manufacturer of machines for cutting hoops, in which certain knives are used. He had dealt in the same knives for eight years, and bought from White Bros., of Buffalo, N. Y. One of the plaintiffs called upon defendant in September, 1888, soliciting orders for knives. Prices were talked over, and defendant claimed that he exhibited to plaintiff bills of knives which defendant had purchased from White Bros., and plaintiff said: "We will furnish you them at the same price you pay White Bros., and give you a better knife." The bills show the price per set to be \$58.28. Defendant gave no order at that time. In November following defendant ordered by letter, from plaintiffs, two sets of hoop knives. Nothing was said about prices in the order. Plaintiffs booked the orders, and the goods were shipped, one set November 30, and the other December 5. Defendant testified that he was in a hurry for the knives, and that the bills came several days after the knives were received; that when he received the knives the machines were waiting for them, and his customers were waiting for the machines. The sole controversy in the case is as to the price which defendant shall pay for these knives. Plaintiffs claim \$72.86 per set, and defendant admits an indebtedness of \$58.28 per set. Plaintiffs admit that they were members of the Knife-Makers' Association; that this association at that time embraced all the knife-makers in the United States; that the prices charged by plaintiffs and sought to be collected were fixed by the association; that one of the principal objects of the association was to keep up prices; that the members of said association agree to sell at the prices fixed by the association, and that in case of any violation of such agreement, the member violating should forfeit \$100; that the prices were subject to change without notice; that during the year 1888 there was a change made by the association, and twenty per cent added to the price. In answer to questions upon cross-examination, one of the defendant's witnesses said: "The Knife-Makers' Association was formed seven or eight years ago to keep up prices. In the early part of 1889 we [a new firm which had gone into the business in 1889, and was not in the association] cut 10 per cent on old prices, making 30 per cent off the list. Then later in the year the association cut 20 per cent on old prices, being 10 per cent below us. Then later on they cut 5 per cent more about holidays, and present prices were made early in 1890, making 45 per cent off the list. We followed to their figures."

Upon cross-examination of one of the plaintiffs, defendant's counsel sought to ascertain 18 L. R. A.

whether plaintiffs were governed in fixing prices by a printed schedule furnished by the association. Objection was made, and the court excluded the testimony, saying: "The only question is as to value; it don't make any difference how it was fixed. What could these knives be purchased for in the open market?" Counsel asked defendant when upon the stand what, in his judgment, was a fair market price for the knives in November, 1888, but the court excluded the testimony, saying: "Not what the fair market price was, but what the market price was,—what he could buy at from other manufacturers."

Defendant's counsel requested the court to charge the jury as follows: "(1) If you find that it was understood and agreed between Michels and Lovejoy, in September, 1888, that Lovejoy would make and furnish the knives to Michels at the same price as White had theretofore sold them, and that the order in question was given and accepted in pursuance of such agreement, then both parties are bound by it. (2) If no price was agreed upon, then plaintiff is entitled to recover the fair market value of the knives. (3) In arriving at such value, you are not bound by the price fixed by the Knife-Makers' Association. (4) The Knife-Makers' Association, under the evidence in this cause, was an unlawful combination for the purpose of fixing prices. (5) In arriving at the fair market value of the knives in question, you will consider all the evidence in the case, including the market value both before and after the time in question, and all other items of information as to the value, which have been admitted in evidence before you. (6) Even if plaintiffs could not have bought the goods elsewhere for less than the price fixed by plaintiffs, yet if you find from the evidence that such price was an arbitrary one, beyond the true value, temporarily maintained by an unlawful combination of manufacturers, then you are not bound by such price, but may fix the true market value from all the evidence in the case." These requests were refused.

The charge of the court contained the following: "Mr. Michels contends that he had some conversation with one of the plaintiffs in this case in September, when he was here, with reference to making certain knives, and he urges that his understanding at that time was that these knives should be made at the price that he had been paying for them heretofore, although there was nothing said with reference to these particular knives. Now, if there was any such understanding between Mr. Michels and the plaintiffs, why didn't he mention it in the letters that he wrote them after these goods were received? One of these letters was dated January 10, 1889, and it seems, from an inspection of these letters,—and they have been read to you,—that he make no reference whatever, in complaining of the price of these knives, that these knives were made by the plaintiffs for a price agreed upon in September. Now Mr. Lovejoy says that no such conversation ever took place as claimed by Mr. Michels. Mr. Michels says there was such a conversation. It is for you to determine whether there was or not. If there was, how does it happen that no reference to it was made in these letters to the plaintiff in January, 1890, after the receipt of

these goods? Now, there is another thing as bearing upon this price. These goods were made and shipped to Mr. Michels, he claiming that they were, as he supposed, to be \$58 a set; but it appears that there was an invoice sent with these goods at the time. Now, if the price was as contended by him, would he not, in the ordinary course of business, have made some complaint at once upon the receipt of these goods, seeing that they were charging for them 20 per cent more than he supposed he was to pay? This testimony in this case should be considered in all its bearings as determining the dispute between the parties. On the part of the defendant it is further contended that there was an unlawful combination between the manufacturers of such articles as these for the purpose of enhancing their price or putting their price beyond the real market value. If that is so, such a combination is unlawful, and the mere fact that the price is fixed in an arbitrary manner like that is not binding upon the jury in determining the real market value of the property. On the part of the plaintiff it is admitted that there was such an association or organization of the manufactures of knives or edge tools of this country; that they got together and put reasonable prices only upon their goods. Well, if that is a fact, then there would be nothing unlawful in such a combination as that. If they combine for the purpose of putting a fictitious value upon their goods, or for the purpose of driving small manufacturers out of the business by putting their goods down to a lower price than the market price, and below what they can be made for, and do this for the purpose of ruining such other manufacturers, such a combination is unlawful. It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not. The fact that there is an association would not justify the inference that it was unlawful or that it was formed for a purpose contrary to law. If without any reason they put an additional 20 per cent upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but if, on the other hand, as it is claimed, there was a great risk connected in the making of these particular knives, and, on account of the nicety of the work required and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent on it, I should say it was a legitimate act."

The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only "market price" was that fixed by the association.

In *Richardson v. Buhl*, 77 Mich. 682, 6 L. R. A. 457, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was

claimed that the combination had in fact reduced prices, and upon that point the court says: "It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree."

In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its character. Associations of this character give the buyer no voice, and close the market against competition.

In *Acebal v. Levy*, 10 Bing. 376, cited in 1 Benjamin on Sales, 108, the court declared that, when there was no express contract as to price, the price is to be a reasonable price,—“such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. The price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various causes.”

In *James v. Muir*, 33 Mich. 223-227, *Mr. Justice Campbell*, speaking for the court, says: “According to *Acebal v. Levy*, there is at least no implication of a promise to pay at what may happen to be the market rate, which may not be always, as there held, a reasonable rate.”

In *Kountz v. Kirkpatrick*, 72 Pa. 376, the court says: “Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its market value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because ‘value’ and ‘price’ are really convertible terms, but only because they are ordinarily so in a fair market. The market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not

as a conclusive legal presumption. Without adding more, I think it is conclusively shown that what is called the 'market price' or the quotations of the articles for a given day is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day has been unnaturally inflated."

It has frequently been held that the value of a commodity is not to be determined by the necessities of a particular buyer or the demands of a particular seller. If the "current price" is not conclusive upon the purchaser, because the vendor may have by some act of his own made that price unreasonable, or if it may be shown that the market price had been unnaturally inflated, how can it be said that a price fixed by a combination of the manufacturers of a given article, with sole reference to their interests, is to govern, to the exclusion of all other considerations? In such case there is no market price, and evidence of a fair market price or a fair market value is clearly admissible. In the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value.

The argumentative portion of the charge, relating to the letters written by defendant, was clearly erroneous. It could not fail to convey to the jury the impression formed by the trial judge regarding that testimony, and to give direction to their judgment. All inferences to be drawn from the testimony are exclusively for the jury, and not for the court. *Richards v. Fuller*, 38 Mich. 656; *People v. Gastro*, 75 Mich. 182, and cases cited. It is no part of the duty of the court to convince the jury as to matters of fact.

The judgment must be reversed, and a new trial ordered, with costs to defendant.

Morse, J., concurred with **McGrath, J.**

Champlin, Ch. J., delivered the following opinion:

In executed contracts of sale upon credit, where the price is not agreed upon at the time of sale, the law implies an understanding to pay what the commodity is reasonably worth. 1 Benjamin, Sales, § 85, p. 102. In *Acebal v. Lery*, 10 Bing. 376, the declaration alleged that the plaintiff had sold to the defendants a cargo of nuts, at a certain value, namely, the then usual and common shipping price for nuts at the port where the cargo was shipped, and that in consideration thereof defendants undertook and faithfully promised to accept the said nuts, and pay the plaintiff for the same on delivery thereof to the defendants. The declaration then alleged that the usual and common shipping price and value of the nuts at the port of shipment was at a certain rate, naming it; and that they were ready to deliver, and offered to deliver, the nuts to the defendants, but they refused to accept. In deciding the case, *Chief Justice Tindal* said: "Whether, in all cases of executory contracts of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to the price by inferring that the parties must have intended to sell and to buy at a rea-

sonable price, may be a question of some difficulty. Undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendant, in order to prevent the injustice of the defendant taking the goods without paying for them. But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession or under the control of the seller." And he further says: "A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the case shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the commodity may be highly unreasonable, from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

This case is cited and approved in *James v. Muir*, 38 Mich. 228. The principle underlying the decision is that the vendor cannot be permitted, by withholding the commodity from market or otherwise, to fix the current price of the commodity, and thus fasten upon the purchaser an implied agreement to pay such price. If the plaintiffs in this suit, by combining with other manufacturers or dealers, can thus arbitrarily establish the current price of the commodity sold, and if the purchaser can be held to have impliedly promised or agreed to pay the price so established, it follows that he may be obliged to pay a highly unreasonable price. I do not think a price so fixed by a combination of manufacturers or dealers is competent evidence to show a reasonable price of goods sold by the members of such combination. Such combinations to control prices are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute therefor the stimulus of unconscionable gain, whereby the participants in such combinations become enriched at the expense of the consumer, beyond what he ought legitimately to pay, under a healthy spirit of competition in the business community. The effect of such combinations to control prices is the same as that other class of contracts which has always been denounced as vicious, namely, contracts in restraint of trade. Public policy places its reprobation upon one equally with the other. These combinations to control prices are becoming very numerous, and affect, not only the staples of human sustenance, but nearly all the necessities of life and the necessities of business. Such combinations to control prices are against public policy, and void, on the ground that they have a mischievous tendency, so as to be injurious to the best interests of the State. The best interests of the State require that all legitimate business should be open to competition; that the current price of commodities should be controlled by the law of demand and supply; that the laws of commerce should flow in their accustomed channels, and should not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties. Of course,

what is said above does not apply to monopolies authorized by law; as, for instance, to patented articles. The odious features of illegal monopolies are plainly apparent. These can absolutely control the prices which the public shall pay, and it is this monopolistic feature of such combinations to control prices which stamps them as odious, because they exercise the franchises of the monopoly without the legal right. These views are supported in the following cases: *Anderson v. Jett*, 89 Ky. —; *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 9 L. R. A. 754; *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; *Hilton v. Eckersley*, 6 El. & Bl. 47; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600, 617; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160; *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Leavitt*, 46 Mich. 447; *Faulds v. Yates*, 57 Ill. 416; *Wright v. Ryder*, 36 Cal. 842.

I have no doubt that in executory contracts of sale, where the goods have not been accepted, such prices so fixed cannot be recovered; and I am also of opinion that such price so fixed is no criterion of the market value or current price in an action brought for goods sold and delivered, where no price has been agreed upon. In this case the goods have been ordered and accepted without any reference to the price to be paid. The law presumes that defendant intended to pay what the knives were reasonably worth. As pointed out in *James v. Muir*, 38 Mich. 223, the market value and the reasonable worth of a commodity are not always the same. Ordinarily the market value is evidence of what goods are reasonably worth. *Kountz v. Kirkpatrick*, 72 Pa. 376, 386; *Benjamin, Sales*, p. 103, § 86. If there be no market value of manufactured goods, the evidence to establish the reasonable worth must necessarily be the cost of production, which would include the cost of labor and material, and a reasonable profit on the cost of production. The testimony must be submitted to the jury, and it is their province to determine from such testimony the reasonable worth of such goods. It does not rest with the witnesses to swear what they are reasonably worth, but they may state the facts from which the jury may determine the reasonable worth. Nor can this court pass upon that question. It is one of fact, and not of law. *Becker v. Hecker*, 9 Ind. 497. Generally speaking, it is competent for a witness, after he has been shown to be qualified to express an opinion as to value of the thing in dispute, to state to the jury what his opinion as to value is. But such opinions are not absolutely binding upon the jury, but only as persuasive, and may be considered by them in arriving at their own conclusion. *Thompson, Trials*, § 380.

In order to pass upon the specific questions raised by the assignment of errors, it is necessary

to specify with more particularity what the record shows. The declaration in this case was upon the common counts in assumpsit, and the bill of particulars for goods sold August 29, 1889. This, however, is not the true date of sale. The plea was the general issue, with notice of recoupment. On the trial in the circuit the plaintiffs claimed to recover \$139.89 and interest. The defendant admitted the plaintiffs' claim to the amount of \$116.06, less \$6, under the plea of recoupment. Under the charge of the court the jury returned a verdict of \$140.74, for which plaintiff had judgment. The sale of the goods was through a written order signed by defendant, and mailed to plaintiffs in November, 1888, for two sets (six knives) hoop knives, one half inch thick, to be so made that they will interchange one with the other. The plaintiffs are manufacturers of machine knives of all kinds, at Lowell, Mass. They received the order on November 30, and December 5, 1889, the knives were shipped to defendant and received by him. The defendant claims that they were not exactly according to the pattern furnished, and that he expended some \$6 in fitting them. On the same day the goods were shipped a bill was forwarded to defendant charging him \$72.86 per set for the knives, and 20 per cent extra for manufacturing so that they could be used as one knife, or \$14.57 for this purpose. Thus the total bill for the two sets amounted to \$174.86, from which the plaintiffs discounted 20 per cent to the trade, leaving a balance of \$139.89, the amount they claimed due them. Elwin W. Lovejoy, one of the plaintiffs, testified that the plaintiffs charged the regular market price of \$72 per set; that the price was \$174.86 for the two sets, less discount to the trade of twenty per cent, making \$139.89, which he testified was a reasonable charge, and was the market price for the knives, exactly such as would be charged by other dealers for the same knives; and that the goods were sold on thirty days' time. He also testified that the plaintiffs made the knives from a pattern furnished them before that time, along in the summer, by Michels. It appears from the testimony that plaintiffs are members of what is called the "Machine Knife Makers' Association," and at the time of the trial all the manufacturers of knives in the United States were members of that association, with the exception of the Anderson Knife & Bar Association, located at Anderson, Ind. But this association had not commenced the manufacture of knives at the time the goods in this case were sold. The association of which the plaintiffs were members was formed in 1882, for the purpose of keeping up the prices on the goods, and that such was its principal object was testified to by Lovejoy. Every member of the association is bound by agreement to maintain the prices fixed by the association, and there is a clause in the agreement that a man who does not sell at these prices shall forfeit \$100. The plaintiffs agreed to sell at the regular prices fixed by the association. It further appears that the prices charged for the goods sold defendant are the regular prices fixed by the association, and the reason why the plaintiffs fixed these prices was because the association had before that fixed it at the same price.

These prices are fixed twice a year, in January and July, and the witness Lovejoy testified that he was one of the persons who assisted in fixing the prices. It also appears that in July, 1888, the association advanced the prices, as claimed by the witness, 20 per cent from what had been the prices prior thereto in 1887 and 1886, and that no notice of such advances had been given to their customers; that at former prices goods such as these sold to defendant had been sold at a fair profit. The prices for which they had been fixed prior to July, 1888, was \$58.28 a set, this price having also been fixed by the association; and it further appears that there had not been 20 per cent difference in the cost of making knives. The association raised the price in July from \$58.28 for knives such as those sold to defendant to \$72.86, an increase of 25 per cent. The plaintiffs then added 20 per cent more because defendant ordered them to be made so as to be used interchangeably, or \$14.57 each set, and then made a discount of 20 per cent on the whole amount to the trade. The defendant had purchased such knives in 1886 and 1887 of a firm in Buffalo, N. Y., who were members of the association, and had charged therefor the prices fixed by it, namely, \$58.28 a set, and plaintiffs were aware that this price was fixed by the association. It was the theory of plaintiffs that the price fixed by the association was the market price, because that price was what all the members of the association sold the goods for; and they produced several witnesses to testify that the price sued for was the market price, but these witnesses were members of the association, and testified that they regarded the prices fixed by the association as the market price. No other criterion to ascertain the reasonable worth of the goods sold was given by the plaintiffs' witnesses.

The defendant's theory was, first, that he had agreed with plaintiffs, in an interview with Mr. Lovejoy a short time before he gave the order, that plaintiffs should furnish the knives for the same price that he had been paying to the Buffalo firm; that the inducement held out by Lovejoy was that plaintiffs would make him a better article. This was denied by Lovejoy. The defendant's contention, further, was that the agreement made by the association to fix the prices, to which all the members were bound, embracing, as it did, nearly the whole of the manufacturers of such goods in the United States, and the whole, with one exception, was an unlawful combination, entered into for the purpose of controlling prices of such goods, based, not upon the market value or upon what such goods were reasonably worth, but upon the arbitrary determination of the members for the purpose of profit, and such price so fixed was no evidence of what such goods were reasonably worth; that his liability could not extend beyond the reasonable worth of such goods; that the price charged for which plaintiffs sued and recovered was unreasonable; and, as relevant to this issue, he claimed the right to show by the plaintiffs' witness Lovejoy who had, with others, raised the price 20 per cent, and had testified that such price was reasonable, that in June, 1888, he was selling this same kind of goods for \$58.28, and

that the cost of production had not increased, and that in June plaintiffs regarded \$58.28 as a reasonable price. I think, upon cross-examination of this witness, the defendant was entitled to inquire of him, "What was the price of these knives in June, 1888?" and that the court erred in excluding the answer. He also erred in not permitting the witness Lovejoy to answer this question: "Was there any increase in the cost of making these knives in November from what there was in June?"

Defendant's counsel requested the court to charge the jury as follows: "First, If you find that it was understood and agreed between Michels and Lovejoy in September, 1888, that Lovejoy would make and furnish the knives to Michels at the same price as White had theretofore sold them, and that the order in question was given and accepted in pursuance of such agreement, then both parties are bound by it." This request was given, but in language and with observations which counsel for defendant deemed subject to exception. The learned judge said: "Mr. Michels contends that he had some conversation with one of the plaintiffs in this case in September, when he was here, with reference to making certain knives, and he urges that his understanding at that time was that these knives should be made at the price that he had been paying for them heretofore, although there was nothing said with reference to these particular knives. Now, if there was any such understanding between Mr. Michels and the plaintiffs, why didn't he mention it in the letters that he wrote them after these goods were received? One of these letters was dated January 10, 1889, and it seems, from an inspection of these letters,—and they have been read to you,—that he made no reference whatever, in complaining of the price of these knives, that these knives were made by the plaintiffs for a price agreed upon in September. Now Mr. Lovejoy says that no such conversation ever took place as claimed by Mr. Michels. Mr. Michels says there was such a conversation. It is for you to determine whether there was or not. If there was, how does it happen that no reference to it was made in these letters to the plaintiffs in January, 1890, after the receipt of these goods? Now, there is another thing as bearing upon this price. These goods were made and shipped to Mr. Michels, he claiming that they were, as he supposed, to be \$58 a set. But it appears that there was an invoice sent with these goods at the time. Now, if the price was as contended by him, would he not, in the ordinary course of business, have made some complaint at once upon the receipt of these goods, seeing that they were charging for them 20 per cent more than he was supposed to pay? This testimony in this case should be considered in all its bearings, as determining the dispute between the parties." We have had occasion heretofore to call attention to the impropriety of the trial judge calling the attention of the jury to a particular part of the testimony of a witness for comment, and everything that savors of argument had much better be left to the hired advocates of the parties. Some points in the testimony of a witness may strike a trial judge as inconsistent with disclosed facts, but there is dan-

ger of creating a prejudice against the witness, to the detriment of the rights of the parties, if the trial judge steps aside from instructions as to the law which governs a case to draw inferences from facts disclosed. It is exclusively within the province of the jury to draw such inferences. Everyone who reads this charge, and anyone hearing it given, must have been impressed with the idea that the trial judge did not believe the testimony of the defendant, Michels. He pointed out inferences which might be drawn by the jury which were apparently inconsistent with the idea of a contract. He failed to observe upon the testimony of the plaintiff, given upon his direct examination, that "we made the knives from a pattern furnished before that time, along in the summer, by Michels;" and the inference that might be drawn therefrom; and he might have added, with equal pertinency, Why, if there had been no contract or agreement previous to the written order, had Michels furnished plaintiffs with a pattern for the knives? I mention this for the purpose of showing the impropriety of attempting an argument to the jury by a judge upon the facts, unless it is argued fully for both sides. These witnesses were parties, and their testimony was conflicting, and their credit should have been left to the jury, without pointing out upon one side inferences which might tend to affect it. *Williams v. Sheldon*, 61 Mich. 815; *Bulen v. Granger*, 63 Mich. 311; *People v. Finley*, 38 Mich. 486; *People v. Colerick*, 67 Mich. 362; *People v. Gastro*, 75 Mich. 127; *Kelly v. Emery*, 75 Mich. 147.

The court further charged the jury as follows: "On the part of the defendant, it is further contended that there was an unlawful combination between the manufacturers of such articles as these, for the purpose of enhancing their price or putting their price beyond the real market value. If that is so, such a combination is unlawful, and the mere fact that the price is fixed in an arbitrary manner like that is not binding upon the jury in determining the real market value of the property. On the part of the plaintiff it is admitted that there was such an association or organization of the manufacturers of knives or edge-tools of this country; that they got together, and put reasonable prices only upon their goods. Well, if that is a fact, then there would be nothing unlawful in such a combination as that. If they combine for the purpose of putting a fictitious value upon their goods, or for the purpose of driving small manufacturers out of the business by putting their goods down to a lower price than the market price, and below what they can be made for, and do this for the purpose of ruining such other manufacturers, such a combination is unlawful. It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not. The fact that there is an association would not justify the inference that it was unlawful or that it was formed for a purpose contrary to law. If, without any reason, they put an additional 20 per cent upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but

if, on the other hand, as it is claimed, there was a great risk connected with the making of these particular knives, and on account of the nicety of the work required, and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent on it, I should say it was a legitimate act." What I have said in the beginning of this opinion need not be repeated; much that is said in the instruction is a correct statement of the law, but testimony was ruled out that would have thrown light upon the question as to whether the purposes of the association are only "to put reasonable prices upon their goods." The testimony of the members of the association cannot be taken as undisputed or indisputable. On the contrary, the testimony in the case before referred to was sufficient, in my judgment, to condemn the object of this association as unlawful. The reasonableness of the prices must depend upon the cost of production, the cost of material used, the risks of the business, the labor of producing, the demand for the goods, and all those facts which tend to show the reasonable worth of the articles, and there can be no market value of the article where its current price is not affected by competition, but, on the other hand, competition is disarmed by combination, and the price is fixed arbitrarily by the sellers, to which all engaged in selling must conform. The judgment should be reversed, and a new trial granted.

Grant, J., delivered the following opinion:

This suit is brought to recover the price of two sets of knives used in hoop-machines. Plaintiffs carried on their business in Lowell, Mass., while the defendant resided and did business in Detroit, Mich. Defendant sent a written order in November, 1888, without any reference to price. Defendant's counsel insist that these goods were ordered in reliance upon an agreement made in September previous between himself and plaintiff E. W. Lovejoy, who visited him in Detroit. Defendant's version of the conversation then had fails to establish an agreement. Mr. Lovejoy at that time solicited an order, but defendant told him he did not need any knives then, and made no promise to order any in the future.

1. This claim of defendant is based entirely upon the statement of defendant, which is that he showed Mr. Lovejoy some bills of knives purchased from White Bros., and that Lovejoy said: "We will furnish you them at the same price that you pay White Bros." This conversation was two months or more prior to the written order of defendant. There is not a *scintilla* of evidence tending to show any agreement, or even understanding, that defendant would order goods from plaintiffs in consequence of this statement or any other. Courts cannot manufacture contracts for parties out of such statements. Did defendant agree to buy? Did he agree to order? If he agreed to do either, when was the contract to be performed? Was this a standing offer to be accepted by defendant at any time in the future? Furthermore, defendant in his written order made no reference to this conversa-

tion, nor did he testify that he gave it, relying upon Lovejoy's statement. The court left it to the jury to determine whether this conversation constituted an agreement. The alleged erroneous instructions of the court upon this branch of the case become immaterial, for the finding of the jury was such as the court should have instructed them to find.

2. The price charged was \$72.86 per set with 20 per cent extra. From the total bill a discount of 20 per cent was allowed, leaving the amount claimed \$189.89. Defendant admitted his liability for all except the extra 20 per cent, amounting to \$29.14. This price was fixed by the Machine Knife Makers' Association of the United States, of which plaintiffs were members, and which then embraced all the knife-makers in the United States. Under its rules, its members were required to charge association prices, under a penalty of \$100 for neglect to do so. These knives were what were called "special knives," so made as to form in reality one knife. Evidence on the part of the plaintiff showed that greater care was required in their manufacture than in that of ordinary knives, and that the price charged afforded a reasonable profit. Defendant's counsel requested the court to instruct the jury that this combination was unlawful. This the court refused, but did instruct them that "an arbitrary price fixed by such an association was not binding upon them in determining the market value of the property, but that there was nothing unlawful in their combining and putting reasonable prices upon their goods; that the fact that there is an association would not justify the inference that it was unlawful, or that it was formed for a purpose contrary to law; that if, without any reason, they put an additional twenty per cent upon these knives, merely using this power that they had arbitrarily, for the purpose of controlling the market, that would be unlawful on their part; but if, as it is claimed, there was a great risk connected with the making of these particular knives, and on account of the nicety of the work required, and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this twenty per cent on it, I should say it was a legitimate act."

Associations of manufacturers are not necessarily unlawful. The evidence does not show that the sole object of this association was to control prices. The association might be entirely lawful, while an arbitrary price fixed by it would not bind a purchaser who had not expressly agreed to pay it. The court would certainly have been justified, under the plaintiff's evidence, in instructing the jury that this 20 per cent so fixed by this association did not bind the defendant, and did not make a market price. But, in addition to the instruction I have above quoted, the court instructed the jury that the combination was unlawful, if formed for the purpose of enhancing the price, or putting it beyond the real market value. There was no evidence that the price was unreasonable, or afforded more than a fair profit. The only error in these instructions was in not informing the jury that as to this 20 per cent there was no evidence of a market value, for a

combination cannot fix a price arbitrarily, and make it the market price, and that the only question for them was the reasonable worth of the knives. But the failure to so instruct the jury is not complained of. If the case made was one for a jury to determine the "fair" or "real" market value, I think the charge fairly submitted that question to the jury, and that no error, was committed in refusing to charge that the association was unlawful.

3. Did the court commit any errors in rejecting testimony offered by the defendant? The defendant was asked by his counsel to state the fair market value of these knives. The court rejected this testimony as incompetent, but limited the question to the market price. It is insisted that this ruling limited him to the price fixed by the association. The price of commodities bought and sold may be fixed in three ways: (1) by express agreement; (2) by the market; (3) by the actual value. It must be remembered that we are dealing with an executed contract, one of those daily commercial transactions between buyer and seller, where the one orders, and the other completes the transaction by delivering the goods. In such cases the price must be determined in one of the three ways above mentioned. If there be no express agreement and no market price, the contract then is to pay what the commodity is reasonably worth. As already shown, there was no express agreement as to price, and no market price. Therefore the only issue to be tried was, Was this additional 20 per cent reasonable, affording only a fair profit to the plaintiffs? A market price is the price fixed by fair and open competition in an open market, where sellers and buyers stand upon an equal footing. Legally the price so established is fair, and fixes the reasonable worth of the commodity. When the price is high, the purchaser may call it unfair; when the price is low, the seller may call it unfair; but in law both are fair, and, in the absence of any express agreement, seller and purchaser alike contract with reference to it. Upon no other basis can the great commercial transactions of the world be carried on. The immense granaries of this country are filled with products which represent labor, some of which has been remunerative, and others unremunerative, according to the character of the soil and the industry and management of the laborers and other conditions. If the market price of wheat reaches \$1.25 to \$1.50 per bushel, will a purchaser be permitted by the law to say to the farmer who sells: "That is not a fair market price; it allows you too much profit, and therefore is not binding upon me?" On the other hand, if the market price of the same commodity is so low as not to afford the farmer a reasonable profit, can he say to the purchaser of his grain: "The market is unfair, and affords me no profit, and therefore you must pay more." If there be a "fair market price," distinguishable in law from the "market price," then there is no such thing as a "market price," binding upon sellers and buyers, unless they contract with express reference to it; but it must be left to a jury in each case to determine what is the fair market value. The same rule must apply to manufactured commodities, the price of which is ordinarily fixed by such competition in an

open market. But a price fixed by a combination of sellers or of buyers is not a market price, and binds no one. The testimony was therefore, in my judgment, properly rejected by the court.

4. A witness for plaintiffs testified that if he had made the same knives for defendant he would have charged the same price that plaintiffs charged, and that it was a "fair market price." Upon cross-examination, he was asked the price he had manufactured them for before. This testimony was rejected by the learned circuit judge upon his own motion, and without any objection from plaintiffs. This testimony was competent, and should have been admitted.

5. During the progress of the trial the court, in the presence of the jury, used the following language: "The only question is as to the value; it don't make any difference how it is fixed. What could these knives be purchased for in the open market?" I think these and other similar remarks were erroneous, for the reasons above given, and tended to mislead the jury; and for these errors the verdict should be set aside, and a new trial ordered. I do not think that the defendant presented his case upon the proper theory, and therefore no costs should be allowed. The testimony he offered and his requests to charge were based solely upon the idea of a fair market value.

Long, J., concurred with Grant, J.

PENNSYLVANIA SUPREME COURT.

George C. HAMILTON *et al.*

v.

Stephen S. JACKSON *et al.*,
Impleaded, etc., *Appts.*

(....Pa....)

1. Subscribers to the stock of corporations which never become fully organized because all the stock is not taken, but which are merged with their consent in a new corporation, cannot set up illegality of the merger or the lack of corporate character of any or all of the companies to defeat their liability as against

creditors of the new company after they have permitted it to incur liabilities.

2. Administration in one county will not prevent an administrator of a stockholder from being joined as defendant in another county in a suit in equity to enforce the liability of stockholders.

(October 5, 1891.)

A PPEAL by defendants S. S. Jackson, R. C. Winslow and A. E. Litch, administrator of Thomas K. Litch, deceased, from a decree of the Court of Common Pleas for Warren

NOTE.—Corporations are amenable to the rules governing equitable estoppel.

Where both the contracting parties are duly chartered as corporations, the one entering into the contract cannot subsequently deny the corporate existence of the other. The principle of estoppel may be successfully invoked. *Smelser v. Wayne & U. S. L. Turnp. Co.* 32 Ind. 419; *Douglas County v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Swartwout v. Michigan A. L. R. Co.* 24 Mich. 396; *Jones v. Bank of Tennessee*, 8 B. Mon. 128; *Bigelow, Estoppel*, 2d ed. 424; *Dutchess Cotton Mfrs. v. Davis*, 14 Johns. 244; *Hubbard v. Chappell*, 14 Ind. 601; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 416; *St. Louis Comrs. v. Shields*, 62 Mo. 251; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205; *Brownlee v. Ohio, I. & I. R. Co.* 18 Ind. 70; *Methodist Episc. U. Church v. Pickett*, 19 N. Y. 485; *Kennedy v. Cotton*, 28 Barb. 59.

In the case of the associates in the corporate management and those who have had dealings with it, there is a mutual estoppel, resting upon broad grounds of right, justice and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers. *Armstrong v. Harvey*, 11 Ohio St. 527; *Methodist Episc. U. Church v. Pickett*, *supra*; *Brouwer v. Appleby*, 1 Sandf. 158; *Ewing v. Robeson*, 15 Ind. 29.

The State itself, it has been held in this State, may be precluded by its action or neglect from denying the incorporation (*People v. Maynard*, 15 Mich. 463); or from taking advantage of a forfeiture after long acquiescence. *People v. Oakland County Bank*, 1 Doug. (Mich.) 232.

In further illustration of these views, reference is made to *Smith v. Heldecker*, 39 Mo. 157; *Goodrich v. Reynolds*, 81 Ill. 490; *Low v. Connecticut & P. R.* 18 L. R. A.

Co. 45 N. H. 378; *Society for Visitation of Sick v. Com.* 32 Pa. 125; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275.

The injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them is obvious. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. Their powers are prescribed by statute, and everyone who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, it is conceded that the corporation would be estopped from setting up that its contract was *ultra vires*. *Bissell v. Michigan S. & N. I. R. Co.* 22 N. Y. 258.

The sound rule upon the subject is this: A private corporation will be estopped to set up the defense of *ultra vires* in respect to all acts and contracts within the apparent scope of its powers; and that both private and public corporations will be estopped to set up such defects in their establishment or organization, or in the preliminaries to the execution of their acts, as are peculiarly within their own knowledge. *Bigelow, Estoppel*, 2d ed. 423.

Corporate powers are limited by charter recital.

The powers of a corporation are such, and such only, as are conferred on them by the Acts of the Legislature of the several States under which they are organized. *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 32 L. ed. 837.

That a corporation, as a creature of the Legislature, can possess and exercise "no other powers than those specially conferred by the Act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created"

County in favor of plaintiffs, who were creditors of the Clarion, Mahoning & Pittsburgh Railroad Company, in an action brought to enforce payment of plaintiff's claims out of unpaid subscriptions to the stock of the debtor corporation. *Affirmed.*

From the findings of the master the following facts appear:

The Mahoning & Susquehanna Railroad Company was incorporated by an Act of Assembly approved April 19, 1854. Supplements to this Act were passed on March 24, 1865, April 9, 1869, April 3, 1872, and April 5, 1873, which made some changes in the commissioners appointed to open subscription books and in the limit to the amount of capital stock, and provided for the extension of time for the completion of the road.

What if any steps were taken to organize this company did not appear, nor did it appear who were its stockholders or what the amount

of unpaid stock subscription. No part of this road was ever built or completed.

The Conewango & Clarion Railroad Company became incorporated by Articles of Association filed in the office of the secretary of the Commonwealth on November 22, 1881. Its capital stock was fixed at 20,000 shares of the par value of \$50 each. Defendants became subscribers to this stock. The total number of shares subscribed for was 4,008 shares.

These two companies by a joint agreement dated December 6, 1881, and filed in the office of the secretary of the Commonwealth were consolidated and merged into one company, named the Clarion, Mahoning & Pittsburgh Railroad Company. By the agreement the companies undertook to consolidate all their rights, powers, privileges, franchises, corporate stock, etc., so that they might form one company, but agreed that all stock actually subscribed for should be canceled.

(Caldwell v. Alton, 33 Ill. 416, 418); that it cannot of its own motion absolve itself from its obligations by transferring its franchise to another (Thomas v. West Jersey R. Co. 101 U. S. 71, 26 L. ed. 950); and that it cannot by a vote of a majority of the stockholders arbitrarily deprive a minority of their interest in its property and practical existence (Kean v. Johnson, 9 N. J. Eq. 413).—are propositions too plain to be disputed. *Boston & P. R. Corp. v. New York & N. E. R. Co.* 13 R. I. 290.

So Nelson, Ch. J., in *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, says: "The charter is the fundamental law of the association—the constitution which prescribes limits to the directors, officers, and agents of the company not only, but to the action of the body corporate itself, and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished, or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent."

Acts ultra vires of the corporation.

Robbins v. Clay, 38 Me. 132, decides that the directors of a corporation, as such, and without special authority for that purpose, have no authority to make sale of any portion of its property, which is essential for the transaction of its customary business. *Kean v. Johnson*, 9 N. J. Eq. 401; *Bagshaw v. East R. Co.* 7 Hare, 114, and *Bank of Comrs. v. Bank of Brest*, *Harr. Ch. (Mich.)* 101, are strongly confirmatory of the decision, *supra*.

An act which, to all intents, terminates the corporation, by taking from it its power to fulfill the purposes of its organization, is not consistent with the purposes of its constitution. That which changes the nature and business of a corporation from that for which it was created does effectually destroy it for all the purposes for which it was formed. It is no longer the same corporation. An act which compels a corporation to change its business is no less valid and repugnant to its charter than an act that directly makes the change. A similar act was styled by Judge Willard "an act of self-destruction which the law cannot tolerate." *Conro v. Port Henry Iron Co.* 12 Barb. 64.

The chancellor held, in *Ward v. Sea Ins. Co.* 7 Paige, 294, 4 L. ed. 162, "that the directors of a corporation could not, even with the consent of the stockholders, discontinue the corporate business and distribute the capital stock among the stockholders, unless expressly authorized by legislative Act." It is true that this decision proceeds upon principles of public policy, but it throws light upon 18 L. R. A.

the question as to the power of directors and the limitations upon their power.

So, also, a lease or sale of one railroad to another, without express authority from the Legislature, is beyond the power of the directors or a majority of the stockholders as against a dissenting stockholder. It is a violation of the implied contract between the corporation and each stockholder that the business prescribed in the charter will be pursued until the dissolution of the corporation. Generally the lease of a railroad is made under an agreement whereby the stockholders of the old corporation are guaranteed a certain income. The effect in any case, however, is not a continuation of the business of the old corporation, but an abandonment of it. It is an act *ultra vires* of the corporation, and in violation of the contract between the corporation and its stockholders. A single stockholder may obtain an injunction against the lease, or if it is already made, may go into a court of equity and have it set aside. *Cook, Stock and Stockholders*, 2d ed. § 668, citing *Winch v. Birkenhead, L. & C. J. R. Co.* 5 De G. & S. 562; *Cass v. Manchester J. & S. Co.* 9 Fed. Rep. 640; *Stevens v. Davison*, 13 Gratt. 819; *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230; *Tippacanoe County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 85; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 465, reversing 22 N. J. Eq. 130; *Simpson v. Denison*, 10 Hare, 51; *Clinch v. Financial Corp.* L. R. 5 Eq. 450; *Kean v. Johnson*, 9 N. J. Eq. 401.

But though a corporation cannot directly put an end to its existence, and merge it by any process of amalgamation in that of another, yet it may accomplish this in an indirect and circuitous manner. It may do so by transferring its property, funds, rights, and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding up. Generally the arrangement is supplemented by a proviso, whereby the transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect of claims, existing or prospective. *Green's Brice, Ultra Vires*, 607, citing *Anglo-Australian L. Assur. Co. v. British Provident S. & F. Soc.* 3 Giff. 521, 4 De G. F. & J. 341; *Re Albert L. Assco. L. R.* 11 Eq. 164.

Consolidation; amalgamation; merger.

Authority is frequently given to corporations either by special charter or by general law, "to consolidate" with other corporations. The meaning to be attached to the word "consolidated," when thus applied, and the important legal consequences following from a consolidation, have, as yet, been only partly determined by the courts. It

This agreement was signed *inter alia* by Stephen S. Jackson and R. C. Winslow, both of whom became officers of the new company. Thomas K. Litch was named as a director of the new company.

The capital stock of the new company was fixed at 120,000 shares of the par value of \$50 each. It did not appear that any of this stock was subscribed for.

On December 21, 1881, the Clarion, Mahoning & Pittsburgh Company entered into a contract for the construction of its road, which was signed by Jackson and Winslow. Nothing was ever done under this contract. There has been no election of directors, or work done under the company's charter since 1883. During the period from November, 1884, to June, 1886, plaintiffs recovered judgments against the company, which is insolvent.

As conclusions of law, the master found, *inter alia*, as follows:

is plain that corporations cannot be consolidated without the consent of the shareholders of both companies, and that this consent cannot be implied. A consolidation would involve the formation of a new company by the shareholders, under a new constitution. *Morawetz, Priv. Corp.* 2d ed. §§ 939, 940.

The Legislature may, when public necessity requires it, grant authority to consolidate existing connecting railroad routes, if they provide a just compensation for the shares of such stockholders as dissent. *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455.

As a general rule, the consent of every stockholder is necessary for consolidation, and those who dissent cannot be compelled. *Ibid.*; *Kean v. Johnson*, 9 N. J. Eq. 401; *Fisher v. Evansville & C. R. Co.* 7 Ind. 407; *Blatchford v. Ross*, 5 Abb. Pr. N. S. 434, 54 Barb. 42; *Chapman v. Mad River & L. E. R. Co.* 5 Ohio St. 119. And see *Re Empire Assur. Co.* L. R. 4 Eq. 341.

There is no power to force a dissenting stockholder to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604. And see *McMahan v. Morrison*, 16 Ind. 172; *Mowrey v. Indianapolis & C. R. Co.* 4 Bias. 78.

And a consolidation without his consent relieves him from liability on his subscription, or entitles him to recover his interest. *Shelbyville & R. Turnp. Co. v. Barnes*, 42 Ind. 498; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42; *Illinois G. T. R. Co. v. Cook*, 28 Ill. 237. Compare *Cork & T. R. Co. v. Paterson*, 18 C. B. 414; *Midland G. W. R. of Ireland v. Leech*, 3 H. L. Cas. 872; *Boone, Corp.* § 188.

Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the Statute. *Re Prospect Park & C. I. R. Co.* 67 N. Y. 371.

That the company with which the consolidation is effected belongs to another State is immaterial. *Scotland County v. Thomas*, 24 U. S. 682, 24 L. ed. 219.

Strictly speaking, a merger of one corporation into another "is a dissolution, destroying the actual identity of both, while the legal identity of one of them is preserved. As where a life estate is merged into a fee simple, one being destroyed and the other enlarged by the operation." *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42.

The consolidation may be authorized either by the charters of the corporations, by general laws, 18 L. R. A.

3. It is not a good defense to the defendants in this action, that the Conewango & Clarion Railroad Company and Mahoning & Susquehanna Railroad Company were merged and consolidated into a new company as the Clarion, Mahoning & Pittsburgh Railroad Company. The regularity of such merger and consolidation cannot be questioned collaterally in this proceeding.

4. The Clarion, Mahoning & Pittsburgh Railroad Company being a *de facto* if not a *de jure* corporation, the defendants who have dealt with it in its corporate capacity cannot in this proceeding question the legality of the corporation.

5. As against these creditors of the Clarion, Mahoning & Pittsburgh Railroad Company, the defendants cannot defend on the ground that all the stock of the corporation has not been subscribed for.

6. The agreement in the articles of consolidation of the Conewango & Clarion Railroad

by an Act passed subsequent to the incorporation of the several companies, or by legislative recognition and ratification of the proceeding. 1 *Waterman, Corp.* § 153, citing *Bishop v. Brainerd*, 28 Conn. 289; *Mead v. New York, H. & N. R. Co.* 45 Conn. 199; *Mitchell v. Deeds*, 46 Ill. 416; *McAuley v. Columbus, C. & I. R. Co.* 83 Ill. 348. See *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

After the consolidation all debts due to or rights of action vested in either of the previously existing companies are vested in the new company. *London, Brighton & S. C. R. Co. v. Goodwin*, 3 Exch. 230; *East Union R. Co. v. Cochrane*, 24 Eng. L. & Eq. 495.

Where two or more railroad companies are consolidated, as far as the creditors of one of the original companies are concerned, the consolidated company is successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditors have no claim against it upon their original contracts but only by virtue of its assumption of the obligations of the old companies. *Prouty v. Lake Shore & M. S. R. Co.* 52 N. Y. 363.

The English doctrine of amalgamation.

The recognized English doctrine on the subject of amalgamation is, that a majority of the members cannot amalgamate, and transform shares from one association into another, as such a proceeding would be *ultra vires*. *Field, Corp.* § 425.

Mr. Brice observes: "It may do so by transferring its property, funds, rights and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by a winding-up. Generally the arrangement is supplemented by a proviso, whereby a transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect to claims existing or prospective. This, after all, is not an amalgamation; it is not a union of one corporation with another, but is simply a transfer of assets, with attendant responsibilities. It is, however, a sufficient amalgamation for all practical purposes, and it is therefore the process always adopted." *Green's Brice, Ultra Vires*, 518; *Anglo-Australian L. Assur. Co. v. British Provident S. & F. Soc.* 3 Giff. 521, 4 DeG. F. & J. 341. See also same principle in *Hodges v. New England Screw Co.* 1 R. I. 312, 3 R. I. 9; *Booth v. Bunce*, 33 N. Y. 139; *Rorke v. Thomas*, 56 N. Y. 559; *Barclay v. Quicksilver Min. Co.* 9 Abb. Pr. N. S. 233, 6 Lans. 25; *Kelly v. Mari-posa L. & Min. Co.* 4 Hun, 632. F. S. R.

Company and Mahoning & Susquehanna Railroad Company, that all their stock actually subscribed for shall be canceled, is not sufficient to relieve the defendants from liability to the creditors of the Clarion, Mahoning & Pittsburgh Railroad Company upon their unpaid subscriptions to the Conewango & Clarion Railroad Company.

The material parts of the master's opinion are as follows:

It is very strenuously urged on behalf of the defense, that the merger and consolidation of the Conewango & Clarion Railroad Company, and the Mahoning & Susquehanna Railroad Company, into a new company, or into a company with a new name, is illegal. I agree with the learned counsel for some of the defendants, Mr. Corbet, that, under the law, the merger should be of one existing railroad company into another existing railroad company. But I do not agree with him that because two railroad companies have merged into a new company, or into a company with a new name, such merger is so illegal as to constitute a valid defense in favor of the subscribers to the capital stock of one of the companies, in a suit by judgment creditors of the new corporation. The law carefully gives a remedy to the stockholders if they are dissatisfied with, or object to, the consolidation. Section 8 of the Act of May 16, 1861, Pub. Laws, 708, entitled "An Act Relating to Railroad Companies," provides for the disposition of the stock of dissatisfied stockholders, in cases of consolidated companies. Section 2 of the same Act provides for notice to the stockholders of the intended consolidation and method of voting thereon. The forms of law have been gone through with, and the agreement of consolidation of the two companies has been filed in the proper office at Harrisburg. No objection to this consolidation has been raised by any one of these defendants, so far as we are advised by the evidence. After all this, it will be presumed that the law was complied with so far as notice to them of the intended consolidation was concerned, and that they were satisfied with the merger. But more than that, in this case several of the defendants have dealt with the new corporation in various ways. In so far, they have invited others to deal with the consolidated corporation, and I think are held out to the world to give it credit.

The corporation defendant is a corporation *de facto* if not *de jure*. Morawetz, Priv. Corp. §§ 133, 145.

In the latter section it is said: "The rules referred to in the preceding sections are applicable in an action brought by a creditor of an insolvent corporation, to enforce the liability of its stockholders to pay the amount of their stock subscriptions. In a case of this character, the defendant cannot impeach the binding force of their contracts of membership by showing that the formation of the corporation was unauthorized by law, nor can they establish the invalidity of the obligation assumed by the company in favor of complainant, upon the ground that the company had no authority to act in a corporate capacity." And see *McHose v. Wheeler*, 45 Pa. 32.

It is urged on behalf of some of the defendants as a ground of defense, that all the stock

of the Conewango & Clarion Railroad Company was not subscribed for. I think this would be a complete defense in an action by the corporation to recover unpaid subscriptions to its capital stock. But it does not follow that a defense, good between the subscriber to its capital stock and the corporation, is good in a suit between such subscriber and a creditor of the corporation. After having permitted unquestioned the consolidation of the companies, and the consolidated company to make contracts and incur liabilities, I do not see how this defense can be interposed.

In Morawetz on Private Corporations, § 285, it is said: "A stockholder may waive the performance of a condition precedent to his liability to contribute his proportionate share of the capital of the company; and after such waiver he will be liable as if the conditions had been performed. Yet if a subscriber, knowing that the requisite subscriptions had not been obtained, should attend meetings of the corporation and co-operate in votes for expending money and for making contracts, or take part in any other acts which could be properly done only upon the assumption that the capital of the company had been fully subscribed, he would not be permitted to refuse to contribute his proportion of capital upon the ground that the amount required by the charter had not been subscribed."

In section 135 of the same work it is said: "For similar reasons it has been held that a stockholder might be estopped by his conduct from setting up as a defense to an action for calls that the number of shares required by law to authorize the corporation to be founded have not been subscribed."

It is urged in opposition to this view that those dealing with the corporation are bound to know that all the stock has not been subscribed to. There is some force in this view; yet I think that those persons who originate a corporation should see that it does not act, until the implied condition on which they subscribed has been complied with; and that when it does act persons dealing with it have a right to assume that the precedent conditions have been complied with. Neither do I think that the stipulation in the agreement of merger, that, "all the stock of the two first-mentioned companies actually subscribed for shall be canceled," constitutes a good defense. This stipulation is followed by the provision, "That the Clarion, Mahoning & Pittsburgh Railroad Company shall and will issue to the several holders and owners of, or subscribers to, the stock of the Conewango & Clarion Railroad Company, and the several owners and holders of, or subscribers to, the stock of the two last-named companies shall be entitled to receive for every share thereof one share of the capital stock of the Clarion, Mahoning & Pittsburgh Railroad Company." The plain intent and effect of this agreement is to substitute the stock of the consolidated company for the stock of the companies which have become merged in it. It is the stock that is canceled and not the subscription for stock. Any other construction would have been to denude the consolidated company of all advantages from the subscriptions to the capital stock of the two companies merged in it.

The construction I have given this agreement is in harmony with the provision contained in the third section of the Act of May 16, 1861, Pub. Laws, 703, that, "all the property, real, personal and mixed, and debts due and rights of action, shall be deemed and taken to be transferred to, and vested in the company into which such merger may have been made, without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of such company or corporation into which such merger may have been made, as they were of either of the former corporations, parties to said agreement." And see *Lane's App.* 105 Pa. 62.

The important assignments of error are as follows:

1. In not sustaining joint exception number 4 which is as follows: "In not finding that there was no legal or sufficient evidence that the alleged Mahoning & Susquehanna Railroad Company ever existed as a corporation."

2. In not sustaining joint exception number 11, which is as follows: "In not finding that there was no legal or sufficient evidence that the alleged Conewango & Clarion Railroad Company was a corporation."

3. In not sustaining joint exception number 14, which is as follows: "In not finding it was incumbent on the plaintiffs, the same having been put in issue by the pleadings, to establish the existence of the corporation by them styled the Clarion, Mahoning & Pittsburgh Railroad Company, and that its existence was legal, which plaintiffs did not do; but on the contrary the evidence adduced by them showed that such company had no corporate existence by any warrant or authority of law."

4. In not finding, *vide* Litch's 9th and Winslow and Jackson's 5th exceptions, as therein stated: "That T. K. Litch, R. C. Winslow, and S. S. Jackson, severally, never became stockholders of the Conewango & Clarion Railroad Company; that there was no evidence that any stock certificates were ever issued by it, or tendered either of them; or that such company ever so far organized that they could have complied with their respective agreements to take shares of stock therein."

11. (Assigned on behalf of E. A. Litch, administrator.) In not sustaining the 40th exception of E. A. Litch, administrator, that the Master erred in his 10th conclusion of law, which is as follows: "This suit may be maintained in Warren County against E. A. Litch, administrator of the estate of Thomas K. Litch, deceased, joined with other defendants, for their unpaid subscriptions to the capital stock of the Conewango & Clarion Railroad Company notwithstanding the residence and domicile of Thomas K. Litch in Jefferson County, at the time of his death, and the granting of letters of administration upon his estate by the Register of Jefferson County."

Messrs. George A. Jenks and Charles Corbet, for appellants:

After the expiration of the time fixed by law, for the completion of the road in a collateral action for the recovery of stock, the defense of non-completion can be set up and is a valid defense. *McCully v. Pittsburgh & O. R. Co.* 82 Pa. 31.

In consequence of the company's failure to
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build any road within the time fixed by the Acts, the franchise reverted to the Commonwealth without judicial action.

Com. v. Lykens Water Co. 1 Cent. Rep. 219, 110 Pa. 391..

The Acts of Assembly authorizing the Mahoning & Susquehanna Railroad Company, which purported to constitute it, had ceased to exist and were void before the 6th day of December, 1881.

No letters-patent appear to have been issued in pursuance of those Acts, as required by the second section of the Act of February 19, 1849.

Brightly's *Purd. Dig.* p. 1417, pl. 19.

Until the requirements of this section are complied with, the Acts authorizing incorporation are absolutely ineffective to establish a corporate life.

The alleged consolidation of the non-existent Conewango & Clarion Railroad Company, with the non-existing Mahoning & Susquehanna Railroad Company was void; and the Clarion, Mahoning & Pittsburgh Railroad Company, the result of the pseudo-consolidation, was a nullity.

Act of May 16, 1861; Brightly's *Purd. Dig.* 1429, pl. 78.

That there never was such a corporation, goes to the right of action and is pleadable in bar.

Northumberland County Bank v. Eyer, 60 Pa. 486. See also *Rheem v. Navagatuck Wheel Co.* 83 Pa. 358; *Seovill v. Thayer*, 105 U. S. 143, 150, 151, 26 L. ed. 908, 972, 973.

The defendants are not by virtue of their subscriptions to the articles of association of the Conewango & Clarion Railroad Company, responsible to the amount of their respective subscriptions for the debts of the Clarion, Mahoning & Pittsburgh Railroad Company.

A corporation cannot sustain an action against one who, before it was chartered, with others, signed a paper agreeing to take a certain quantity of its stock and afterwards refused to do so.

Strasburg R. Co. v. Echternacht, 21 Pa. 220; *Cook, Stock & Stockholders*, § 186.

A subscriber to the capital stock of a corporation cannot be held on his subscription unless the whole capital stock is subscribed for.

Cook, Stock & Stockholders, § 176; *Rockland, Mt. D. & S. S. B. Co. v. Sewall*, 78 Me. 167, 12 Am. & Eng. Corp. Cas. 85.

As the consolidation is "a radical change in the organization," it therefore takes "away the motive which induced the subscription, as well as affects injuriously the consideration of the contract."

Nugent v. Putnam County Suprs. 86 U. S. 19 Wall. 241, 22 L. ed. 83.

A dissenting member cannot be forced into a new corporation, and his property in one corporation cannot be taken from him and the stock of another imposed upon him by way of compensation, by the Act either of the Legislature or of his co-corporators, or of both combined.

Lauman v. Lebanon Valley R. Co. 30 Pa. 42. See also *Cook, Stock & Stockholders*, § 671.

A stockholder who never converted his stock into that of the consolidated company has no footing in court for a stockholder's bill against the said company.

Philadelphia & E. R. Co. v. Catawissa R. Co. 53 Pa. 20, 62.

Messrs. George N. Frasinge, James W. Wiggins and S. T. Neill, for appellees:

Were this a suite even by the Conewango & Clarion Railroad Company against these defendants to recover upon their unpaid subscriptions, the defense set up would not avail.

Garrett v. Dillsburg & M. R. Co. 78 Pa. 465. As to the existence of the Clarion, Mahoning & Pittsburgh Railroad Company, the record from the office of the Secretary of the Commonwealth was sufficient proof.

Com. v. Atlantic & G. W. R. Co. 53 Pa. 9. In *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219, the consolidated company did not adopt the name of either corporate body and it was held not to be of any consequence.

The Clarion, Mahoning & Pittsburgh Railroad Company was entitled to collect and recover the subscriptions to the capital stock of the Conewango & Clarion Railroad Company.

Act of May 16, 1861; *Brightly's Purd. Dig.* p. 1480, pl. 75.

The cancellation of the stock certificates did not cancel the subscription.

See *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. ed. 88; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872.

The decree *pro confesso*, entered November 26, 1888, against the corporation defendant, is conclusive upon the stockholders, defendants, as to the regularity of the organization of said corporation as averred in the bill.

Hawkins v. Glenn, 131 U. S. 819, 33 L. ed. 184; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105; *Williams v. Corwin*, 1 Hopk. Ch. 471, 2 L. ed. 491.

If there is anything settled it is that the corporate existence of a corporation *de facto* cannot be inquired into collaterally.

Cochran v. Arnold, 58 Pa. 405.

Paxson, Ch. J., delivered the opinion of the court:

The opinion of the learned master covers this case so fully that an elaborate discussion of it is unnecessary. The main contention on the part of the appellants was that the Mahoning & Susquehanna Railroad Company, the Conewango & Clarion Railroad Company, and the Clarion, Mahoning & Pittsburgh Railroad Company never had a legal corporate existence; that the said appellants, T. R. Litch, R. C. Winslow, and S. S. Jackson never became stockholders in the last-named company, and that said company was never so far organized that they could have complied with their respective agreements to take shares of stock therein. See first, second, third, and fourth assignments of error.

It would be tedious to detail all the proceedings in relation to the organization of these companies, and the merger of the first two companies into a consolidated corporation under the name of the Clarion, Mahoning & Pittsburgh Railroad Company. All this has been carefully done by the learned master. It is enough to say that the merger sufficiently appeared by the certificate of the secretary of the Commonwealth, and the effect of it was, under 18 L. R. A.

the third section of the Act of May 16, 1861, Pub. Laws, 702, to vest in the consolidated company all the property, rights and franchises of said companies subject to all rights of their respective creditors. The consolidated company is estopped by the decree *pro confesso* from alleging that it is not a corporation *de jure* and liable as charged in the bill to the plaintiffs, who are the appellees here, and who have recovered judgments against it in actions at law. It is idle, as against creditors, to set up the defense that the corporation had no legal existence. It had sufficient existence to contract debts, and in the interests of its creditors it must at least be treated as a *de facto* corporation. And if there is anything settled in the law it is that the existence of a corporation *de facto* cannot be inquired into collaterally. *Cochran v. Arnold*, 58 Pa. 399. Much less can such a corporation or a stockholder therein set up a defect in its charter as against a creditor who has contracted with it upon the faith of its charter. We are not considering the case of a subscriber to shares who refuses to pay his subscription on the ground that the organization has not been perfected, and the cases cited upon this point have no application.

We are clearly of opinion that by force of the articles of consolidation and the Act of Assembly the subscription to the stock of the Conewango & Clarion Railroad Company inured to the benefit of the consolidated company, and became an asset in its hands for the payment of debts, and that the subscribers thereof are liable to the creditors of the latter to the amount of their unpaid subscriptions. This bill was filed to enforce this personal liability against certain of the stockholders. The corporation itself is admittedly insolvent. It does not appear to have any available assets. While it is well settled that a single creditor may not sue a particular stockholder at law, and thus secure an advantage over other stockholders (see *Bunn's App.* 105 Pa. 49), yet this bill was filed by or on behalf of all the creditors against the corporation, and its stockholders, precisely as was done in *Bunn's App.*, *supra*. The rights of all parties, therefore, can be adjusted in the one proceeding, and the decree of the court below is so framed as to compel contribution in case any one defendant is required to pay more than his just proportion.

A point was made that this suit cannot be maintained against E. A. Litch in Warren County for the reason that he is sued as administrator of Thomas K. Litch, deceased, the domicile of said administrator being in Jefferson County, in which county the letters of administration were taken out. See eleventh assignment.

This objection is based upon the ground that the Orphans' Court of Jefferson has the exclusive jurisdiction over the estate of said decedent. It may be conceded that the estate of Thomas R. Litch cannot be distributed by the Common Pleas of Warren, but no such question arises here. It is not a question of distribution but of the fixing of a liability or of a right. When that is ascertained it will be for the Orphans' Court of Jefferson to decide to what extent it can be enforced against the estate. That will depend upon the amount of the estate and the rights of other creditors. Aside from

this it must not be overlooked that it was a bill in equity, and the court acquired jurisdiction over E. A. Litch, administrator, because said court had "acquired jurisdiction of the subject matter in controversy by the service of its process on one or more of the principal defendants." Act of April 6, 1869, Pub. Laws, 387.

No question appears to have been raised as to the regularity of the proceeding under this Act. It was urged that the administrator should not have been joined with living parties,

and we are asked what execution would issue on a judgment against a survivor and the representative of a deceased party? If this were a judgment at law there would have been more force in this suggestion, but a court of equity can always mould its decrees to meet the difficulties of the case, and do no injustice to anyone.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

IOWA SUPREME COURT.

J. J. SCHLAWIG

v.

Mariana DE PEYSTER *et al.*, *Appts.*

(.....Iowa.....)

1. **A provision for service of process on a person by leaving a copy with some member of his family** at his usual place of residence will not validate a service by delivering a copy to such member at the residence of the family, after defendant has established himself in business in another State with the intention of making that his permanent residence and of removing his family there when convenient.
2. **One who has not appealed from a decree** cannot ask to have it changed by the appellate court.
3. **Where the time limited by the trial court for the making of a redemption** authorized by it expires, pending an appeal by the opposite party from the decree, the appellate court, on affirming the decree, will extend the limitation a certain time beyond the entry of judgment in its decree.

(October 7, 1891.)

A PPEAL by defendants from a decree of the A District Court for Plymouth County, in favor of plaintiff, in a proceeding to redeem certain lands from a mortgage, and from a sheriff's sale under a foreclosure thereof. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. M. Marsh and T. G. Henderson, for appellants:

The place where a married man's family resides is generally to be considered his domicile. And if a married man has his family fixed in one place, and conducts his business in another, the former is considered the place of his residence.

State v. Groome, 10 Iowa, 316; *Story*, Conf. Laws, § 46.

The intention, and the act of making the place home must concur to constitute the residence.

Hinds v. Hinds, 1 Iowa, 46; *Cohen v. Daniels*, 25 Iowa, 89; *Ringold v. Barley*, 5 Md. 186, 59 Am. Dec. 108.

If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence has been changed thereby.

Vanderpool v. O'Hanlon, 53 Iowa, 246.

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A person may have more than one residence, and it is not necessary that an original notice be served at the one where he is located at the time of service, and in the absence of clear and unmistakable evidence that plaintiff did not have a residence in Sioux City, the return itself must stand as evidence of the fact of his residence there.

Love v. Cherry, 24 Iowa, 204; *Story*, Conf. Laws, §§ 39-49; *Hinds v. Hinds*, *supra*; *Penley v. Waterhouse*, 1 Iowa, 498.

Messrs. O. C. Tredway, Argo & McDuffie and W. G. Clarke for appellee.

Beck, Ch. J., delivered the opinion of the court:

1. The plaintiff executed a mortgage to defendant De Peyster to secure the payment of \$600 and interest payable upon maturity of certain notes given therefor. Upon the maturity and non-payment of interest, an action to foreclose the mortgage was instituted, and a decree of foreclosure was rendered, and a sale of the land thereon was for the amount of the judgment for interest, with attorneys' fees and costs. Plaintiff seeks in this action to redeem from the sale and mortgage, basing his right on the ground, among others, that the decree of foreclosure is void, for the reason that the original notice in the case was not served upon him as required by law. The service was made by copy delivered to a member of his family (his wife) at his alleged usual place of residence in this State. Plaintiff alleges that his usual place of residence at the time of service was in the Black Hills, Dak., and not in Iowa, and insists, therefore, that the decree is void for want of jurisdiction of his person.

2. The record very satisfactorily shows that about eighteen months before the service of the notice defendant, who then lived with his family in Sioux City, went to the Black Hills, intending to make his home there. He left his family consisting of a wife and children, in Sioux City, intending to remove them to the Black Hills as soon as he could do so. He engaged in mining and other business in the Black Hills, and built a house, shop, and other buildings there. He voted at the elections and sat upon juries and discharged other duties of a citizen, but did not remove his family there, though continually intending so to do. He visited his family about two years after he went to the Black Hills, and repeated the visit at long intervals. He never abandoned his purpose of removing his family to Dakota. He seems to have done no act indicating that

he regarded Iowa as the place of his residence. We think that actual residence, with the purpose and intent that it is and shall be permanent, fixes the legal residence contemplated by the Statute providing for service of original notices of actions by a copy delivered to a member of defendant's family at his usual place of residence, without regard to the place of residence of his family. We know of no rule which fixes absolutely a man's residence at the place of residence of his wife and family. A presumption may arise that his residence is with his family, but that presumption may be overcome by evidence showing the fact to be otherwise. Such presumption is in this way overcome by the evidence in this case. In support of these views, see the following cases: *Cohen v. Daniels*, 25 Iowa, 88; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; *Ringgold v. Barley*, 5 Md. 186; *Gilman v. Gilman*, 62 Me. 185; *Hairston v. Hairston*, 27 Miss. 704.

Love v. Cherry, 24 Iowa, 204, cited by counsel for defendant, is not in conflict with our conclusions in this case. Because of absence of intention to make the residence in question permanent, and a continual purpose to return to a prior place of residence, it was held in that case that at such prior place of residence service of notice could be lawfully made by copy upon a member of defendant's family. In this case there was a fixed and constant purpose to

remove plaintiff's family to the Black Hills which was all the time regarded by him as the permanent place of residence and home of plaintiff. This purpose was never relinquished or changed, and there is no evidence showing facts in conflict thereto. It is our conclusion that the decree of foreclosure is void for want of jurisdiction of the person of plaintiff, and for this reason he may redeem from sale and mortgage.

3. Plaintiff complains of the amount which he is required by the decree to pay in order to make the redemption. We think the evidence well supports the correctness of the decree in this regard. Besides, as plaintiff did not appeal, he is not in a condition to complain of the decree, and ask that it be reversed or changed in this court. By the decree of the court below, plaintiff had ninety days from the rendition thereof in which to make redemption. That time has expired pending the appeal which prevented performance by plaintiff. The time for redemption ought to be extended for ninety days after the entering of final decree and judgment upon this appeal.

The decree of the District Court is affirmed, with the modification just suggested, that plaintiff have ninety days in which to redeem. A decree to that effect will be entered in this court.

NEW YORK COURT OF APPEALS (2d Div.).

Christian KUMMEL, *Respt.*,

v.

GERMANIA SAVINGS BANK, Kings
County, *Appt.*

(.....N. Y.....)

1. **That the signature to the receipt by one receiving payment of a savings bank deposit** did not seem exactly right to the bank officials is sufficient to make a question for the jury as to negligence in paying over the money to him, especially where the genuine and forged signatures are both in evidence.

2. **Active vigilance to detect fraud and forgery is due by savings bank officers to a depositor** on paying the deposit to one presenting the pass-book, although the by-laws provide that the bank will not be responsible for fraud in presenting the bank-book and drawing the money, where they also require its presentation by the owner or his agent duly constituted by a writing signed and acknowledged, as a condition of payment.

(October 6, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover the amount of a savings bank deposit. *Affirmed.*

NOTE.—For liability of bank on payment of forged or altered paper, see *Atlanta Nat. Bank v. Burke* (Ga.) 2 L. R. A. 98, *note*; *Deposit Bank v. Fayette Nat. Bank* (Ky.) 7 L. R. A. 849, *note*.
13 L. R. A.

The facts sufficiently appear in the opinion. **Mr. Matthew Hale**, with **Mr. William D. Veeder**, for appellant:

When a savings bank has prescribed rules, and its depositor has assented to them, they are the agreement, and each party must keep it, to preserve rights against the other. The extent of the duty which the savings bank is under will, in some degree, be measured by the strictness or extent of the rule it has put upon itself.

Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314.

It is the duty of a court to give effect to all of the provisions and language used in framing a law, if it is susceptible of such a construction, and they are precluded from giving it such an effect as will render any of its clauses inoperative or ineffectual.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 801, 101 N. Y. 62.

In this case the provision that payments should not be made unless the depositor should call for and receive the same in person or by attorney, should be regarded as qualified by what follows: That the Bank will not be responsible to any depositor for a fraud committed upon the officers in producing the pass-book and drawing the money without the knowledge or consent of the owner.

The mere location of the covenants in a deed does not have any significance.

Phenix Ins. Co. v. Continental Ins. Co. 87 N. Y. 400.

The plaintiff was bound to show affirmatively that the defendant did not exercise ordinary

care and diligence at the time it paid out the money. This he failed to do.

Israel v. Bowers Sav. Bank, 9 Daly, 507.

Where it is sought to hold another liable for negligence, the negligence is to be made out by some positive proof, or by proof of circumstances from which the jury may fairly infer its existence.

Heaney v. Long Island R. Co. 112 N. Y. 122.

Mr. Hugo Hirsh, for respondent:

Fraud does not absolve the bank from liability if it does not take ordinary care and precaution to discover and avoid it.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 801, 101 N. Y. 58; *Eaves v. People's Sav. Bank*, 27 Conn. 233; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 318; *Boone v. Citizen's Sav. Bank*, 84 N. Y. 88; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 18; *Israel v. Bowers Sav. Bank*, 9 Daly, 509; *Underhill v. Poughkeepsie Sav. Bank*, 32 Hun, 432.

The relation of a depositor to this Bank is that of creditor, and upon an accounting it is liable for all such sums deposited as it has paid away without receiving valid directions therefor.

People v. Mechanics & T. Sav. Inst. 92 N. Y. 9; *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 53.

There can be no pretense on the evidence in this case that the Bank believed it was paying the depositor.

The submission to the jury of the question whether the defendant exercised reasonable care and diligence in order to see that the party to whom it paid money was entitled to it, was a more favorable submission than it had a right to receive.

Ouderkirk v. Central Nat. Bank, 119 N. Y. 263.

It appears from the entire case that the defendant relied almost exclusively upon its by-law permitting it to pay the money to anyone who produced the pass-book, and upon the case of *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418.

Haight, J., delivered the opinion of the court:

This action was brought to recover the sum \$450.11, being balance of amount deposited by the plaintiff with the defendant. It appears that this balance had in fact been paid by the Bank upon a forged check or receipt to a stranger, who had stolen the pass-book from the plaintiff. At the time the plaintiff opened his account with the Bank, he subscribed his name in a book kept for that purpose, giving his place of residence, place of birth, the names of his parents, brothers, and sisters, etc. A pass-book was issued to him, in which was entered the amounts of deposits made by him from time to time. Among the by-laws printed in the book appears the following: "Payments shall not be made unless the depositor shall call for and receive the same in person, or by an attorney duly constituted by writing, signed and acknowledged. When the payment is made, the pass-book must be produced. When the entire deposit is withdrawn, the pass-book must be surrendered. . . . The Bank will not be responsible to any depositor for any fraud committed on the officers in pro-

ducing the pass-book and drawing money without the knowledge or consent of the owner." The money in controversy was drawn upon two different occasions,—\$100 on the 13th day of April, 1888, and the remaining \$350.11 on the 17th day of April thereafter. The court, in submitting the case to the jury, charged that the by-laws printed in the pass-book constituted a contract between the depositor and the Bank, and governed their relations; that a payment made in good faith, in the exercise of reasonable care and diligence, by the officers of the Bank to a person presenting the pass-book, even though obtained by fraud, and who was not a depositor, was a valid payment. The question thus presented for the determination of the jury was as to whether the officers of the defendant had exercised ordinary care and diligence in seeing that the person to whom the money was paid was authorized to receive it.

The first question which we are called upon to consider is as to whether the evidence was of such a character as to justify the submission of this question to the jury. The \$350 item was paid by the cashier, Frederick Koch. He states that he asked the person presenting the bank-book where he lived, and that he at first answered "New York," and that afterwards he stated that he had lived in Brooklyn before that, at 56 Tillary Street; that he did not ask him any further questions, but paid him the money. The other payment was made by Oscar Thomas, a clerk, who assisted the cashier. He judged from the first that the signature to the receipt was not exactly right, and asked the person presenting it if he could not write with a more fluent hand, and received the answer that he was not feeling well. He thinks he put the other questions to him appearing upon the signature book, and that they were answered correctly. As to the payment of the \$350 receipt, the question of negligence was clearly for the jury. It affirmatively appears that the cashier did not avail himself of the means at hand to identify the person presenting the pass-book and forged receipt. As to the \$100 payment, the question is involved in more doubt; but, in view of the fact that the acting cashier making the payment was an interested witness, that the signature to the receipt was such as to lead him to judge that it was not right, and that upon the trial the signature of the plaintiff, as well as that upon the receipt, was before the court and the jury for comparison, upon which the variance may have been so great as, of itself, to put a prudent person upon inquiry, we are inclined to the view that this question was also one for the jury, and that no error is apparent that would justify a reversal.

In the second place, it is contended that, the Bank having paid in good faith to the party presenting the pass-book, it is not liable, even though negligent; and the case of *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, is cited as sustaining such a rule. There are some expressions in the opinion in that case which tend to sustain the appellant's claim; as, for instance: "Nor do I see that it was at all material to the defendant whether the order was a forgery or not. The defendant was at liberty to pay the amount of the deposit to any

person presenting the pass-book. No order of the depositor was required. A forged order, while ordinarily of no legal effect, was at least equal to no order at all; so that it appears to me the bank had the right to make the payment it did on a simple production of the pass-book." But that doctrine has been criticised, and has not been followed, in later cases. *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Boone v. Citizens Sav. Bank*, 84 N. Y. 83-88; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 63, 1 Cent. Rep. 801. In the *Schoenwald Case* the chief question litigated was as to whether the order upon which the money was paid was a forgery, and the question of negligence does not appear to have been considered. In the case of *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12, it was held that the rules prescribed by a savings bank for its protection in the payment of deposits do not dispense with the exercise of ordinary care upon the part of its officers; and if, by a custom or regulation adopted by it, designed to prevent fraud, a fact is brought to the knowledge of the officers calculated to excite suspicion and inquiry, a failure to institute such inquiry is negligence for which the bank is liable. It was, however, held that, inasmuch as the charge of negligence rested upon the dissimilarity in the signatures, the discrepancy should be such as could be readily discovered by a competent person; that there was no evidence of that character, and, inasmuch as the trial court had the benefit of a personal inspection, the difference in the letters may not have been such as to indicate a different handwriting; that on review the court had no means of determining but that the trial court properly decided that the dissimilarity was of such a

character that negligence could not be predicated upon a failure to discover it. See cases above cited.

The pass-book of a savings bank cannot be regarded as negotiable, and its possession does not constitute proof of a right to draw money thereon. The book imports a liability of the bank to the depositor for the amount of monies entered therein as deposited, and an agreement to repay at such time and in such manner as he shall direct. Assuming that the by-laws printed in the book are binding upon the depositor, and constitute a contract between the parties, we still think that the duty devolves upon the officers of the bank to exercise care and diligence, in order that their depositors may be protected from fraud and larceny. The defendant by its by-laws, to which we have called attention, has undertaken with the plaintiff that payment shall not be made unless he shall call for the same in person, or by an attorney duly constituted by writing, signed and acknowledged. Here is a positive and direct agreement, which would absolutely protect the plaintiff from losses of this character. This agreement, however, must be considered as modified by that which follows, to the effect that the bank will not be responsible for fraud committed on its officers in producing the pass-book and drawing money without the knowledge or consent of the owner; but this modification does not permit the officers to carelessly shut their eyes, and pay to any person presenting the pass-book, but, on the contrary, they owe the depositor active vigilance, in order to detect fraud and forgery.

The judgment should be affirmed, with costs.
All concur.

NEW YORK COURT OF APPEALS.

James GALWAY, *Respt.*,

vs.
METROPOLITAN ELEVATED R. CO. *et al.*, *Appts.*

(.....N. Y.)

1. **An equitable remedy to restrain continuous trespasses upon real estate is not barred** by the lapse of ten years from the time of the original trespass under Code Civ. Proc., § 888, fixing that limit for actions the time for which is not otherwise specially prescribed. It will not be barred so long as the legal title is in the plaintiff and his right of action at law for injuries is not barred.
 2. **No estoppel against an injunction to restrain continuing trespasses** by the operation of an elevated railroad in a street in front of plaintiff's premises arises out of his mere delay to bring suit for eleven years after the original trespass and his occasional riding on the road as a passenger, although his only protest against the construction of the road was by subscription to pay counsel to prevent it.
 3. **That an elevated railroad track was intended to be and was in fact made a permanent structure** does not prevent its being a continuing trespass upon the easements of landowners abutting upon the street through
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which it is constructed so as to take it out of the rule of limitations applicable to actions for continuing trespasses and bar all remedy unless the action is brought within the time after its construction prescribed in case of a single trespass.

(October 6, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in an action brought to compel payment of damages because of defendant's alleged interference with plaintiff's easements in a certain street. *Affirmed.*

The facts are stated in the opinion.

Messrs. John F. Dillon, Julien T. Davies and J. C. Thomson, for appellants:

I. The plaintiff's right to maintain an action in equity to enjoin the maintenance and operation of the defendants' railway, and to recover damages to the inheritance by reason of the permanence of the structure, is barred by the ten years' limitation contained in § 888 of the Code of Civil Procedure.

The limitation of ten years is applicable to equitable remedies.

Cathoun v. Millard, 8 L. R. A. 248, 121 N.

Y. 60; *Butler v. Johnson*, 111 N. Y. 204; *Hubbell v. Sibley*, 50 N. Y. 468; *Peters v. Delaplaine*, 49 N. Y. 362; *Oakes v. Howell*, 27 How. Pr. 145; *Roberts v. Sykes*, 80 Barb. 178; *Wood v. Wood*, 26 Barb. 356; *Salisbury v. Morse*, 7 Lans. 359. See also *Venice v. Breed*, 65 Barb. 597; *Hubbell v. Medbury*, 53 N. Y. 98; *Cramer v. Benton*, 60 Barb. 216; *Hoyt v. Putnam*, 39 Hun, 402.

This rule is subject to an important qualification. It is applicable only when courts of equity have exclusive jurisdiction of the action.

Although courts of equity were never deemed to be within the terms of the Statute of Limitations, they were bound by their terms where they exercised only a concurrent jurisdiction with courts of law.

Hovenden v. Annesely, 2 Sch. & Lef. 607; *Kane v. Bloodgood*, 7 Johns. Ch. 89, 2 L. ed. 231; *Murray v. Custer*, 20 Johns. 575; *Borst v. Corey*, 15 N. Y. 505; *Clark v. Ford*, 8 Keyes, 370; *Rundle v. Allison*, 34 N. Y. 180; *Loder v. Hatfield*, 71 N. Y. 92; *Salisbury v. Morse* and *Butler v. Johnson*, *supra*.

A cause of action does not exist at law to recover damages once for all in an action of this character, because the illegal structure cannot be regarded as permanent in a court of law.

Uline v. New York Cent. & H. R. R. Co. 2 Cent. Rep. 116, 101 N. Y. 98; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 571, 104 N. Y. 295; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

A cause of action exists in equity in a case of this character.

Henderson v. New York Cent. R. Co. 78 N. Y. 423.

The present suit is within the rules governing purely equitable remedies.

Rundle v. Allison, 34 N. Y. 180; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Sibley*, 50 N. Y. 468; *McTeague v. Coulter*, 6 Jones & S. 208; *Morris v. Budlong*, 78 N. Y. 543; *Scott v. Stebbins*, 91 N. Y. 605; *Butler v. Johnson*, 111 N. Y. 204; *Mann v. Fairchild*, 14 Barb. 548; *Still v. Hobbrook*, 23 Hun, 517; *Rodman v. Devlin*, 23 Hun, 590; *Hoyt v. Tuthill*, 33 Hun, 196; *Hoyt v. Putnam*, 39 Hun, 402; *Mills v. Mills*, 48 Hun, 97.

A suit in equity may be barred by the equitable limitation, although the plaintiff may have resorted to a court of equity to establish or enforce a legal right which is not barred.

Peters v. Delaplaine, 49 N. Y. 362; *Cathoun v. Millard*, 8 L. R. A. 248, 121 N. Y. 69; *Hubbell v. Sibley*, 50 N. Y. 468; *McTeague v. Coulter*, 6 Jones & S. 208.

Courts of equity have exclusive jurisdiction of suits for injunction.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Knorr v. Metropolitan Elev. R. Co.* 58 Hun, 517; *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 440, 84 L. ed. 234; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 190; 1 Pom. Eq. Jur. § 136.

There can be no recovery in an action at law of future damages for a continuing nuisance or trespass.

The cause of action at law is the injurious effects which have been caused by the unlawful structure in the past.

People v. Clark, 70 N. Y. 518; *Lexington City Nat. Bank v. Guynn*, 6 Bush, 486; *Me-*

nard v. Hood, 68 Ill. 121; *Wangeun v. Goe*, 50 Ill. 459; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Owen v. Ford*, 49 Mo. 436; *Chesapeake & O. R. Co. v. Patton*, 5 W. Va. 234; *Cole v. Duke*, 79 Ind. 107; *Georgia Pac. R. Co. v. Douglassville*, 75 Ga. 828; *East Saginaw Street R. Co. v. Wildman*, 58 Mich. 286; *Smith v. Davis*, 22 Fla. 405; *Ewing v. Rourke*, 14 Or. 514.

There is thus a clearly marked distinction between the causes of action at law and in equity in cases of this kind.

Where the wrong against which relief is sought has been consummated by a single act done with a view to a permanent condition that will continue without change from any cause but human labor, the action is barred by the lapse of the statutory period, and the Statute commences to run from the time when the act causing the original damage was committed.

Code Civ. Proc. § 415.

It is against the maintenance of the structure itself that an injunction runs. If the maintenance of the structure were not a trespass upon plaintiff's rights, the operation of the road would be beyond attack, and its effects could not be complained of by abutters, even if consequential injuries were effected.

Story v. New York Elev. R. Co. 90 N. Y. 160; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 458, 121 N. Y. 505; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 295.

The cause of action in equity which springs into existence upon the erection or threatened erection of an unlawful structure consists in the sum total of the injurious consequences that are reasonably to be anticipated to result from the structure. As time passes, these anticipated consequences sometimes become realities and give rise, from day to day and from hour to hour, to distinct causes of action at law. But it cannot be said that distinct causes of action in equity also arise.

2 *Story, Eq. Jur.* § 1521a; *Bruce v. Tilson*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 N. Y. 362; *High, Inj.* §§ 7, 10, 618, 643, 731, 756, 797, 837, 884, 895, 926.

Plaintiff's right to relief accrued "when the defendant began to construct its railway in front of his lots." It necessarily follows that the ten years' limitation began to run against his right to relief at the same time.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Power's App.* 125 Pa. 175; *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

When the Statute has begun to run, its operation will only be suspended by the intervention of some of the statutory exceptions, or by the commencement of an action.

Piper v. Hoard, 9 Cent. Rep. 445, 107 N. Y. 67. See *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Uline v. New York Cent. & H. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98.

The rule which we ask this court to follow in equitable actions is logical and supported by authority.

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231.

This court has admitted that the adoption of such a rule would have been productive of less inconvenience, even in actions at law.

Pond v. Metropolitan Elec. R. Co. 112 N. Y. 186.

When the nuisance or trespass is continuing in its character, and the original injury was permanent in its effect, so as to give but one cause of action in which complete compensation for the tort may be recovered, the Statute commenced to run when the injury was first effected.

Chicago & E. I. R. Co. v. McAulay, 8 West. Rep. 457, 121 Ill. 160; *Chicago & E. I. R. Co. v. Loeb*, 5 West. Rep. 887, 118 Ill. 203; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288; *James v. Kansas City*, 88 Mo. 567; *Pratt v. Des Moines N. W. R. Co.* 72 Iowa, 249; *Powers v. Council Bluffs*, 45 Iowa, 652; *Kansas Pac. R. Co. v. Milman*, 17 Kan. 224; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Lyles v. Texas & N. O. R. Co.* 73 Tex. 95; *Houston & T. C. R. Co. v. Chaffin*, 60 Tex. 554.

II. The plaintiff is precluded by his laches and acquiescence from seeking relief in a court of equity.

Smith v. Clay, 2 Ambl. 645; *Calhoun v. Millard*, 8 L. R. A. 248, 121 N. Y. 69; *Altord v. Syracuse Sav. Bank*, 98 N. Y. 699; *Re Neilley*, 95 N. Y. 382; *Coit v. Campbell*, 82 N. Y. 509; *Lyon v. Park*, 111 N. Y. 350.

In other jurisdictions the effect of silence, neglect, and delay under similar circumstances has often been before the court, and the decisions have uniformly been that relief by injunction must be refused.

Western U. Tele. Co. v. Judkins, 75 Ala. 428; *Bigelow v. Los Angeles*, 85 Cal. 614; *Pensacola & A. R. Co. v. Jackson*, 21 Fla. 146; *Griffin v. Augusta & K. R. Co.* 70 Ga. 164; *Midland R. Co. v. Smith*, 12 West. Rep. 669, 113 Ind. 233; *Logansport v. Uhl*, 99 Ind. 531; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *Spencer v. Falls Turnp. R. Co.* 70 Md. 136; *Osborne v. Missouri Pac. R. Co.* 37 Fed. Rep. 830; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Erie R. Co. v. Delaware, L. & W. R. Co.* 21 N. J. Eq. 283; *Pickert v. Ridgefield Park R. Co.* 25 N. J. Eq. 816; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Goodin v. Cincinnati & W. V. Canal Co.* 18 Ohio St. 169; *Pennsylvania Co. v. Platt*, 47 Ohio St. 866; *Pottsgrove Twp. v. Pennsylvania & S. V. R. Co. (Pa.)* 2 Montg. Co. L. Rep. 133; *Pettibone v. La Crosse & M. R. Co.* 14 Wis. 443; *Wood v. Charing Cross R. Co.* 33 Beav. 290; *Greenhalgh v. Manchester & B. R. Co.* 3 Myl. & C. 784.

The applicability of the doctrine of laches to suits to enjoin the maintenance of defendants' elevated railway is conceded in—

Abendroth v. Manhattan R. Co. 11 L. R. A. 634, 122 N. Y. 1. See also *Hentz v. Long Island R. Co.* 13 Barb. 655; *Ninth Ave. R. Co. v. New York Elec. R. Co.* 3 Abb. N. C. 358; *Kincaid v. Indianapolis Nat. Gas Co.* 8 L. R. A. 602, 124 Ind. 577; *Fremont Ferry & B. Co. v. Dodge County Comrs.* 6 Neb. 18; *Atty. Gen. v. New York & L. B. R. Co.* 24 N. J. Eq. 49; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Andrews v. Farmers L. & T. Co.* 22 Wis. 298.

Messrs. John E. Burrill and George Zabriskie, for respondent:
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The questions of acquiescence and the Statute of Limitations constitute no defense.

I. As to the Statute of Limitations, see—

Haight v. Price, 21 N. Y. 241; *Campbell v. Seaman*, 63 N. Y. 568; *Broiestedt v. South Side R. Co.* 55 N. Y. 220; *Tallman v. Metropolitan Elec. R. Co.* 8 L. R. A. 173, 121 N. Y. 123.

II. As to acquiescence.

The mere fact that the owner of the premises did not take legal proceedings to prevent the defendants from building their road, as they claimed to be authorized to do by various Acts of the Legislature, is no evidence of acquiescence.

Platt v. Platt, 58 N. Y. 646; *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.* 71 N. Y. 430, 3 Abb. N. C. 872.

Mere failure to institute proceedings to restrain or prevent the construction or continued operation of the railroad, cannot deprive an owner of the constitutional right to recover compensation for the taking of his property, and to enjoin the continuance of the wrongful act until such compensation shall be made, unless the right is barred by the Statute of Limitations, or unless the defendants have in some legal manner acquired a title to the property taken, or unless the owner is equitably estopped from asserting his claim.

Abendroth v. Manhattan R. Co. 11 L. R. A. 634, 122 N. Y. 1; *Ode v. Manhattan R. Co.* 56 Hun, 199; *McMurray v. McMurray*, 66 N. Y. 176; *Tallman v. Metropolitan Elec. R. Co.* 8 L. R. A. 173, 121 N. Y. 123; *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273; *Haight v. Price*, 21 N. Y. 241; *Ormsby v. Vermont Copper Min. Co.* 56 N. Y. 623; *Powers v. Manhattan R. Co.* 120 N. Y. 178; *Menendez v. Holt*, 128 U. S. 523, 32 L. ed. 528; *Knox v. Manhattan Elec. R. Co.* 58 Hun, 517.

The defendants can never acquire a right by prescription to obstruct the easements in question.

Broiestedt v. South Side R. Co. 55 N. Y. 220; *American Bank Note Co. v. Manhattan Elec. R. Co.* 37 N. Y. S. R. 885.

Ruger, Ch. J., delivered the opinion of the court:

This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth Avenue, in the City of New York, adjacent to the plaintiff's property, thereby unlawfully interfering with it. This property consisted of five vacant lots, extending about 125 feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth Streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself or through its lessee, the Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises on Sixth Avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent

to its construction. The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air, and access to his premises, he had been damaged, and demanded judgment for such damages as well as a perpetual injunction against the defendant from further operating and maintaining their railroad in front of his premises. A trial was had at special term and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction unless the defendants should pay to the plaintiff, within a limited time, the sum of \$20,000 as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendants a conveyance of the easements. The depreciation in the value of plaintiff's property by reason of the erection and maintenance of the railroad was found by the trial court to be \$20,000, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto, and occasionally as a passenger rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action. It was also found that, after the commencement of the action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroads, and that such proceedings were pending, undetermined, at the time of the trial. The defendants requested the trial court to find the following propositions of law: First, "that this action is barred by the Statute of Limitations;" and, second, "that plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten-year Statute of Limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and, that period having elapsed, that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure to cover cases inadvertently omitted or otherwise unprovided for. The general right of an abutting owner on a public street to recover damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defendants; nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easements; but

it is claimed that he has lost the right to proceed in equity, not only by reason of the Statute of Limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses. The case, therefore, involves the question how far, if at all, the owner has forfeited his rights in his property by reason of his alleged laches and inaction during the period of eleven years intervening between the construction of the road and the commencement of the action.

We think it would be impossible to sustain this appeal without unsettling the established law of the State. It is, in effect, an effort to exempt actions in equity from the operation of the well-settled principle, that trespasses upon real property, effected by an unlawful structure or nuisance, are continuous in their nature, and give successive causes of action from time to time, as the injuries are perpetrated. The questions raised are answered by elementary principles established in this State by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action, barred only by the running of the Statute against the successive trespasses; and the further principle that no lapse of time or inaction merely, on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages. It may be that there is no case where the precise question as to the application of section 388 to such causes of action has been directly decided in this State; but the rule follows as a logical conclusion from the cases, and it affords a strong argument against the appellant's theory that, in the numerous cases in this State in which the question has been involved the point has never before been taken by counsel for the trespasser in any case in this court. It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts, by reason of his neglect to demand it within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate, or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim we think is altogether untenable. The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, or have his property taken for public use without just compensation; and it necessarily follows that, so long as such person continues to be the owner of property and liable to be injured in respect thereto by the

unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured. *Uline v. New York Cent. & H. R. Co.* 101 N. Y. 98, 2 Cent. Rep. 116; *Arnold v. Hudson River R. Co.* 55 N. Y. 661; *Colrick v. Swinburne*, 105 N. Y. 503, 8 Cent. Rep. 701; *Tallman v. Metropolitan Elev. R. Co.* 121 N. Y. 123, 8 L. R. A. 173.

The cause of action, both at law and equity, in such cases, arises out of the trespasses committed, and is based on the ownership of the property upon which the injuries are inflicted, and it is obvious that no cause of action can be barred while there is an outstanding legal cause of action for which the party has a legal remedy. The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in respect to the subject matter. The questions presented have been so frequently considered and decided in this court, in analogous cases, adversely to the contention of the appellants, that they should no longer be the subject of controversy or debate. The learning and ability, however, with which the counsel for the appellants have pressed their case before us, have induced us to treat the questions argued at greater length than would otherwise have been thought necessary or proper, and we therefore indicate, briefly, the general theory upon which this court has proceeded in the determination of like questions. That theory is concisely expressed by Judge Earl in the *Case of Tallman*, *supra*. It was there said that, "when the defendant began to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it, and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would, at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards, during his ownership of the lots, with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots caused by the construction, maintenance, and operation of the railway." In the *Arnold Case* it was held that an easement to carry water in a trunk over the land of another "was such an interest in land as could not be modified or discharged save by conveyance in writing or by operation of law; that it was property within the meaning of article 1, § 6, of the Constitution, and therefore could not, nor could any portion of it, be taken for public use without compensation;" and "that this right of enjoying such easement was a continuous one, and the unlawful preventing its exercise a continuous injury;" 13 L. R. A.

and that, therefore, the Statute of Limitations did not bar plaintiff's claim for the injuries sustained." It is now the settled law of this State that no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained. *Uline v. New York Cent. & H. R. R. Co. supra*; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 187.

Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim. Where the trespass is of such a character that it may be discontinued, at the option of the wrong-doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise, the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner, and thus violate the rule of law as well as the plainest principles of equity. Upon settled principles, a court of equity had unquestioned jurisdiction, by reason of the continuance of the legal right and the inadequacy of the legal remedy, to render the judgment pronounced in this case by the trial court. *Henderson's Case*, 78 N. Y. 423; *Tallman's Case*, *supra*.

That successive causes of action have accrued to the owner for each day's maintenance and operation of the railroad structure adjoining his premises is undisputable, and that he is entitled to recover some damages for each trespass, even though it be nominal only, is equally undeniable. *Colrick v. Swinburne*, *supra*. The plaintiff may delay his action, and join together such causes of action as have not been outlawed, or he may bring an action daily, and recover such damages as he can establish. *Baldwin v. Calkins*, 10 Wend. 167. In the case of unoccupied lands, these damages may be small, but by delay the owner may lose them altogether, and in the mean while his toleration may be laying the foundation of an adverse claim to the property itself, and thus be the cause to him of irreparable injury. While it is indispensable to the protection of his rights that he should assert them before his right is barred, in such case it may not be to his interest to do so as often or as promptly as when his damages are large and immediate; but no bar is available against his laches unless it continues until the legal action is barred. The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance, and must, from the nature of the case, continue so long as that necessity exists. The existence of either of the grounds of equity jurisdiction referred to is sufficient to maintain an action, but they in fact are all present here, and indicate the propriety

of the judgment appealed from. It was said by Judge Earl, in *Campbell v. Seaman*, 68 N. Y. 582, that "the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by a proper tribunal." The lapse, therefore, of six years after a trespass has been committed upon real estate bars not only the legal action, but also constitutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress; because the right to such redress has, as to such wrongs, expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law, but also in equity. *Utine's Case*, *supra*.

Section 388 of the Code finds its true interpretation when applied to causes of action founded upon equitable rights alone, or cases not specified in the general Statutes of Limitation. It being conceded, as to legal causes of action for trespass and nuisance, that the injuries thereby occasioned are continuous, and arise from time to time as fresh trespasses are committed, it is difficult to see why the same principle should not apply with at least equal force and propriety to equitable actions. Indeed, it is obvious that it should be held to apply with greater reason to the latter, since otherwise the equity jurisdiction would be practically subverted. While the appellants' contention would permit the equity jurisdiction to be preserved for ten years, it precludes its exercise forever thereafter, and leaves the evils of incessant litigation to harass the public for practically an unlimited period of time. It would seem, therefore, that it is immaterial, either in equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual, and of a permanent character, or were of a temporary nature only, and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued. *Krehl v. Burrell*, L. R. 11 Ch. Div. 146; *Henderson's Case*, *supra*; *Baldwin v. Calkins*, 10 Wend. 170; *Williams v. New York Cent. R. Co.* 16 N. Y. 111.

The defendants' chief contention is that the relief in equity, as now given against elevated railroads for invasions of the rights of abutting owners in streets, is, practically, an action to recover permanent damages for such injuries, and that, therefore, the Statute of Limitations should commence to run from the time when any cause of action arose. There would be some force in this argument were that the real character of the action or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this State. The action here is, neither in practice or theory, an action of such a character, and by its fundamental rules, as well as the constitutional requirement that compensation for

such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone. *Bradley v. Bosley*, 1 Barb. Ch. 125, 5 L. ed. 324; *Morse v. Elmendorf*, 11 Paige, 277, 5 L. ed. 185; art. 1, § 7, Const. A court of law is the exclusive tribunal for the determination of such actions.

We have been referred to no case in this State where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action, in which the plaintiff has no legal right to demand permanent damages and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party and not as matter of right to the injured owner. As was said in the *Henderson Case*, "equitable relief is awarded, not, as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiffs' property, and forbear from any further interference with their rights." Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him or to suffer the judgment of the court to stand. While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it nevertheless does no more than to place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered imperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their

protection. It furnishes no cause of complaint to the wrong-doer that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not.

A consideration of the cases generally, in which equity courts have exercised the power of giving damages as an incident of the equitable relief granted, seems to be unnecessary in this case, as such courts in this State have not in this class of actions, so far as we know, assumed to exercise that power. The cases cited by the appellants to sustain the authority of an equity court to award permanent damages to real property were those of foreign jurisdiction where special statutes existed, or those in which no constitutional provision requiring such damages to be assessed by a jury or commissioners were in force. Here such a requirement exists, and the courts decline to assess such damages, but simply say to the corporations, "You may escape the legal consequences of your conduct by complying with certain conditions, as, for instance, by paying the plaintiff a specified sum of money." This sum may represent the actual depreciation in the value of the plaintiff's property, or the amount of damages already suffered, or any other arbitrary sum. The defendant, who has an option to pay it or not, at his own will, cannot justly complain of the action of the court. The option is given to the defendant, and not to the plaintiff. His remedy is confined to his injunction. The injury which results to the defendant, in case the option is not accepted, results from the judgment rendered by the court, and not from his neglect to make payment. The expression, made use of in some of the cases, to the effect that "the only remedy, whereby just compensation for the property taken can be compelled, is an action to restrain the continuous trespasses" (*Pond v. Metropolitan Elec. R. Co.* 112 N. Y. 186; *Tallman Case*, *supra*), means simply that an injured party can by that means secure the enjoyment of his property, unless the wrong-doer, by making compensation, in some form, for the injury inflicted, has acquired the lawful right to continue it. In this sense only, they may be, not incorrectly, called actions to compel the payment of damages.

The defendants also urge as a reason why the Statute of Limitations should bar this action, that otherwise they will be embarrassed in their efforts to secure a right by prescription. We ascribe but little weight to this suggestion. The law applies a period of limitation to actions for the public benefit. They are termed "statutes of reform," and are founded upon the maxim, *interest reipublice ut sit finis litium*. They are not intended for the benefit of wrong-doers, and while the law tolerates and protects title acquired by prescription, when clearly made out, it does not favor or encourage that mode of acquiring property.

We are therefore of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained, if brought at any

time, so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law. But the defendants, failing to establish the bar of the Statute of Limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. From the inception of the enterprise to the present time, the claim has been made that the defendants had no right to build their road in the streets of New York without compensating the abutting owners for the damages inflicted upon their property, and the defendants have continued the prosecution of their purpose regardless of their legal liability, and in the face of strenuous opposition, with an apparent intention to wholly ignore the claims of such owners. The judicial annals of the State are filled with the history of the litigations which have sprung out of the efforts of the elevated railroad companies to appropriate the property of the citizens of New York to the benefit of such railroads without compensation. In view of these facts, it is idle to claim that such companies have been induced, in any respect, to prosecute their enterprises in reliance upon the assumed acquiescence of the owners. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 181. The building and completion of their road in this case occurred in the first half of 1878, and before the numerous parties concerned could have been fully awake to the real consequences of the enterprise. So far as the permanent structure is concerned, their expenditures were all incurred within six months, and while the parties were making earnest efforts to stay any expenditures. The case is entirely destitute of proofs showing the existence of any elements of estoppel, and the defendants are therefore driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim. This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise. But this question we also think is governed by authority equally conclusive with that relating to the Statute of Limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other States, it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the

presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violation of this right has been uniformly applied in this court. *Tallman v. Metropolitan Elev. R. Co.* and *Arnold v. Hudson River R. Co.* *supra*; *Broistedt v. South Side R. Co.* *Long Island*, 55 N. Y. 220; *Campbell v. Seaman*, *supra*; *Ormsby v. Vermont Copper Min. Co.* 58 N. Y. 623; *Haight v. Price*, 21 N. Y. 240; *Viele v. Judson*, 83 N. Y. 82; *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 9 Cent. Rep. 827; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296.

In the *Case of Ormsby*, as appears by the head-note, it was held that "the doctrine of laches and acquiescence, as a bar to an action through lapse of time, finds its just application in respect to equitable rights only. As to legal rights, mere lapse of time, before an action to enforce them, is of no moment, unless it comes up to the requirements of the Statute of Limitations." In the *Chapman Case*, this court held that the silence and inaction of the plaintiff while seeing the defendant construct sewers and spend large sums of money in completing a sewage system, which discharged the filth of the city into a stream belonging to the plaintiff, did not constitute a defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel. It was held in *Haight v. Price* "that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license." *Judge Earl*, in the *Campbell Case*, said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. . . . No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs within any rule laid down in any reported case. In *Viele v. Judson*, *Judge Finch*, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud, and actually itself misled. In all there was both the specific opportunity and apparent duty to speak, and in all the party maintaining silence knew that someone was relying upon that silence, and either acting or about to act as he would not have done had the truth been told." It was held in the *Broistedt Case* that the possession by a railroad company of a highway, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him. In *New York Rubber Co. v. Rothery* the defendant had built expensive structures for manufacturing purposes, and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her ac-

tion for damages. *Judge Peckham*, writing in the case, says: "In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." See also *McMurray v. McMurray*, 66 N. Y. 176.

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to such an action. Such is also the doctrine, generally, of the elementary writers. 2 Pom. Eq. Jur. § 817; Bigelow, *Estoppel*, p. 476 *et seq.* The same general principle has also been held in England. In the case of *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, Fry, J., says that "mere lapse of time unaccompanied by anything else, has, in my judgment, just as much effect, and no more, in barring a suit for an injunction, as it has in barring an action for deceit." And the head note in *Re Maddever*, L. R. 27 Ch. Div. 523, reads: "That, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal right; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law." The Supreme Court of the United States has also laid down the same rule in the recent case of *Menendez v. Holt*, 128 U. S. 523, 32 L. ed. 528, where *Chief Justice Fuller*, writing for the court, says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder. *Atty-Gen. v. Eastlake*, 11 Hare, 205."

Even in case where laches has been allowed to operate as a defense, the question is to be determined in the discretion of the court, upon all of the circumstances of the case. *Fullwood v. Fullwood*, *supra*.

There is nothing in the history of this case which induces us to suppose the court committed any error in the exercise of their discretion in granting the injunction appealed from. The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enterprise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time, in expectation that the defendants would eventu-

ally do justice to those whose property they were appropriating to their own use. The novelty of the questions presented; the vast number of people who were suffering similar injuries; the importance of the projected road for the public convenience,—were all circumstances addressed to the discretion of the court upon the question of laches, and presented strong reasons why a strict rule should not be applied to the delay of the injured parties in seeking redress in this and similar cases. The rule requiring promptness in soliciting the intervention of a court of equity is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded, and the circumstances of the case. *Calhoun v. Millard*, 121 N. Y. 82, 8 L. R. A. 248; *Fullwood v. Fullwood*, *supra*; *Rayner v. Pearsall*, 3 Johns. Ch. 578, 1 L. ed. 723; *Atwater v. Fowler*, 1 Edw. Ch. 420, 6 L. ed. 194. What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right, without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors, and condemning them to suffer remediless wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defense to the action. *Krehl v. Burrell*, L. R. 7 Ch. Div. 551, on appeal, L. R. 11 Ch. Div. 146.

For the reasons stated, we think the judgment appealed from should be affirmed, with costs.

All concur.

Lewis M. TEEL, *Respt.*,
r.

Abraham YOST, *Appt.*

(..... N. Y.)

1. A judgment duly entered in one State on a warrant of attorney is as conclusive

NOTE.—*Judgments confessed on warrants of attorney; conclusiveness.*

A judgment confessed on a warrant of attorney has the same force as any other. *Keith v. Kellogg*, 97 Ill. 147.

In what cases authorized.

The practice of entering judgment in debt on warrants of attorney is very old, so old that the date of its origin is unknown. 2 Chitty, Pr. 234.

A warrant of attorney may authorize confession of judgment on a note. *Parker v. Poole*, 12 Tex. 86.

In an early English case the use of such warrants in ejectment was involved and it was held that ejectment is not a "personal" action within the meaning of a Statute requiring the presence of an attorney in such actions on the entry of judgment on a warrant. *Doe v. Kingston*, 1 Dowl. P. C. N. S. 263.

Soon after by the same court a judgment on a warrant of attorney was allowed in ejectment. *Doe v. Beaumont*, 2 Dowl. P. C. N. S. 972.

Judgment upon a warrant of attorney contained in a lease cannot be entered in an action of forcible detainer, but is *coram non jure* and void as the statutory proceeding in such cases is exclusive. 13 L. R. A.

in all other States as in the State where it is entered.

2. Jurisdiction to render a judgment on a note containing a warrant of attorney to confess judgment may be acquired by the appearance of the party's authorized agent.

3. The entry of judgment on a note containing a warrant of attorney to confess judgment may be made before maturity of the note.

(October 6, 1861.)

A PPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Trial Term in favor of plaintiff in an action upon a foreign judgment. *Affirmed.*

The judgment upon which the suit was brought was confessed by the prothonotary of the court of common pleas in which the judgment was entered, and the record of the judgment was as follows:

"Continuance Docket Entry of December Term, 1877.

Lewis M. Teel

v.

Abraham Yost,

—*d. s. b.*, \$2,268 00. And now Jan'y 14, 1878, a single bill, under the hand and seal of the defendant, dated Jan'y 12, 1878, wherein he promises to pay to the plaintiff or order, one year after date, twenty-two hundred and sixty-eight dollars, containing a clause authorizing the entry of judgment, waiving stay of execution, with ten per cent for collection fees, is produced hereto, to have judgment entered thereon.

"Wherefore judgment."

Mr. Lemuel Skidmore, for appellant:

The alleged judgment record shows that there was nothing offered to the Pennsylvania court as the basis of a judicial decision. It is in the nature of a mere memorandum by the clerk, and does not amount to a judgment.

Cromwell v. Bank of Pittsburg, 2 Wall. Jr. 584.

The alleged record here shows that the defendant was not in any way summoned or notified, and there is no waiver by him of such notification.

French v. Willer, 2 L. R. A. 717, 126 Ill. 611, overruling *Johnson v. Crane*, 22 Ill. App. 363; *Links v. Mayer*, 22 Ill. App. 439.

The words "warrant of attorney" in the Pennsylvania Act of April 4, 1877, authorizing an appeal from a decision as to opening judgments thereon, do not refer to anything but money judgments. *Swartz v. App.* 11 Cent. Rep. 681, 119 Pa. 208; *Limburt v. Jones*, 11 Cent. Rep. 672, 118 Pa. 589; *Blythe Twp. v. Morris* (Pa.) 11 Cent. Rep. 660.

Form and validity of warrants.

A warrant of attorney need not be by deed but must have an attesting witness. *Kennerley v. Mussen*, 5 Taunt. 264.

It need not be under seal. *Kneedler v. App.* 92 Pa. 428.

But the authority of an attorney to confess a judgment, where there is nothing on the record to show that it is by virtue of a warrant of attorney need not be in writing. *Limburt v. Jones*, 11 Cent. Rep. 672, 118 Pa. 589.

A warrant of attorney "to enter" judgment is sufficient to authorize a confession. *Mason v. Smith*, 8 Ind. 73.

It is not within the clause of the Constitution of the United States requiring full faith and credit to be given in each State to the judicial proceedings of another State, because it is not in any sense a judicial proceeding within the meaning of the Constitution or the Act of Congress of 1790.

Thurber v. Blackbourn, 1 N. H. 242; *Doughty v. Doughty*, 28 N. J. Eq. 585.

The power of attorney, if not void for indefiniteness, is of an attorney in fact, and therefore special and limited, and must be strictly pursued.

Baldwin v. Freyendall, 10 Ill. App. 106.

The law plainly does not authorize entry of judgment for an amount not appearing to be due.

The plain and reasonable sense of the word "due" is payable immediately.

Allen v. Patterson, 7 N. Y. 476.

No practice ever existed at common law, before the enactment of this Statute, of entering judgment upon a note or other obligation before it was by its terms payable.

3 Chitty, Gen. Pr. 669; *Allen v. Smillie*, 1 Abb. Pr. 354.

That Statute did not intend to authorize the prothonotary to enter judgment in a case wherein no judgment could have previously been entered by "the agency of an attorney," and by "declaration filed." No declaration could have been founded upon the promissory note in the present case before it was due and payable, according to its terms.

Nicholl v. Bromley, 2 Brod. & B. 464.

From the statements of judges in the Penn-

sylvania cases, it appears that prothonotaries are generally men ignorant of law, some of them totally uneducated; and that no uniform routine prevails among them, but each one does what seems best in his own eyes; also that a summary mode of rectifying their mistakes exists by *ex parte* application to a judge at chambers.

Lewis v. Smith, 2 Serg. & R. 142; *Holden v. Bull*, 1 Penn. & W. 460.

It would be absurd to predicate a rule of law upon the doings of such men, contrary to the plain meaning of the statute under which they profess to act, or to hold that the courts of our State are required to give to such loose proceedings the character of a judgment.

Messrs. Edward Lyman Short, Samuel Blythe Rogers, and John C. Thomson, for respondent:

The defendant, being domiciled in Pennsylvania at the time the judgment was entered there, was bound personally by the judgment, provided it was rendered in accordance with the laws of that State.

See *Trebilcock v. McAlpine*, 46 Hun. 469; *Huntley v. Baker*, 38 Hun. 578; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451; *Gibbs v. Queen Ins. Co.* 63 N. Y. 114; *Hunt v. Hunt*, 72 N. Y. 238; 1 Wharton, Ev. § 808; *Elaesser v. Haines*, 52 N. J. L. 17; *Douglas v. Forrest*, 4 Bing. 686; *Beequet v. MacCarthy*, 2 Barn. & Ad. 951; *Bank of Australasia v. Nias*, 6 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661; *Vallee v. Dumergue*, 4 Exch. 290; *Meeus v. Thellusson*, 8 Exch. 638; *Copin v. Adamson*, L. R. 9 Exch. 845;

Strict construction.

A warrant of attorney to confess judgment should be strictly construed. *Spencer v. Emerine*, 46 Ohio St. 433.

The warrant must be strictly pursued. *Henshall v. Matthew*, 1 Dowl. P. C. 217; *Grubbs v. Blum*, 62 Tex. 423.

The rule that the power to confess a judgment must be clearly given and strictly pursued must not be applied to defeat the obvious intentions of the party granting the power. *Keith v. Kellogg*, 97 Ill. 147; *Holmes v. Parker*, 125 Ill. 478; *Holmes v. Bemis*, 14 West. Rep. 383, 124 Ill. 458.

Blanks and omissions.

Blanks in a warrant to confess a judgment will not affect its validity if it is clear and explicit as to the intention. *Links v. Mayer*, 22 Ill. App. 489.

Blanks for "I" "my" and "me" in a power of attorney to confess judgment do not make it void. *Swessey v. Kitchen*, 80 Pa. 160.

Where the name of the party against whom judgment is authorized is left blank in a note signed by several persons authorizing an attorney to confess judgment, judgment cannot be entered against any of them; the remedy being harsh and stringent no presumption will be indulged in to aid the contract. *Morris v. Bank of Commerce*, 87 Tex. 603.

The omission of the name of one debtor from the power of attorney which he executes in common with another is not a ground for setting aside the judgment entered on the warrant against both of them. *Wood v. Ellis*, 10 Mo. 382.

Who authorized to make the confession, and where.

A warrant of attorney in a lease may be to "any attorney" generally. *Poppers v. Meager*, 33 Ill. App. 19; *Mikeska v. Blum*, 63 Tex. 44.

A warrant to a certain person or any other attorney

will authorize a confession by him and another attorney. *Patton v. Stewart*, 19 Ind. 233.

The prothonotary may be authorized by a written order to enter a judgment by confession. *McCallmant v. Peters*, 18 Serg. & R. 196; *Cook v. Gilbert*, 8 Serg. & R. 567.

But not where the power in the warrant is given only to the creditor, his executor or administrator. *Rabe v. Heslip*, 4 Pa. 139.

A bond authorizing "any attorney of any court of record in the State of New York or any other State to confess judgment" does not authorize judgment by a prothonotary or clerk under a special law of a State in which the debtor does not reside, but the authority must be strictly pursued. *Grover & B. S. Mach. Co. v. Radcliffe*, 6 Cent. Rep. 679, 66 Md. 511.

A warrant by two residents of Pennsylvania and one of New Jersey to a certain person, "attorney of the court of common pleas at Philadelphia, etc., or of any court there or elsewhere, or to any prothonotary of any of the said courts," does not authorize a confession of judgment in New York. *Manufacturers & M. Bank of Phila. v. St. John*, 5 Hill, 497.

Insanity or death of party.

The insanity of the debtor will not revoke the power of attorney to confess judgment. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

Judgment cannot be signed on such a warrant after the death of the defendant. *Cowie v. Allaway*, 8 T. R. 257; *Heath v. Brindley*, 4 Nev. & M. 235.

Nor after the death of the plaintiff. *Wild v. Sands*, 2 Strange, 718. But see *infra*.

A warrant to two or more persons may be executed by the survivors after the death of one. *Fendall v. May*, 2 Maule & S. 76; *Todd v. Dodd*, 1 Wils. 812; *Futcher v. Smith*, 2 W. Bl. 1301; *Raw v. Alderson*, 1 Moore, 145; *Harper v. Jackson*, 1 Harr. & W.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cassidy v. Leetch*, 53 How. Pr. 108; *Shepard v. Wright*, 113 N. Y. 582.

The judgment sued on is, under the laws of Pennsylvania, in every respect a valid, binding, personal judgment.

Braddee v. Brownfield, 4 Watts, 474; *St. Bartholomew's Church v. Wood*, 61 Pa. 100; *Colvin v. Blymyer*, 121 Pa. 582; *Montague v. McDowell*, 99 Pa. 265; *Hopkins v. West*, 83 Pa. 109; *Rutherford v. Boyer*, 84 Pa. 347; *Hageman v. Salisbury*, 74 Pa. 280.

The record here proved is sufficient to show the rendition of a judgment.

Lewis v. Smith, 2 Serg. & R. 142, 155; *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr. 569, 581; *Com. v. Conard*, 1 Rawle, 249; *Helvete v. Rapp*, 7 Serg. & R. 806.

Such words as "wherefore judgment," taken in connection with other statements, are quite sufficient.

Freem. Judgm. §§ 47, 50; *Cromwell v. Bank of Pittsburgh*, *supra*; *Fish v. Emerson*, 44 N. Y. 376; *Church v. Crossman*, 41 Iowa, 378; *Reg. v. Yeoveley*, 8 Ad. & El. 806, 818; *Leathers v. Cooley*, 49 Me. 387, 343; *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 333, 340, 16 L. ed. 650.

The record here proved is not a mere memorandum of the clerk, but the only judgment in the case.

Moreover, the prothonotary certifies that this record is "a copy of the judgment." These duly certified recitals are presumptive evidence of the truth of the facts certified to.

Hatcher v. Rochelleau, 18 N. Y. 86, 94; *Smith v. Tiffany*, 5 Thomp. & C. 552; *Whitaker v. Bramson*, 2 Paine, 209, 222.

There is nothing in the point that the judgment was entered before the note was due.

It appears that it is customary and according to law to enter such a judgment at once, for the sake of the lien given, though it cannot be enforced by execution, etc., until the note becomes due.

Com. v. Conard, 1 Rawle, 249; *Montelius v. Montelius*, 1 Brightly, 79; *Helvete v. Rapp*, 7 Serg. & R. 305; *Cooper v. Shaver*, 101 Pa. 547; *Scudder v. Coryell*, 10 N. J. L. 403; *Sand Blast F. S. Co. v. Parsons*, 54 Conn. 313.

Ruger, Ch. J., delivered the opinion of the court:

This was an action upon a judgment, and the question involved is whether the record in evidence constituted a valid judgment, in another State, by confession. In the case of such a judgment it is, of course, unnecessary that any process should be issued or served, declaration filed, or personal appearance entered by the defendant; as these proceedings are totally inconsistent with the nature of a judgment by confession. The appearance by an attorney, under a written power from the party, authorizing his consent to a judgment, is the legal equivalent of the process and proceedings usually taken in an action *in initium*. In all such cases it is simply a question as to what the principal has authorized to be done in his name, and does not involve any of the

214; *Johnson v. Jenkins*, 1 Dowl. P. C. 367; *Build v. Wightman*, 1 Dowl. P. C. 545; *Hind v. Kingston*, 6 Dowl. P. C. 525.

Entry by executors or administrators.

A warrant to a certain person named will not authorize his executors to enter judgment, although it recites that it is to secure payment to him "his heirs, executors, administrators and assigns." *Henshall v. Matthews*, 1 Dowl. P. C. 217.

Nor although the defeasance recites that the warrant authorizes "his executors and administrators" to enter up judgment. *Manville v. Manville*, 1 Dowl. P. C. 544; *Foster v. Claggett*, 8 Dowl. P. C. 524.

A warrant to the creditor alone, although releasing error to him, "his executors and administrators," will not authorize them to enter judgment after his death. *Short v. Coglin*, 1 Anstr. 225.

Against whom judgment may be entered.

A clause in a promissory note authorizing judgment "against me" will authorize it against the maker only and not against indorsers. *Williams v. Merchants Nat. Bank of Kansas City*, 67 Tex. 606.

Judgment may be confessed against both lessees on a provision in a lease that "the party of the second part" authorizes any attorney to enter "their" appearance and confess judgment. *Frank v. Thomas*, 35 Ill. App. 547.

In whose favor.

An indorsee may enter judgment by confession on a note containing a power of attorney in favor of the "holder." *Richards v. Barlow*, 1 New Eng. Rep. 577, 140 Mass. 218.

A transferee without indorsement may enter judgment on a warrant of attorney in a sealed note giving authority to confess judgment in favor of the "holder." *Clements v. Hull*, 35 Ohio St. 141, 13 L. R. A.

But not where the power is in favor of the "legal holder." *Cushman v. Welsh*, 19 Ohio St. 538.

Nor on a mere power to confess judgment on a note payable to bearer without specifying in whose favor the judgment may be confessed. *Spencer v. Emerine*, 46 Ohio St. 433.

Indorsing a judgment note to a third person merely that judgment may be entered in his name gives him no standing in a court of equity to obtain any affirmative relief based on such judgment. *Chisholm v. McDonald*, 30 Ill. App. 176.

A power of attorney authorizing judgment in favor of "said-[payee] & Bro." while the note is payable to one person only will authorize judgment in his favor and the words "& Bro." may be rejected as surplusage. *Holmes v. Bemis*, 14 West. Rep. 383, 124 Ill. 453.

A lease by an agent "for Patterson Mills" giving authority to confess judgment will not authorize a confession in favor of the executors of "Robert E. Patterson, deceased, trading as R. Patterson & Co." *Patterson v. Pyle*, Pa. Feb. 25, 1889.

When entry of judgment may be made.

A power of attorney to appear before any court of record and confess judgment may be exercised before a clerk of the court in vacation. *Keith v. Kellogg*, 97 Ill. 147.

Such judgments cannot be entered by the prothonotary, before the warrants reach his office. *Chambers v. Denie*, 2 Pa. 421.

Judgment on a note not due may be entered on a warrant authorizing confession at any time after date. *Sherman v. Baddely*, 11 Ill. 622; *Adam v. Arnold*, 86 Ill. 185; *McDonald v. Chisholm*, 131 Ill. 273; *Aldritt v. First Nat. Bank of Morrison*, 22 Ill. App. 24, 192.

Or on a note payable on a future day certain authorizing confession "at any time hereafter."

questions arising in an action *in invitum* against resident or nonresident defendants. The judgment sued upon purported to have been rendered by the Court of Common Pleas of the State of Pennsylvania on the 14th day of January, 1878, in favor of the plaintiff, Lewis M. Teel, and against the defendant, Abraham Yost, for \$2,268, *d. s. b.*, or as upon debt without process. It was entered upon an instrument, filed in the records of the court, reading as follows:

"South Bethlehem, January 12, 1878.

"\$2,268.

"One year after date I promise to pay Lewis M. Yost twenty-two hundred and sixty-eight dollars, without defalcation, for value received. And I do hereby authorize any attorney of any court of record in Pennsylvania or elsewhere to confess judgment therefor, and release of errors, and I do hereby waive all stay of execution from and after the maturity of the above note. Witness my hand and seal the day and date above written, with ten per cent allowed for collection fees, with interest from date. "Abraham Yost. [L. s.]

"Witness present: Geo. Ziegenfuss."

This instrument is usually called a "judgment note,"—an obligation quite common in the State of Pennsylvania. The parties to the note were both residents of that State, and had been so for a long time previous to and after the rendition of the judgment, and the court of common pleas was a court of general jurisdiction in that State, of which the prothonotary was clerk, and had charge of its records, and authority to enter judgments by confession.

If the court in Pennsylvania had jurisdiction of the person of the defendant and the subject matter of the action, whatever course it might afterwards have pursued in determining the rights of the parties, they cannot be heard now to re-litigate the questions considered in that action. As to such matter, upon the principle of *res adjudicata*, the judgment is binding and conclusive upon the parties. If this was a valid judgment under the laws of the State where it was rendered, it must, under the Constitution of the United States and the laws of Congress, be accorded the same force and effect in this State that it had in the State where rendered. Section 1, art. 4, Const. U. S.; Rev. Stat. U. S. § 905.

The rule laid down in *Shumway v. Stillman*, 6 Wend. 458, was "that the judgment of a court of general jurisdiction, in any State in the Union, is equally conclusive upon the parties in all the other States as in the State in which it was rendered. This, however, is subject to two qualifications: *first*, if it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, *second*, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." This case has been quite uniformly cited and approved as a leading case in subsequent cases in this State. Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him

Richards v. Barlow, 1 New Eng. Rep. 577, 140 Mass. 218.

A warrant to confess a judgment at any time "after the date" of a note which is on demand will not authorize judgment on the same day. *Waterman v. Jones*, 28 Ill. 54; *White v. Jones*, 38 Ill. 150.

But it is otherwise where judgment is authorized "at any time hereafter." *Thomas v. Mueller*, 108 Ill. 36.

Power to enter judgment on notes for such sum "as may appear to be unpaid" will not authorize a judgment until the notes are due. *Sloane v. Anderson*, 57 Wis. 123; *Reid v. Southworth*, 71 Wis. 238.

Power to enter judgment on such warrants before the maturity of the note must be given in clear and precise language. *Reid v. Southworth*, *supra*.

On entry of appearance one day earlier than is authorized by the power of attorney the judgment will be void for lack of jurisdiction. *White v. Jones*, *supra*.

Contingencies; unadjusted equities or claims.

A warrant to confess judgment for "any rent which may be due by the terms of this lease" is void under a statute authorizing confession for a debt justly due if the amount of the rent under the lease is contingent. *Little v. Dyer* (Ill.) June 15, 1891.

The equities must first be adjusted before judgment can be entered on an instrument making the liability depend on contingencies and equities between the parties. *Dilley v. Van Wie*, 6 Wis. 200.

Unless the amount due can be ascertained from the face of the instrument, the prothonotary cannot enter judgment on it under the Pennsylvania Act of 1806. *Conway v. Halstead*, 73 Pa. 354.

But he can enter judgment on a contract for payment in annual installments, as he can ascertain *prima facie* the amount from the face of the instrument. 13 L. R. A.

ment itself and the indorsments thereon. *Whitney v. Hopkins*, 185 Pa. 246.

For what amount; variance; misdescription.

Entry of judgment for the amount of a note, where the complaint claims much larger damages, and the plea of confession admits that the larger amount is due, is not valid. *Tucker v. Gill*, 61 Ill. 236.

Judgment can be entered only for the sum actually due, although the warrant of attorney authorizes it for the "sum appearing to be due." *Dilley v. Van Wie*, 6 Wis. 200; *Sloane v. Anderson*, 57 Wis. 123.

A judgment is not entirely void because entered on a warrant of attorney for an excessive amount. *Davenport v. Wright*, 51 Pa. 202.

The debtor only can complain that the amount of a judgment entered on a warrant of attorney is excessive. It cannot be attacked for that reason by a creditor. *Adam v. Arnold*, 88 Ill. 185.

A judgment confessed under a warrant of attorney in a tax collector's bond must be for the whole penal sum, and one for less will be stricken off with leave to enter one for the whole amount. *Com. v. Evans*, 8 Pa. Co. Ct. 665.

An attorney's fee may be included in a judgment entered by warrant of attorney where the fee is fixed by the warrant, but the attorney has no authority to fix it. *Campbell v. Goddard*, 5 West. Rep. 129, 117 Ill. 251.

Power to confess judgment on a note of a certain date will not sustain a judgment on a note of a different date, although it is claimed that there was a mistake in writing the date. *Chase v. Dana*, 44 Ill. 262.

A mere misdescription of the "foregoing note," which is on the same paper, as to the time when

to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant, and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it.

Several objections are raised to the recovery in this action, some of them going to the form of the judgment, and others assailing the jurisdiction of the court to render it; but we are of the opinion that none of them are well founded. It was found by the trial court, as a question of fact, that said "judgment was duly rendered and entered according to the laws of Pennsylvania. It is, and was by the laws of Pennsylvania, a valid, binding adjudication, *in personam*, against the defendant herein, and entitled, by the laws of said State, to have the same faith and credit given to it as if it had been entered upon a verdict after a trial in which the defendant had appeared." A finding of law to the same effect was made by the court, and it is upon exceptions to these two findings that

the questions in the case arise. These findings were amply supported by the evidence, and unless, therefore, it appears that some error of law was committed by the court on the trial, the judgment must be sustained. The evidence leaves no room for doubt but that this was considered in form and substance a valid judgment, *in personam*, in the State where it was rendered, and constituted a "judgment," within the meaning of the Acts of Congress requiring faith and credit to be given to it in other States. The reasons for this conclusion are so well stated in the opinions of the supreme court of that State that we shall content ourselves with reference to two reported cases only.

It was said in the case of *Helvetia v. Rapp*, 7 Serg. & R. 806: "The evident and sole intention of the Legislature in conferring the power of entering a judgment on the judgment bond, without the intervention of an attorney, was to exempt the obligor from the payment of costs to an attorney. This Act was passed on the 24th of February, 1806. It provided that the prothonotary of any court of record, on the application of the original holder, or his assignee, of a bond, note, or other instrument, on which judgment is confessed, or containing a warrant of attorney to confess a judgment,

interest runs, is immaterial. *Osgood v. Blackmore*, 50 Ill. 281.

A misdescription in the declaration on a sealed note, payable at a particular place, describing it as an unsealed note payable generally, will not make the judgment void. *Adam v. Arnold*, 86 Ill. 185.

Proof necessary.

After a year and a day a judgment cannot be entered on a warrant of attorney without leave of the court, and proof that the maker is still alive and an indebtedness still due. *Hinds v. Hopkins*, 28 Ill. 844; *Lushington v. Waller*, 1 H. Bl. 94; *Anonymous*, 6 Mod. 212; *Manufacturers & M. Bank of Phila. v. St. John*, 5 Hill, 497.

But failure of such proof is not alone sufficient to make the judgment void. *Rising v. Brainard*, 36 Ill. 79; *Stuhl v. Shipp*, 44 Ill. 183.

The record must show proof of the execution of the warrant of attorney. *Gambia v. How*, 8 Blackf. 133.

Also the nature of the liability. *Ibid*.

Failure to file proof of the execution of a power of attorney on the entry by a clerk of a court of record, in vacation, of a judgment by confession renders the judgment void for lack of jurisdiction. *Gardner v. Bunn*, 7 L. R. A. 729, 132 Ill. 403; *Durham v. Brown*, 24 Ill. 94; *Iglehart v. Chicago Mut. & F. Ins. Co.* 85 Ill. 514.

The filing of an affidavit is a condition precedent to the entry of judgment on an instrument authorizing the prothonotary to enter judgment for any installment or installments due, "as fixed by the affidavit" of the party. *Koons v. Hendricks*, 6 Kulp, 185.

The written authority of an attorney must be on file, under the Texas statute, at the time of entering judgment thereunder, and the lack is not cured by subsequently putting it on file. *Grubbs v. Blum*, 62 Tex. 428.

This rule applies although the note containing the warrant is lost. *Strasburger v. Heidenheimer*, 63 Tex. 5.

Failure to file with the confession proof of execution of the power of attorney under which it is made is ground for setting aside the judgment and quashing an execution issued thereon. *Stein v. Good*, 1 West. Rep. 686, 115 Ill. 93.
18 L. R. A.

A judgment entered on a warrant without the required affidavit may be allowed to stand by a *nunc pro tunc* order upon filing it, but an execution previously issued should be set aside if necessary to protect intervening liens. *Woods v. Woods*, 126 Pa. 386.

The affidavit, if made by anyone but the plaintiff, must show the knowledge of the affiant. *McCabe v. Sumner*, 40 Wis. 898; *Sloane v. Anderson*, 57 Wis. 123.

It must also show the amount due. *Sloane v. Anderson*, *supra*.

An affidavit that the affiant is acquainted with the hand-writing of the debtor, and that the signature to the warrant of attorney is genuine, is a sufficient proof of its execution. *Hall v. Jones*, 32 Ill. 88.

The clerk cannot hear evidence and determine the proof of the execution of the warrant. *Roundy v. Hunt*, 24 Ill. 598.

On a confession of judgment under a warrant in open court, it will be presumed that the authority to confess it was judicially passed upon. *Hall v. Jones*, *supra*; *Iglehart v. Chicago Mut. & F. Ins. Co.* 85 Ill. 514; *Roundy v. Hunt*, 24 Ill. 598.

So as to the proof of a notice required by statute in order to render the note due. *Bush v. Hanson*, 70 Ill. 480; *Osgood v. Blackmore*, 50 Ill. 281.

To enter judgment on a premium note, under Pa. Act July 26, 1842, a full statement and affidavit of premiums due and account with the assured must be filed. *Barker v. Beeber*, 2 Cent. Rep. 810, 112 Pa. 216.

Consolidation.

The court may consolidate several powers of attorney and enter one judgment thereon. *Iglehart v. Chicago Mut. & F. Ins. Co.* 35 Ill. 514.

Setting aside; correcting.

The court has a discretion as to setting aside judgments entered on warrants of attorney. *Kneeder's App.* 92 Pa. 428; *Hall v. Jones*, 32 Ill. 38.

A new judgment may be entered where the first one is invalid for failure to comply with the terms of the instrument authorizing its entry. *Koons v. Hendricks*, 6 Kulp, 185.
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shall enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, appears to be due, without the agency of any attorney, or declaration filed, particularly entering on his docket the date and time of the writing, which shall have the same force and effect as if a declaration had been filed, and judgment had been confessed by an attorney, or given in open court in term time. . . . There being no literal form directed, and no precedent to guide the prothonotary in the exercise of this new duty, each has adopted his own mode. They are as various as their faces, and many of them scarcely present a feature to inform a purchaser or designate a judgment. But here is a substantial entry of a judgment bond, containing all that is necessary to give information. It is entered on the docket in the form of an action, as a judgment bond; the names of the parties; the amount due; the date and time of the writing. It states the entry of a judgment bond, and seal of the defendant. The judgment bond is filed of record, entered the 17th of May, 1815. What is entered? A judgment on the bond filed. No man could be deceived by this mode of entry; for, however inartificial it may be, however defective in the technical words of a judgment, none who called for information would be led into error. The docket entry gave full information. It might have been more formal, but still it is the entry of a judgment entered by the prothonotary, who was authorized to make the entry."

The head-note in the case of *Com. v. Conard*, 1 Rawle, 249, reads that "a prothonotary complies substantially with the directions of the Act of Assembly of the 24th of February, 1806, when, in entering judgment on a bond with warrant of attorney, upon the application of the party he enters on his docket the names of the obligor and obligee in the form of an action as parties, the date of the bond and warrant of attorney, the penal sum, the real debt, the time of entering the judgment, and the date of the judgment on the margin of the record." These clear and explicit announcements by the highest courts of the State, of the force and effect given to such judgments in that State, are entitled to the highest respect, and cannot, without ignoring the requirements of comity and propriety prevailing among sister States, be disregarded by the courts of other States. It should in any event be for the gravest reasons alone, and those demanded by the clearest rules of public policy and justice, that the courts of one State should deliberately deny to the decisions of the courts of another State the authority which they possess in the State where rendered. So far from the questions in this case being of that character, we are of the opinion that judgments by confession, in all material respects similar to the one under consideration, are not only valid judgments at common law, but have been authorized by the statute law of most of the States of the Union, and among others, by our own.

The principal claim made by the defendant on the argument of the case here was that the note did not authorize a confession of judgment upon it before it was due; but it was also claimed that the record produced did not constitute a judgment, inasmuch as it did not ap-

pear thereby that process was issued and served on the defendant, or declaration filed, or personal appearance made by him, or proof taken of the cause of action by the court, and therefore that it had no jurisdiction to render a judgment. We have already stated that in judgments by confession neither process, declaration, nor personal appearance are anywhere required in order to authorize the rendition of a valid personal judgment by a competent court. The appearance of the agent appointed by the party in his warrant of attorney upon the entry of the judgment constitutes, to every intent and purpose, an appearance by the party, and gives the court jurisdiction to render a judgment to the effect authorized against his principal.

We are also of the opinion that the entry of judgment, before the maturity of the note, was sanctioned, not only by the law of Pennsylvania, but by that of every other country where judgments by confession are permitted. The evidence in the case showed that it was the common practice in Pennsylvania to enter judgment on such notes at any time after their date, without respect to the time when they became due; but the prothonotary was not authorized to issue execution for their collection until, by the terms of the note, it became due. The cases of *Com. v. Conard*, 1 Rawle, 249; *Montelius v. Montelius*, 1 Brightly, 79, and *Helbete v. Rapp*, 7 Serg. & R. 306,—are examples of judgment on such notes; and in *Cooper v. Shaver*, 101 Pa. 547, an application to set aside the entry of judgment on a collateral obligation, guaranteeing the collection of a judgment with warrant of attorney, was denied, although no proof was given that an effort had been made by the plaintiff or that he was unable to collect the original judgment. In New Jersey where the practice of giving bonds and notes, with warrant of attorney, is similar to that prevailing in Pennsylvania, the court held that it was not error to enter a judgment by confession upon a note before it became payable.

In this case there is no restriction upon the authority of the attorney to confess judgment, and the waiver of a stay of execution after the maturity of the note constitutes an implied admission on the part of the defendant that judgment could be entered previous to that time. Under the former practice of entering judgments upon a warrant of attorney, it was uniformly held, in England and in this country, that where the warrant is given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of judgment until default be made in the payment, unless there is some restriction as to the time of entry in the warrant. See *Graham*, Pr. 778, and cases cited. We are therefore of the opinion that the entry of the judgment before the maturity of the note was in accordance with the settled practice, not only in Pennsylvania, but also in other jurisdictions where judgments by confession have been authorized.

There are also some authorities in this State, holding, substantially, that judgments, similar to the one in question, when rendered under the authority of the law of the State in which they are entered, may be enforced by action in this State. That doctrine was impliedly held

in *Trebilcock v. McAlpine*, 46 Hun, 471, by the General Term in the Third Department, where a judgment entered upon a Pennsylvania note, similar to that under consideration, was held to be a valid judgment *in personam* in this State under the laws of Congress, provided it was authorized by the law of the State where it was rendered. The judgment in that case was reversed, because it was not shown that the law in Pennsylvania authorized the entry of such a judgment.

In *Huntley v. Baker*, 38 Hun, 578, it was held by the General Term of the Fifth Department that, by reason of the relations between the State and its citizens, which affords protection to him and his property and imposes duties on him as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the State furnishing a method of service which is not personal, and which, in fact, may not become actual notice to him, even though he is absent from the State where the judgment was entered. In that case the law authorized the service of a summons at the usual place of abode of the defendant, in case of his absence from the State, and the service was made by leaving it there in the presence of his wife.

In *Gibbs v. Queen Ins. Co.*, 68 N. Y. 114, it was held that, where a foreign fire insurance company has designated an agent, in compliance with the State Insurance Laws, making the appointment of an attorney or agent in this State upon whom process in suits against the company may be served a prerequisite to its doing business in the State, it thereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction, and may render a judgment valid and capable of being enforced upon any property within the jurisdiction. The court in that case refers to the case of *Douglas v. Forrest*, 4 Bing. 686, where the decrees sued upon were pronounced in Scotland against a native thereof, who went out of the jurisdiction before the commencement of the action, and never returned, and had no notice of the proceeding. The decrees ordered him to pay certain sums of money. He had been summoned by posting, according to the law of Scotland. The court of common pleas of England held these decrees to be consistent with the principles of justice. The ruling, however, was confined to a case "where the party owed allegiance to the sovereignty which gave the judgment, from being born under it, and from his property being protected by it." The court also cited *Bequet v. McCarthy*, 2 Barn. & Ad. 951, where it was held that a "judgment *in personam* obtained in a British colony against an absent party without notice to him, but by the service, according to local law, upon the king's attorney-general for the colony, was not so contrary to natural justice as to be "void;" and in *Hobhouse v. Courtney*, 35 Eng. Ch. 119, it was held that where a nonresident has created an attorney in fact, to deal with the particular matter afterwards in suit, a service on such attorney will be good service upon the principal. We may also refer to the case of *Vallee v. Du-mergue*, 4 Exch. 290, where the defendant, a

resident of England, was a shareholder in a French corporation and was by the law of France required to elect a domicile in France where the directors of the company might notify him of all proceedings of the company or its shareholders. By the law of France, all legal proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France. A judgment recovered by default upon process served at such elected domicile was held to be a valid judgment *in personam*, Baron Alderson, saying: "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

To come, however, more particularly to judgments by confession, I am of the opinion that the one under consideration conforms to all of the requirements of the law in the various countries where such judgments have been authorized. It is stated in Chitty's General Practice (vol. 2, p. 838, 1st ed.), in speaking of the jurisdiction of the court of king's bench, that "this court (as well as common pleas and exchequers) has an exclusive summary jurisdiction (as well of an equitable as of a legal nature) over a warrant of attorney authorizing a judgment in the particular court, and all proceedings thereon to entertain a motion to set the same aside if it authorize a judgment in that particular court; and it has been usual to frame that security under seal, enabling certain attorneys, therein named, or any other attorney of a particular court, to appear in that court as attorney for the party, and to receive a declaration in an action, usually of debt, for a named sum at the suit of the creditor, and to confess such action, or suffer judgment by *nil dicit* or otherwise, to be entered up against the party, and also authorizing such attorneys, respectively, to release any errors in the proceeding.

How or when this peculiar security for a debt, authorizing a creditor, as it were, *per saltum*, to sign a judgment and issue an execution without even issuing a writ, was first invented, does not appear; but it has now become one of the most usual collateral securities on loans of money." It is further said, with reference to the form of the warrant of attorney, that "it need not in strictness be under seal, though usually so, in order to authorize the release of errors."

But it will, perhaps, be more satisfactory to show that a practice similar to that prevailing in Pennsylvania obtained in our own State from the earliest times to the adoption of the Code in 1848. The earliest allusion to this practice occurs in chapter 15 of the Colonial Laws of 1774, under the title "An Act for the Better Discovery of Judgments in the Courts of Record in this Colony," wherein it is provided that the clerks of courts of record within six days after every term of court, shall enter in an alphabetical docket the name of the party against whom the judgment is entered, with a particular "of all judgments by confession, *non sum informatus* or *nil dicit*, etc. By chapter 104 of the Laws of 1801, it was provided "that no judgment shall be entered upon

any bond or contract in writing, hereafter to be made, upon the confession of any attorney, by virtue of any authority whatever contained in the same instrument . . . with such bond or contract, and no judgment shall be entered upon any confession taken out of court before any judge," etc. By section 8, chap. 259, Laws 1818, it was provided that a confession of judgment by bond and warrant of attorney should contain a particular statement and specification of the nature and consideration of the debt or demand, and in default thereof the judgment should be adjudged fraudulent as to other bona fide creditors. Certain other provisions, in relation to warrants of attorney, not material to be particularly noticed, are found in chapter 48 of the Laws of 1818, and chapter 50 of the same year, and other years previous to 1828. By section 10, art. 1, title 4, chap. 6, Rev. Stat., it was provided "that judgments may be entered in the supreme court, or in any court of common pleas, in vacation or in term, upon a plea of confession signed by an attorney of such court, although there be no writ then pending between the parties, if the following provisions be complied with, and not otherwise: *first*, the authority of confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract, or other evidence of the demand for which such judgment is confessed; *second*, such authority shall be produced to the officer signing such judgment, and shall be filed with the clerk of the court in which the judgment shall be entered, at the time of filing and entering such judgment." It was also provided by section 4, title 3, of the same chapter, that in cases of an action upon a written instrument for the payment of money, where the defendant had suffered default, or upon confession, that a reference might be had to the clerk to assess damages, and in assessing such damages the production to the clerk of the instrument set forth in the declaration shall be sufficient evidence of the same, without any other proof.

The practice under the statutes is described by Graham, in his work on Practice, as follows: "A warrant of attorney is a written authority to the attorney to whom it is directed, or, as is more generally the case, to any attorney of the supreme court, or any other court of record, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default; it also, in general, contains a release of errors. It must be subscribed by the defendant, and must be in some proper instrument (usually by deed in the presence of a subscribing witness, although this is not necessary) distinct from that containing the bond, contract, or other evidence of the demand for which the judgment is confessed; and it must be produced to the officer signing the judgment, and filed with the clerk of the court in which the judgment is entered, at the time of the filing and docketing of such judgment. . . . Within a year and a day from the date of the warrant of attorney, judgment may be entered up as of course, without the leave of court." Graham, Pr. chap. 4, p. 467 *et seq.* I have been unable to find any rule 13 L. R. A.

or precedent in this country or England requiring a power of attorney to confess judgment to be acknowledged, or even to be attested by a subscribing witness. The Code of Procedure effected a change in the mode of procedure, and reinstated the practice of combining in one instrument the authority for a judgment and the proof of debt, and described the process as judgment by confession. By that Code a party could confess judgment either for money due, or to become due, or to secure a person for contingent liability on behalf of the defendant. To do this the defendant was required only to make a statement in writing, signed and verified by him, naming the amount for which judgment might be entered, and authorizing its entry, and stating, concisely, the facts out of which the liability arose. Upon filing this statement with the clerk of the court, he was required to enter the judgment for the amount confessed, with \$5 costs and disbursements, and the statement and affidavit, with judgment indorsed thereon, became the judgment roll. It is thus apparent that, under the practice now existing in this State, judgments are daily entered in our courts without process, declaration, or appearance, and without the intervention of the court, or even an attorney, and without proof of any authority from the defendant except that inferred from his signature to the statement.

This brief historical statement of the condition of the law on the subject in this State will have failed in its purpose if it does not show that heretofore the filing in court of a warrant of attorney, authorizing the confession of a particular judgment, gave the court jurisdiction, over the person of the party executing it, to adjudicate according to its regular practice upon the subject embraced in the warrant. When the warrant is for the confession of judgment for a specific sum, it is, of course, unnecessary to prove the nature, existence, or amount of the debt upon the assessment of damages, as the express authority of the warrant supplies the place of such proof. And, as it is held in Pennsylvania on a warrant authorizing any attorney to confess judgment, the prothonotary may properly be considered such attorney. There would seem to be no valid reason why this should not be so, as the warrant authorizes the plaintiff to select any attorney he may desire, and the exercise of that authority is, at the most, a mere matter of form. Judgment is entered there, as here, on the request of the plaintiff, by the clerk, without the intervention of the judge in term time or vacation, and, in case the debt is not then due, execution is stayed until it matures. The only material difference existing between the present practice in this State and in Pennsylvania, in relation to judgments by confession, is that here a defendant is required to verify his statement as to the nature and circumstances of the indebtedness. This requirement has no relation, however, to the jurisdiction of the court or the authority of the clerk to enter judgment, as its only purpose has frequently been declared to protect creditors from judgments fraudulently confessed by an insolvent debtor. *Sheldon v. Stryker*, 84 Barb. 121; *Chappel v. Chappel*, 12 N. Y. 219; *Dunham v. Waterman*, 17 N. Y. 9. In the latter

case, *Judge Selden* says: "The object of the Statute being to protect the creditors of the party confessing the judgment against fraud, its violation forms a proper subject of equitable jurisdiction." In the case of *Sheldon v. Stryker*, *supra*, *Judge Emott* says, in view of the principles declared in the cases of *Chappel* and *Dunham*, above cited, that such judgment is not "an absolute nullity if it is valid as to any person. It is valid as to the defendant in the judgment, for he cannot even move to set it aside, and such judgments are always amended as to him." It was therefore held that a judgment entered by confession, although it be not confessed in conformity with the provisions of the Code, is not absolutely void, but

is voidable, at the instance of certain creditors, only. In view of these decisions, it would be idle to contend that a defendant can impeach a judgment entered upon a warrant of attorney signed by him, and in conformity thereto, whether his statement be verified or acknowledged or not. It is not easy to point out any difference in principle between the practice now prevailing in this State and that pursued in Pennsylvania. Given a valid warrant of attorney in either State, the rest is matter of form, to be regulated by the laws of the respective States where the cause of action arises.

The judgment should therefore be affirmed.
All concur, except *Finch, J.*, absent.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE OF CONNECTICUT

v.

Edgar M. GEER, *Appt.*

(.....Conn.....)

1. Woodcock, ruffed grouse, or quail need not have been killed for the purpose of conveying them out of the State in order to make it an offense under Gen. Stat., § 2546, to have such birds in possession with intent to procure their transportation out of the State.

2. A state statute prohibiting game birds to be killed for the purpose of conveying them out of the State is not an unlawful interference with interstate commerce.

(October 26, 1891.)

NOTE.—Game Laws as affecting interstate commerce.

The apparently conflicting decisions of the different States on this subject may be mostly reconciled by considering the difference in the language of the statutes.

A statute making it an offense, under a penalty, to have game that has been killed in possession within a certain period of the year, without reference to the time or place of killing, is not, as to game killed in another State, in violation of the Constitution of the United States as an interference with interstate commerce. *Phelps v. Racey*, 60 N. Y. 10; *State v. Randolph*, 1 Mo. App. 15; *Magner v. People*, 97 Ill. 320; *New York Game Prot. Assn. v. Durham*, 19 Jones & S. 806.

And it makes no difference that the game was lawfully killed and purchased before the close season began, if sold afterwards. *Magner v. People*, and *New York Game Prot. Assn. v. Durham*, *supra*.

So in England it has been held that birds killed in Holland and received by a poulterer in England are within the Act of 39 and 40 Vict., chap. 29, § 2, which prohibits any person during a certain portion of the year from having such birds in his possession that have been recently killed. *Whitehead v. Smithers*, L. R. 2 C. P. Div. 558.

A statute making it unlawful to transport game killed within the limits of the State knowing it to have been sold, or to carry it to any place where it is to be sold, or to any place outside of the State, was held valid in a case where the transportation complained of was between places in the same State without any intimation from the court that it would not also be valid as to transportation to places without the State. The court declared that 13 L. R. A.

A PPEAL by defendant from a judgment of the Court of Common Pleas for New London County, convicting him of a violation of the Game Laws. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. R. Wheeler* and *H. A. Hull* for appellant.

Mr. Solomon Lucas, for the State:

This is not one of that class of cases where the law of the State attempts to prohibit the transportation of articles beyond its limits in which the right of property thereto is absolute in the shipper. The assertion of the appellant that the birds had become an article of commerce is based upon a misapprehension and assumes the point in controversy.

American Exp. Co. v. People, 9 L. R. A.

the Legislature could permit persons to kill game on such terms and conditions as it might dictate, and that the person killing it had only such property interest in the game as the Legislature may confer. *American Exp. Co. v. People*, 9 L. R. A. 188, 133 Ill. 649.

But an important modification of the above decisions, if, indeed, it can be reconciled with the last one, is made by the decision that the interstate transportation of carcasses of animals which had been killed in violation of the Game Laws of a State after it has begun cannot be interrupted by a seizure thereof for violation of such laws. *Bennett v. American Exp. Co. (Ma.) ante*, 33.

In several States the Statutes are construed to be intended merely to protect the game of their own State respectively, and not to prohibit the possession of game killed in other States. Thus the possession or offer for sale of "any of said birds" prohibited by Mass. Stat. 1879, chap. 209, § 1, which is prohibited by a clause following the prohibition of taking or killing woodcock, etc., in the Commonwealth, applies only to birds taken or killed within the State. *Com. v. Hall*, 128 Mass. 410.

The possession of game killed in another State is not an offense under the Michigan Act of 1881, which makes it an offense to have game in possession for the purpose of sale during a certain period of the year, since the purpose of the Act as shown by the title is the protection of game within the State. *People v. O'Neill*, 71 Mich. 525.

So the Pennsylvania Act of June 3, 1873, enacting that "no person shall kill or expose for sale or have in his or her possession," etc., after the same has been killed within certain dates, is construed not to apply to the possession of game killed in another State. *Com. v. Wilkinson*, 120 Pa. 236. B. A. R.

138, 133 Ill. 649; *Magner v. People*, 97 Ill. 320.

Seymour, J., delivered the opinion of the court:

The General Statutes (§ 2530) provide that "every person who shall buy, sell, expose for sale, or have in his possession for any purpose, or who shall hunt, pursue, kill, destroy, or attempt to kill, any woodcock, quail, ruffed grouse, called 'partridge,' or gray squirrel, between the first day of January and the first day of October, the killing or having possession of each bird or squirrel to be deemed a separate offense, . . . shall be fined not more than twenty-five dollars," etc. Section 2546 provides that "no person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of the State; or shall transport, or have in possession with intent to procure the transportation, beyond said limits, any of such birds killed within this State. The reception by any person within this State of any such bird or birds for shipment to a point without the State shall be prima facie evidence that said bird or birds were killed within the State for the purpose of conveying the same beyond its limits." The defendant is prosecuted for unlawfully receiving and having in his possession, on the 19th day of October, A. D. 1889, with force and arms, and with the unlawful intent to procure the transportation beyond the limits of this State, certain woodcock, ruffed grouse, and quail, killed within this State after the 1st day of October, A. D. 1889, against the peace, and contrary to the form of the Statute. He demurred to the complaint because (1) the allegations contained therein do not constitute any offense in law; (2) because in the complaint it is not alleged that said birds were killed for the purpose of conveying the same beyond the limits of the State.

It will be seen from the section of the Statute above quoted that it is unlawful to kill or have in possession for any purpose, woodcock, quail, or ruffed grouse, between the first days of January and October, and that it is unlawful to kill them at any time for the purpose of conveying them out of the State. Is it also unlawful to have them in possession with intent to procure their transportation beyond the limits of the State, if killed between the 1st day of October and the 1st day of January, regardless of the question whether they were killed for the purpose of conveying them out of the State? In other words, if they were lawfully killed,—i. e., between October 1 and January 1, and without any intention of conveying them out of the State,—can they be lawfully held with the intent to procure their transportation beyond the limits of the State? In 1882 an Act was passed as follows: "Section 1. No person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of this State. Sec. 2. No person, corporation, or company shall transport or convey beyond the limits of this State any woodcock, ruffed grouse, or quail, killed within

this State, or sell or have in his or her possession any of such birds with the intention to procure the same to be conveyed or transported beyond the limits of this State. Sec. 3. The reception by any person, company, or corporation within the limits of this State of any quail, woodcock, or ruffed grouse for shipment to a point without the State shall be prima facie evidence that the said bird or birds were killed within the State for the purpose of carrying the same beyond the limits of this State. Sec. 4. Any person violating any of the provisions of the preceding sections shall be fined not less than seven nor more than fifty dollars and costs of prosecution." Pub. Acts 1882, chap. 102.

It is evident that under the Act as originally passed the complaint would have been good and sufficient. It is claimed by the defendant that under the Act as revised no offense is committed unless the birds, by him held for transportation, were killed for the purpose of being conveyed beyond the limits of the State. He says that the word "such" in the provision of section 2546 against transporting, or having in possession with intent to procure the transportation, beyond said limits, any of such birds, killed within the State, means woodcock, ruffed grouse, or quail, killed for the purpose of conveying the same beyond the limits of the State. As already suggested, that construction involves a change in the law from the original Act, which expressly forbade any person to have in his possession, with the intention to procure the same to be transported beyond the limits of the State, any woodcock, ruffed grouse, or quail killed within the State. It seems to us evident, also, upon the face of the Statute as revised, that the word "such" was used only to obviate the necessity of repeating the words "woodcock, ruffed grouse, or quail," and that to carry its force and operation further, so as to include the purpose for which they were killed, would not only be unnatural, but dangerous as a precedent for construction, in view of the terms of the old Statute. We cannot believe that careful revisers would have undertaken to change the law without some more definite indication of such purpose. Then, again, when the words "such birds" are used in the very next line of the section, it is evident that they are used to take the place only of the words "woodcock, ruffed grouse, or quail," as if it read: "The reception by any person within the State of any woodcock, ruffed grouse, or quail, for shipment to a point without this State, shall be prima facie evidence that said bird or birds were killed within this State for the purpose of conveying the same beyond its limits;" otherwise we should have the absurd provision that the reception by any person within the State, for shipment to any point without the State, of any woodcock, ruffed grouse, or quail killed for the purpose of conveying the same beyond the limits of the State, shall be prima facie evidence that said birds were killed within the State for the purpose of conveying the same beyond its limits,—that is, the fact that they were killed for transportation shall be prima facie evidence that they were killed

for transportation. The word "such" in both sentences refers to the same antecedent. It is plain enough that the revisers intended not to change, but to condense, the sections of the original Statute, and the language should be construed in the light of such intention. We conclude, therefore, that the complaint is sufficient.

We see nothing in the decision of *Com v. Hall*, 128 Mass. 411, to which the defendant refers us, inconsistent with our conclusion. The object of the Act therein involved was to protect the game in that Commonwealth, and not in another; and a construction confining its force to birds killed therein was to be expected, in the absence of controlling words to the contrary. All the reasoning in that case may certainly be held sound without impugning the reasoning upon which we arrive at our conclusion in this.

But in this view of the matter another question arises. The defendant further demurred to the complaint "(3) because section 2546 of the General Statutes is unconstitutional and void so far as it may be construed to forbid the transporting from the State, or having possession of such birds with intent to procure such transportation, to another State, birds described therein, which birds have been sold to parties in such other State, and have begun to move as an article of interstate commerce; and (4) because it is made to appear in said complaint that the defendant is guilty under said section if such birds were bought by the defendant in the markets of this State as merchandise and commerce, and had begun to move as an article of commerce." In short, the defendant insists that the Statute, as construed by us, is unconstitutional as restricting interstate commerce, and refers to *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 80 L. ed. 694; *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 566, 19 L. ed. 1002; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *State v. Saunders*, 19 Kan. 127; *Territory v. Evans*, (Idaho) 7 L. R. A. 288; *Territory v. Nelson* (Idaho) 23 Pac. Rep. 116; *State v. Indiana & O. O. G. & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 188.

In *State v. Saunders*, 19 Kan. 127, the court says it seems to be finally settled, among other things, that no State can pass a law which will directly interfere with the free transportation from one State to another, or through a State, of anything which is or may be subject to interstate commerce; that a law which prohibits the catching and killing of prairie chickens may be valid, although it may indirectly prevent the transportation of such chickens from the State to any other State; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic and commerce, and at the same time directly prohibits their transportation from the State, is unconstitutional and void. Without stopping to consider the construction which was given to the constitutional provision under discussion by the earlier commentators, except to suggest, in the language of Judge Story

(2 Story Com. 511), that a very material object of its adoption was the relief of the States, which export and import through other States, from the levy of improper contributions on them by the latter,—an object which was shown to be important by the experience of the States during the confederation period,—we feel constrained to hold the provision of the Statute to be constitutional. It being conceded that the State, under its general police power, may lawfully prohibit the killing of the game birds in question, it may of course control such killing, and the times and purposes thereof. It may lawfully enact that they may be killed and sold and held for sale only for domestic consumption. The State, in the exercise of its power, instead of prohibiting the killing altogether, permits the person killing them to acquire only a qualified right in them, namely, the right to appropriate them to his own use, and the right to sell or transport them for domestic use. The birds in question never became articles of commerce within the meaning of the term contended for by the defendant. They became private property of a qualified character. The law limited the purposes for which they might be killed and become private property. The difference between property of this sort and the ordinary private property of commerce is obvious. The apparent assumption of the Kansas court above referred to, that game which the law allows to be caught and killed thereby necessarily becomes the subject of traffic and commerce, meaning interstate commerce, appears to us unsound. If the proposition were true, then the conclusion that a state law interfering with such commerce would be unconstitutional might pass unquestioned. But we cannot acquiesce in a decision which would deny the power of the State to limit the right to kill, sell, and hold its own game by any provision short of an absolute prohibition, without thereby transforming it into that species of property the transportation of which from the State it is unconstitutional to prohibit.

Christopher SPENCER *et al.*

v.

Charles G. ALLERTON, *Appt.*

(.....Conn.....)

1. A blank indorsement by a stranger to a note, under Gen. Stat., § 1860, which makes it "import the contract of an ordinary indorsement," renders the indorser liable as such precisely in the order in which he stands upon the note, although he signs before and above the payee.

2. Parol evidence is not admissible to vary the effect of a blank indorsement by a stranger to the instrument where the statute provides that it shall have the effect of an ordinary indorsement.

(April 30, 1891.)

NOTE.—See note on "parol evidence," as to indorsement, with case of *Kingland v. Koepp* (Ill.) *ante*, 649.

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiffs in an action brought to enforce defendant's alleged liability as indorser of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. S. W. Kellogg, for appellant:

The record discloses no facts or evidence whatever that can render the defendant liable to the payee of the notes as a guarantor.

If it was intended by the parties to the note other than the defendant, that his indorsement was a guaranty for the security of the plaintiffs only, that intention should have been disclosed to the defendant. "Such an indorsement would be sufficient to put the payee, or person to whom it was offered, on his guard, and require of him, before he relies upon it, to make inquiry."

Riddle v. Stevens, 82 Conn. 387.

In the early decisions in this State, as to the effect of a blank indorsement by a third party, there appears to have been an intention or agreement by such third party that the indorsement was made as surety for the maker, for the security of the note to the payee. When such an intention or agreement appeared, the indorsement in blank of the third party was held to be a guaranty to the payee of the note; and the legal import of such an indorsement was held to be that the note when due should be collectible by the use of due diligence.

Beckwith v. Angell, 6 Conn. 815; *Perkins v. Catlin*, 11 Conn. 215; *Lafin v. Pomeroy*, 11 Conn. 440; *Castle v. Candee*, 16 Conn. 223.

Parol evidence has always been held to be admissible to show the real character of the indorsement, whether it was intended to be a guaranty, an ordinary indorsement of negotiable paper, or indorsed merely for the purpose of collection.

Perkins v. Catlin and *Riddle v. Stevens*, *supra*.

Gen. Stat. 1888, § 1860, was passed for the express purpose of changing the law of Connecticut, and making it conform to the settled law of other States. It says that such an indorsement "shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." Such being now the legal import of such an indorsement, the plaintiff cannot recover in this case when the defendant had no knowledge that his indorsement was, or was intended to be, a guaranty. In every case of guaranty in this court since the enactment of that Statute, an express contract of guaranty was made and approved, to hold a party as a guarantor of a note.

City Sav. Bank v. Hopson, 2 New Eng. Rep. 556, 58 Conn. 458; *Cowles v. Peck*, 4 New Eng. Rep. 839, 55 Conn. 251; *Lemmon v. Strong*, 5 New Eng. Rep. 618, 55 Conn. 443; *Loomis Inst. v. Hard*, 57 Conn. 485; *Tyler v. Waddingham*, 8 L. R. A. 657, 58 Conn. 376.

Mr. Lynde Harrison, for appellee:

The contract which is implied from a blank indorsement of a promissory note, whether negotiable or non-negotiable, is that the note is due and payable according to its tenor, and that the maker shall be able to pay it when it comes to maturity, and that it is collectible by the use of due diligence.

13 L. R. A.

Perkins v. Catlin, 11 Conn. 213; *Clark v. Merriam*, 25 Conn. 576; *Ransom v. Sherwood*, 26 Conn. 437; *Holbrook v. Camp*, 38 Conn. 25; *Forbes v. Rowe*, 48 Conn. 415; *Allen v. Rundie*, 50 Conn. 9; *Lemmon v. Strong*, 5 New Eng. Rep. 618, 55 Conn. 443.

If section 1860 of the General Statutes affects this case, it simply means that the blank indorser of a negotiable note, being a person who is neither its maker nor its payee, before or after the indorsement of the note by the payee, shall be under the same liability as an ordinary indorser of negotiable paper.

The contract which an ordinary indorser of negotiable paper enters into between himself and the payee, or subsequent indorsers, is an undertaking on his part to pay the note or bill on due notice of dishonor, together with certain warranties as to title, genuineness, and validity of the paper, as well as capacity and solvency of the parties.

Randolph, Com. Paper, §§ 13, 700, 705-707.

Seymour, J., delivered the opinion of the court:

On September 24, 1884, the plaintiffs, at the request of one J. C. Stevens, gave him their accommodation note for \$2,000, payable in three months, and agreed to give him another three-months note of the same amount at its maturity. In exchange for this note Stevens gave the plaintiffs his six-months note, of the same date, for \$2,000, indorsed by the defendant. On the 27th of December, 1884, the plaintiffs gave Stevens their second note as agreed, with which he took up the first. When the second note became due the plaintiffs paid it. On the 2d of April, 1885, Stevens, in renewal of his six-months note, gave the plaintiffs his note for \$1,000, payable in two months, and his note, for a like sum, payable in three months, each payable to their order at the Yale National Bank. The defendant indorsed each of these notes in blank before Stevens delivered them to the plaintiffs. Afterwards the plaintiffs indorsed them, writing their names below that of the defendant. These notes were given by Stevens to the plaintiffs as a security for the loan by the plaintiffs of the sum therein mentioned, namely, of the sum to be raised by the discount of the above-mentioned accommodation notes made by the plaintiffs. At each of the times when Stevens signed the notes, namely, on September 24, when he signed the six-months note, for \$2,000, and on April 2, when he signed the two notes in renewal thereof (the indorsement of which is the subject of this suit), he and one of the plaintiffs were together at Stevens' office. Before the notes were delivered to the plaintiffs Stevens called the defendant into the office, and he then indorsed the notes in the presence of Stevens and the plaintiffs. There was no conversation in relation to the indorsements, nor was there any conversation between the defendant and the plaintiffs at any other time in relation thereto. There was no evidence of any agreement between them, except such as the law imports from the blank indorsement which the defendant put upon the notes, as the same appears upon them, under

the circumstances and upon the facts already detailed. Nor was there any other evidence that the defendant had any knowledge that his indorsement of the notes was, or was intended to be, a guaranty to the plaintiffs. There was no evidence that the defendant had any knowledge of the exchange of notes by the plaintiffs and Stevens. The notes of April 2, 1885, were duly presented for payment at the bank, but were not paid. Notice thereof was duly given to the defendant. The plaintiffs still own the notes, and they are still wholly unpaid. At their maturity the maker was insolvent, and without any property exempt from execution. These are the facts in brief as they are stated in the finding. The case, after a short explanation by the counsel for the defendant, was submitted to us on briefs, and the questions discussed relate to the liability of the defendant upon the facts found. The finding is slightly complicated. To simplify the matter we copy one of the notes, with its indorsements, the other being precisely similar, except that it is payable three months after date:

"\$1,000. New Haven, Ct., April 2d, 1885. Two months after date, I promise to pay to the order of I. S. Spencer's Sons one thousand dollars at Yale National Bank, value received, with interest. J. C. Stevens.

[Indorsed:] Chas. G. Allerton. I. S. Spencer's Sons."

In the year 1884 the Legislature passed the following Act: "The blank indorsement of a negotiable or a non-negotiable note, by a person who is neither its maker nor its payee, before or after the indorsement of such note by the payee, shall import the contract of an ordinary indorsement of negotiable paper as between such indorser and the payee or subsequent holders of such paper." Gen. Stat. § 1860. Before the passage of this Act, by the law of this State as declared through a long line of decisions, from *Bradly v. Phelps*, 2 Root, 825, to *Ætna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167, the blank indorsement of either a negotiable or a non-negotiable note by a stranger to the note implied, *prima facie*, a contract on the part of the indorser that the note was due and payable according to its tenor; that the maker should be of ability to pay it when it came to maturity; and that it was collectible by the use of due diligence. And this was the law, it was held in the latter case above cited, whether the indorsement by the third party was for the better security of the payee or for the purpose of getting the note discounted. The same case, commenting upon our long-established law on this subject, speaks of it as peculiar to this State, no part of the law-merchant, and the anomalous existence of which eminent judges, while admitting, have regretted. The Statute was doubtless intended to deliver our law from its anomalous position, and bring it into harmony with the law-merchant as it is interpreted in the great commercial centers of our country with which we are connected in business transactions, involving the daily exchange of notes, bills, and all manner of negotiable securities. The Statute is before

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this court for the first time, and we have given it the consideration commensurate to its importance. Under it, it is at once apparent that the blank indorsement of a negotiable or non-negotiable note by a person who is neither its maker nor payee, whether before or after its indorsement by the payee, no longer imports a contract that the indorser will pay the note if, on the use of due diligence, it is not collected of the maker. It is no longer a contract of guaranty. But it imports, as between such indorser and the payee, or subsequent holders thereof, a contract of an ordinary indorsement of negotiable paper, which is, by the law-merchant a contract for payment conditioned on due presentment to the maker for payment and due notice of dishonor. The full contract which the general commercial law implies from the indorsement of a negotiable promissory note on the part of the indorser, with and in favor of the indorsee, and every subsequent holder to whom the note is transferred, is (1) that the instrument itself, and the antecedent signatures thereon, are genuine; (2) that he (the indorser) has a good title to the instrument; (3) that he is competent to bind himself by the indorsement as indorser; (4) that the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity, or when it is due; (5) that if, when duly presented, it is not paid by the maker, he (the indorser) will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. Story, Prom. Notes, § 185. Into this contract, under our Statute, the indorser of a note, either negotiable or non-negotiable, though a stranger thereto, impliedly comes, as between himself and the payee or subsequent holder.

Thus far there is no difficulty, and it is evident that, *prima facie* at least, the defendant is an ordinary indorser, and not a guarantor of the notes. But the facts in this case require us to consider the provision of the Statute that the indorsement therein mentioned shall import a contract of ordinary indorsement between the parties named, whether it stand before or after the indorsement by the payee. Here the plaintiffs indorsed the note after the defendant, and the order of their names upon it accords with the fact. Such an indorsement falls within what Bigelow, *J.*, in *Clapp v. Rice*, 13 Gray, 408, calls "an anomalous class of cases," and which the text-books generally call "irregular indorsements." It is impossible to harmonize the existing decisions in respect to the import of such an indorsement. They are very numerous, diverse, and conflicting. Our statute may render much of the discussion of other jurisdictions valueless to us except as a guide to its construction, if, upon examination, its language should appear ambiguous. Does the Statute, then, intend to go any further than simply to declare that, irrespective of the position of his name, a third person who puts his name on the back of a note is to be held as an ordinary indorser, and not as a guarantor? Or do the other provisions clearly indicate a purpose to leave

no question open which would turn upon the relative position of the indorsements, and to provide that such third party, though indorsing before and above the payee, is, nevertheless, *quoad* him and subsequent holders, impliedly an indorser precisely in the order in which he stands upon the note? We unhesitatingly incline to the latter construction.

The language of the Statute, standing by itself, and also as construed in the light of the greater weight of authority, seems to leave no room for doubt. Daniel, in his work on Negotiable Instruments, treating of the various decisions relating to the transfer of notes by indorsement, says (sec. 713): "When nothing appears but the instrument itself, bearing a third person's name before the payee's, in a suit by the indorsee of the payee, the question next arises, What is to be presumed to have been the contract and liability of such a person? It will be presumed, in the first place, from the fact that the name is before that of the payee in order, that it was placed there before his in point of time, and was placed upon the note in its inception with a view of strengthening its credit with the payee, and inducing him to take it; and, for the reason that such third person never was the legal holder of the paper, it is held by a number of authorities that he cannot be deemed an indorser, and must be regarded, *prima facie*, as a joint maker. By others it is held that he is *prima facie* a surety or guarantor, using those terms as the equivalent of joint maker; others consider that he is *prima facie* only secondarily liable as a guarantor; while very many regard him as assuming the liability of a second indorser." "But," says the author (§ 714), "it would seem to us that such a party ought to be regarded as first indorser. If he intended to be second indorser, he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterwards; and *prima facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he, being an indorser, can be sued by anyone deriving title under him. In fact, his position seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee; and so to regard it simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult." "When (§ 716) the note is sued upon by the payee, it is held that the idea of the party before him being bound as an indorser is excluded. But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one; but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *prima facie* that of an indorser." *Judge Story*, discussing the various decisions concerning irregular indorsements, says:

"When the note is negotiable, and is indorsed in blank by a third person, not being the payee or a prior indorsee thereof, there, in the absence of any controlling proof, it is presumed that such person means to bind himself in the character of an indorser, and not otherwise, and precisely in the order and manner in which he stands on the note. If the note is not negotiable, and the indorsement in blank is not a part of the original transaction, but subsequently made, then, in the absence of the like controlling proofs, it is deemed a mere guaranty, and the indorser liable only as guarantor." *Story, Prom. Notes*, § 480.

Randolph, in his recent treatise on Commercial Paper, goes extensively into the subject of irregular indorsements. Presuming that it is a matter of frequent occurrence, in the United States especially, that one who is neither maker nor payee of a note places his name on the back of it at the time of its inception, he says the legal effect of such indorsements has been much discussed and variously decided. He discusses the numerous cases which follow the Massachusetts rule, and hold such indorser to be a joint maker, though now, by Statute of 1882, he is entitled, like an indorser, to notice of dishonor; the also numerous cases which hold, as did our courts, such an indorser to be a guarantor; and the cases, in opposition to both of these views, which hold that such indorser contracts and becomes liable as an indorser, his position on the back of the note indicating that intention. In California and Dakota, he adds (§ 836), "he is now by statute liable as an indorser to the payee; and so, by a recent Statute in Connecticut, whether the note is negotiable or not, and whether he indorses before or after the payee." *Randolph, Com. Paper*, § 829, *et seq.*

In *Hall v. Newcomb*, 7 Hill, 416, it was held that one who writes his name in blank on the back of a negotiable note before the payee indorses the same is not liable as maker nor as guarantor; thus, says Woodruff, *J.*, in *Hahn v. Hull*, 4 E. D. Smith, 670, overruling all the previous cases to that effect. It was also held in *Hall v. Newcomb*, that the person so writing his name could be held liable to such payee as indorser. *Spies v. Gilmore*, 1 N. Y. 322, is to the same effect. In *Moore v. Cross*, 19 N. Y. 227, it was held that one who, for the accommodation of the maker, indorses his note payable to the order of a third person, is liable thereon to such payee as indorser. In that case, as in the one at bar, the third party indorsed the paper before it was indorsed by the payee. Thus it would appear that in New York the result reached by our Statute was reached through the courts instead of through the Legislature. The authorities quoted, by showing the various positions which have been taken respecting the matter under consideration, throw light not only upon the presumed intention of the Legislature in passing the statute, and the interpretation which should be given it, but show also the impossibility of harmonizing our law, under any interpretation of it, with the law of all our neighboring States. From this examination of the authorities we

feel the more assured in holding that the defendant, in the case at bar, upon the showing of the note itself, is an ordinary indorser, and may be held as such by the plaintiff, who is payee, and whose name appears as an indorser subsequent to that of the defendant. So much for the contract which the Statute imports.

A third question remains, namely, whether the contract which the Statute imports can be varied by parol evidence, and, if so, when and how. The general expressions scattered through our reports, consequent upon our peculiar law respecting the contract *prima facie* implied by the indorsement of a note by a stranger, make it a little difficult to give an answer that shall at first sight appear consistent with some of our decisions, or rather with some of the expressions used in some of our decisions. Indeed, the principle involved has been variously decided in different jurisdictions and at different times in the same jurisdiction. In *Riddle v. Stevens*, 32 Conn. 378, after stating the contract which the law implies from the blank indorsement of a note by a stranger, the case holds that this implication is, however, only *prima facie*, and will yield to proof of the real character of the contract. Notes so indorsed, it says, have not the sanctity of ordinary negotiable paper, and do not fall within the rules of the law-merchant. Any person taking them, therefore, is put upon an inquiry as to the real character of the contract. In *Beckwith v. Angell*, 6 Conn. 315, a third party wrote his name on the back of a non-negotiable note, under, as he claimed, a special parol agreement with the payee. It was decided that he might prove the special agreement when sued by the payee. The court said: "The undertaking of an indorser is always collateral, unless made otherwise by a special agreement. But the defendant was not an indorser, because he was neither promisee nor indorsee. His contract was therefore necessarily special, and whatever the parties chose to make it."

It appears from these and other cases which might be cited that parol evidence has been admitted to prove the real contract entered into by a third party when he made a blank indorsement of a note, because such blank indorsement only *prima facie* implied a contract of guaranty; and because, being anomalous, and not the ordinary indorsement recognized by the law-merchant, it possessed none of its sanctity, but was its own sufficient notice of its irregularity. But our courts have not failed to recognize and uphold the sanctity of a regular indorsement. The law on that subject was admirably stated by Butler, Ch. J., in *Dale v. Gear*, 38 Conn. 15. That case held "that the contract implied by law from a blank indorsement of a negotiable note before its maturity by the payee is as certain and absolute as if written out in full, and parol evidence is not admissible to contradict it. This rule is applicable between indorser and indorsee, and it is not competent for the former to prove a contemporaneous naked agreement that an unrestricted indorsement should be operative as a restricted one only, in bar of an action

by the latter." "There are," says the opinion, "four classes of cases in which, as exceptional cases, and as between the original parties, indorser and indorsee, any relation, antecedent agreement, or state of facts, from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus the relation of principal and agent may be shown, for the agent takes no title or warranty from the indorser, but holds as agent. So, *secondly*, it may be shown that the note was indorsed to the holder for some special purpose, and is holden in trust, as where it is indorsed and delivered for collection merely. *Thirdly*, the relation of principal and surety may be shown, and that the indorsement was made at the request and for the accommodation of the immediate indorsee; for the equity of the relation forbids the enforcement of the contract. Such was the case of *Case v. Spaulding*, 24 Conn. 578. So, *fourthly*, it may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud. Such was *Downer v. Cheesbrough*, 36 Conn. 39. These exceptions illustrate the rule."

In *Allen v. Rundle*, 45 Conn. 328, the defendants had signed a writing on the back of the note, as follows: "For value received, we jointly and severally guaranty the within note good and collectible until paid." Held, that it could not be shown by parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note; nor that they made at the time a verbal promise to pay the debt. The court says: "There is an anomalous class of cases where a third person, neither payee nor maker, puts his name on the back of a note before its indorsement by the payee, where by parol evidence such person may be held liable either as original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties. [Citing cases.] But in all these cases the indorsement is in blank, and there is no written contract, and none is definitely implied by law from the indorsement. In cases of blank indorsements, where the contract is implied by law, it has the same effect as if written, and parol evidence is not admissible to contradict or vary it. The Supreme Court of Massachusetts, in the recent case of *Allen v. Brown*, 124 Mass. 77, held that parol evidence was not admissible to show that indorsers who indorsed a promissory note before delivery to the payee were accommodation indorsers and sureties only." In Story on Promissory Notes, § 146, *note 1*, many cases are cited to the point that the contract implied by law, from a regular indorsement, is as certain as if it were expressed in writing, and parol evidence is not admitted to vary it. To the same effect see Daniel, Neg. Inst. § 717 *et seq.* In Randolph on Commercial Paper, where much attention is given to the subject throughout the work,

it is stated (§ 778) that most authorities hold that the implications and intendments which the law-merchant has attached to blank indorsements of negotiable commercial paper render them express and complete contracts which cannot be explained or varied by parol. See also 2 Parsons, Notes & Bills, p. 28, chap. 1, § 6.

Now, under our Statute, the blank indorsement of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee before or after the indorsement of such note by the payee, can no longer be classed as an anomalous or irregular indorsement, nor will the rules applicable to such indorsements any longer apply. They cease to exist as the reason for them ceases. By the very terms and force of the Statute such an indorsement becomes, to all intents, a regular, ordinary indorsement, and the rules applicable to the regular indorsement of negotiable paper apply. Evidently, then, the judgment rendered by the court below for the plaintiffs in this case was correct. The defendant's case comes within none of the exceptions named in *Dale v. Gear*, *supra*. It comes nearest to the third exception. But in the case of *Case v. Spaulding*, 24 Conn. 578, given as an example of what was covered by that exception, the note was only apparently commercial paper, regularly indorsed. In fact, the defendant, a stranger to the note, indorsed it in blank at the request of the plaintiff, who afterwards indorsed it over the defendant's name, and procured it to be discounted at the bank. As between the parties it was the case of a note indorsed in blank by a stranger, the *prima facie* import of which was that the indorser would pay it if it could not be collected of the maker by the use of due diligence. But the law per-

mitted the defendant to show the real contract, and he proved that his indorsement was intended as security for the bank only, and was made because the bank would not discount the note for the plaintiff on the security of the maker alone, but required an indorser. So the plaintiff, who was the payee, and the first indorser in order of names, though second in order of time, failed to recover. In the case at bar the defendant indorsed the notes in the presence of their maker and the plaintiffs before they were delivered. There was no conversation at that time in relation to such indorsement, nor ever any between the plaintiffs and defendant in relation thereto, nor any evidence of any agreement between them different from that which the law imports from the blank indorsement of the defendant under the circumstances stated. Such circumstances certainly indicate that the indorsement was made for the security of the plaintiffs. At their maturity the notes were duly presented for payment, but were not paid. Due notice of their dishonor was given to the defendant, and subsequently this suit was brought. We see no sufficient reason why, under the Statute, the defendant must not be held as an ordinary indorser of negotiable paper. As the law now stands, if a party intends to contract only as second indorser, he should see to it that the location of his name accords with such intention. If he intends to contract as guarantor, or to make any different contract from that of an ordinary indorser, he should write it out above his signature.

There is no error in the judgment appealed from.

The other Judges concurred.

NEBRASKA SUPREME COURT.

Nicholas WULLENWABER *et al.*

Michael DUNIGAN *et al.*, *Appts.*

(30 Neb. 877.)

***1. A proposition to issue bonds to a railway company is in the nature of a contract,** upon the acceptance of which both parties are bound by the agreement.

2. Where certain petitioners were induced to sign a petition calling an election in K. Township, Seward County, upon the representations of an agent of the railway company that the depot would be located on section 16 of said township, when in fact the depot was afterwards located in section 17.—*Held*, that the company was bound by the representations of its agents, and that persons who had been deceived thereby, and induced to sign the petition, might set up such facts to enjoin the issuing of the bonds.

*Head notes by the COURT.

NOTE.—For power to issue railroad aid bonds, see *Cantillon v. Dubuque & N. W. R. Co.* (Iowa) 5 L. R. A. 726, note.

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3. At least fifty freeholders resident of the township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required the commissioners have no jurisdiction.

(On rehearing.)

4. Where, in the course of the canvassing and electioneering to induce a sufficient number of freeholders of a certain town to become signers of a petition to the county board for an election for the issuance of bonds to be donated to a railroad company, certain representations, promises, and inducements were falsely and fraudulently made and held out by the railroad company to such freeholders, and which resulted in such freeholders becoming signers to said petition.—*Held*, that such representations, promises, and inducements, although made at a time and meeting previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestae*.

5. Where two agents of a railroad company were engaged in the common purpose of soliciting the freeholders of a town to become signers to a petition for the calling of

an election to vote bonds, and one of said agents made certain pledges and promises, and held out certain inducements, to said freeholders, who shortly afterwards were by the other of the said agents presented with said petition, and signed the same.—*Held*, that such pledges, promises, and inducements were a part of the *res gestæ*.

(December 22, 1890.)

APPEAL by defendants from a decree of the District Court for Seward County enjoining the issuance of certain railroad aid bonds. *Affirmed*.

The facts are fully stated in the opinions.

Mearns, D. C. McKillip and George W. Post, for appellants:

None of the representations were made by Goehner while soliciting signers to the petition or while he had the petition for that purpose, and no representations appear to have been made at or about the time of signing; and we insist that in such case they are not a part of the *res gestæ* and are inadmissible.

Mechem, Ag. §§ 714, 716, *note*.

All Goehner ever told any of the witnesses was merely where, in his judgment, the depot would be, and this could not have misled, and was not relied on.

Montgomery S. R. Co. v. Matthews, 77 Ala. 357; *Mechem*, Ag. § 748.

A person dealing with an agent is bound to inquire as to his authority.

Wheeler v. Plattsmouth, 7 Neb. 279.

Goehner's promise to locate a depot at any particular place is insufficient to invalidate the signing of the petition as a fraudulent representation cannot be predicated on a promise not performed.

Perkins v. Lougee, 6 Neb. 223; *Ex parte Fisher*, 18 Wend. 609; *Long v. Woodman*, 58 Me. 49; *Grove v. Hodges*, 55 Pa. 504; *Ranney v. People*, 22 N. Y. 417; *Com. v. Brenneman*, 1 Rawle, 811; 1 Wood, *Railway Law*, pp. 112-114, 120; *Martin v. Pensacola & G. R. Co.* 8 Fla. 870; *Vicksburgh R. Co. v. McKean*, 12 La. Ann. 633; *Carlisle v. Evansville, I. & C. S. L. R. Co.* 18 Ind. 477; *Mississippi, O. & Red River R. Co. v. Cross*, 20 Ark. 448.

The representations must have been made positively as an ascertained and existing fact and so believed to be such existing fact, and must be clearly and distinctly proved as alleged in the petition.

Mechem, Ag. § 748, and *notes*; 1 Wood, *Railway Law*, 110, 111, *note* 6.

The railroad company did not choose or have the right to choose the persons to circulate the petition and is not bound by representations made to procure signers.

Mechem, Ag. § 747, and *note*; 1 Parsons, *Cont.* p. 71.

Nor were the representations made as the representations of the railroad company, but were usually made as the individual representations of Goehner, and in such case they could not bind the company, by reason of its claiming the bonds.

Cedar Rapids & M. R. Co. v. Boone County, 84 Iowa, 51; *State v. Lake City*, 25 Minn. 404; *Platteville v. Galena & S. W. R. Co.* 43 Wis. 493; *People v. Cline*, 68 Ill. 394.

Defendant railroad company cannot be held 13 I. R. A.

liable in this suit, by reason of not having adopted and ratified such alleged representations with full knowledge of their having been made before commencement of this suit.

Burns v. Campbell, 71 Ala. 271; *Ewell's Evans*, Ag. 64-71; *Mechem*, Ag. § 750; *Coke*, Inst. IV. 817; *Story*, Ag. §§ 239, 240. See also *Platteville v. Galena & S. W. R. Co.* 43 Wis. 498; *East Line & R. R. Co. v. Garrett*, 52 Tex. 182; *Belfast & M. L. R. Co. v. Brooks*, 60 Me. 568; *Townsend v. Lamb*, 14 Neb. 324; *Chamberlain v. Painsville & H. R. Co.* 15 Ohio St. 225; 1 Wood, *Railway Law*, § 83, pp. 79, 81.

Oral testimony as to declarations as to where a depot will be located being promissory of something to be thereafter done, are generally regarded as expressing only the declarant's opinion, belief, or expectation, although testified to as having been positively represented.

Montgomery & S. R. Co. v. Matthews, 77 Ala. 357, 24 Am. & Eng. R. R. Cas. 9; 1 Redfield, *Railways*, 5th ed. 172, 173; *Franklin Glass Co. v. Alexander*, 2 N. H. 330, 9 Am. Dec. 92; *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. 86; *Evansville, I. & C. S. L. R. Co. v. Posey*, 12 Ind. 363; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665; *Caley v. Philadelphia & C. C. R. Co.* 80 Pa. 363; *Kostenbader v. Peters*, 80 Pa. 438; *Lippincott v. Whitman*, 83 Pa. 244; *Walker v. Mobile & O. R. Co.* 34 Miss. 245; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio I. C. I. R. Co.* 18 Ind. 680; *Hardy v. Morrisweather*, 14 Ind. 208; *Andrews v. Ohio & M. R. Co.* 14 Ind. 169; *Jones v. St. Louis, K. C. & N. R. Co.* 79 Mo. 92; *Peers v. Davis*, 29 Mo. 184; *Hodges v. Torrey*, 28 Mo. 103; *Cooley*, *Torts*, 483-487; 1 *Story*, Eq. § 199.

A party who had the full means of detecting the misrepresentation and ascertaining the truth has no right to complain, unless some illegal means have been resorted to for the purpose of throwing him off his guard.

Wall v. Stubbs, 2 Ves. & B. 354; *Dyer v. Hargrave*, 10 Ves. Jr. 505.

Under no circumstances can Goehner's acts or declarations of his own authority, made after the signing of the petition, be any evidence against the defendant company.

1 Greenl. Ev. 113, 114; *Phelps v. Georges Creek & C. R. Co.* 60 Md. 536; *Franklin Bank v. Pennsylvania D. & M. Steam Nav. Co.* 11 Gill & J. 84; *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59, 29 Am. & Eng. R. R. Cas. 517.

The admissibility of the declaration of an agent against his principal can be maintained only where what the agent said was in the transaction of the business of his principal and was a part of the transaction itself.

McDermott v. Hannibal & P. R. Co. 87 Mo. 285, 28 Am. & Eng. R. R. Cas. 535.

The location of a depot was no part of the business of getting signers to the petition.

See also *Chapman v. Erie R. Co.* 55 N. Y. 584; *Gilman v. Eastern R. Co.* 13 Allen, 444; *Armist v. Chicago, B. & Q. R. Co.* 70 Iowa, 130, 28 Am. & Eng. R. R. Cas. 467; *Livingston v. Iowa M. R. Co.* 35 Iowa, 556; *Verry v. Burlington, C. R. & M. R. Co.* 47 Iowa, 549.

A parol contemporaneous condition cannot be ingrafted upon the written petition by evidence of the declarations of a party who was

not shown to have other authority than to circulate such petition for signatures.

East Line & R. R. Co. v. Garrett, 52 Tex. 137; *Houston & T. C. R. Co. v. McKinney*, 55 Tex. 176; *Martin v. Farnsworth*, 49 N. Y. 558; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391; *Bond v. Pontiac, O. & P. A. R. Co.* 62 Mich. 643, 26 Am. & Eng. R. R. Cas. 571. *Trudo v. Anderson*, 10 Mich. 357; *Rice v. Peninsular Club of Grand Rapids*, 52 Mich. 87.

Messrs. R. S. Norval and George W. Lowley, for appellees:

To authorize the board of supervisors to call a special township election for the purpose of voting bonds in a township in aid of works of internal improvements a petition signed by not less than fifty freeholders of such township must be presented to such board of supervisors, setting forth the nature of the work contemplated, etc.

Comp. Stat. 1889, chap. 45, § 14, p. 542; *State v. Babcock*, 21 Neb. 187.

The burden of proof was upon the appellants to show at least fifty freehold petitioners upon the petition before the board would have jurisdiction to submit the question of voting aid to the voters of the town.

Canfield v. Smith, 34 Wis. 381; *Eldred v. Leahy*, 81 Wis. 546; *Williams v. Holmes*, 2 Wis. 129.

The obtaining of the names of petitioners by false representations to locate the depot would make those who signed on account of such promises illegal petitioners, and all such names would have to be disregarded in considering the petition.

Sinnett v. Moles, 38 Iowa, 25; *Curry v. Decatur County Suprs.* 61 Iowa, 71; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116; *Wickham v. Grant*, 28 Kan. 517.

False representations made to the electors in order to induce them to vote bonds to a railroad, may be shown in an action to enjoin the issue of the bonds.

Sinnett v. Moles, *Curry v. Decatur County Suprs.* and *Wickham v. Grant*, *supra*; *Melendy v. Keen*, 89 Ill. 895; *Sandford v. Handy*, 23 Wend. 260; *Burhop v. Milwaukee*, 18 Wis. 431; *McClellan v. Scott*, 24 Wis. 81; *Davis v. Dumont*, 87 Iowa, 47; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188.

The relation of principal and agent may be inferred by implication from the acts of the parties, and this rule applies as well to agents of corporations.

Columbus Co. v. Hurford, 1 Neb. 146; *New England Mortg. Sec. Co. v. Harris*, 18 Neb. 556; *McKeighan v. Hopkins*, 19 Neb. 33; *Rogers v. Empkie Hardware Co.* 24 Neb. 658.

A principal must adopt the acts of his agents as a whole, and will not be permitted to retain that part which is beneficial and reject that which is not.

Rogers v. Empkie Hardware Co. supra; *New England Mortg. Sec. Co. v. Hendrickson*, 13 Neb. 158, and case cited.

Maxwell, J., delivered the opinion of the court:

This is an action to enjoin the issuing of certain bonds of K. Township, in the County of Seward, and to have said bonds canceled, and delivered up, and declared null and void. The pleadings, which are very lengthy, need not be set out in this opinion. On the trial of the cause, the court made findings and rendered judgment as follows: "Now, on this 29th day of December, 1888, this cause, heretofore tried on a former day of the present term of court, and taken under advisement, came on for decision and judgment, and the court, being now fully advised in the premises, does find the issues joined in favor of the plaintiffs; and that the injunction heretofore allowed and granted and issued herein ought to be made perpetual; and that the bonds now under custody of the court, in the hands and keeping of S. C. Langworthy, ought to be canceled, and held for naught; and that the said colorable and the apparent record of the proceedings of the board of supervisors of Seward County, recorded in Commissioner's Record No. 4, pp. 94 to 98, inclusive, and on pages 127 to 131, so far as the same relates to the calling of an election, and the voting of bonds, in said K. Township, is incorrect, unauthorized, and ought to be canceled, set aside, and held for naught. It is therefore by the court considered, ordered, and adjudged that the said bonds, and the proposition for their issue, and the election held, and proceedings had and done in pursuance thereof, in reference to the issue of said bonds of K. Township, in Seward County, Neb., were unauthorized by law and void, and that the same, and all proceedings of the said board of supervisors in reference thereto, be held for naught; that the said defendants, their successors in office or assigns, are perpetually enjoined and restrained from delivering or authorizing the delivery, in any capacity whatever, of the said bonds, or any of them, to the said defendant railroad company, and from negotiating or transferring them, or any of them, at any time, and the said defendant railroad company, its officers, assigns, agents, and successors, are each of them restrained from receiving, claiming, assigning, or negotiating said bonds, or any of them, and from in any way holding the same to be valid; that the said board of supervisors and county clerk, and their successors in office, are severally enjoined and restrained from signing, authenticating, or in any way validating, said election canvass on the question submitted at said special election, or the record of said proposition submitted, or the record of the board of supervisors thereon, and from in any way giving color of validity of said proceedings, or any of them, and from recognizing in any way the same to be valid."

To authorize a precinct, township, or village to issue bonds, the Statute requires "a petition signed by not less than fifty freeholders of the precinct, township, or village to be presented to the county commissioners, or board authorized by law to attend to the business of the county within which such precinct, township, or village is situated. Said petition shall set forth the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, which shall in no event exceed eight per cent per annum, and the date when the principal and interest shall become due; and the said petitioners shall give bond, to be

approved by the county commissioners, for the payment of the expenses of the election, in the event that the proposition shall fail to receive a two-thirds majority of the votes cast at the election." It appears from the record that fifty persons did sign the petition, and that thereupon the election was duly called and held, and the bonds declared carried. This election appears to have been held before the depot in the Township of K., Seward County, was located. There is a large amount of testimony in the record tending to show that a considerable number of the signers of the petition were induced to sign the same by representations of the agents of the railroad company that a freight and passenger depot on the line of said railroad would be located upon section 16 of said township. The depot finally was located upon section 17 of said township. A proposition to issue bonds to aid in the construction of a railway is in the nature of a contract, which, when accepted, is binding upon the respective parties; hence, if the electors, through false or fraudulent representations, have been induced to vote bonds to aid in the construction of such railway, a court of equity, in a proper case, will grant relief. *Curry v. Decatur County Suprs.* 61 Iowa, 71; *Sinnett v. Moles*, 88 Iowa, 25; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116; *Wickham v. Grant*, 28 Kan. 517.

Where parties have been induced, by false representations, to sign a petition calling an election to vote aid to a railway, they may set up such false representations as grounds for enjoining the issuing of the bonds. *Sinnett v. Moles*, *Curry v. Decatur County Suprs.* and *Wickham v. Grant*, *supra*; *Meleny v. Keen*, 89 Ill. 395; *Sandford v. Handy*, 23 Wend. 260; *Burhop v. Milwaukee*, 18 Wis. 431; *McClellan v. Scott*, 24 Wis. 81; *Davis v. Dumont*, 87 Iowa, 47; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188.

If, therefore, the plaintiffs were induced to sign the petition by false representations, they have a right to set up such representations to prevent the issuing of the bonds. It is claimed, however, that the persons who procured the signatures to the petition were not the agents of the railway company, and therefore such company cannot be affected by their statements. This question was before the Supreme Court of New York in *Sandford v. Handy*, 23 Wend. 265, and the opinion delivered by Chief Justice Nelson, who says: "The distinction between 'general' and 'special' agent has often been the subject of discussion in adjudged cases, and by elementary writers, but it is not particularly important here, as this is conceded to be a case of special agency. Our inquiry is more especially directed to ascertain the extent of the principal's responsibility in cases of this character; or rather, confining it more particularly to the point before us, to what extent and to what circumstances will the principal be held responsible for the representations and declarations of the agent?" Mr. Justice Story, in his recent valuable commentaries on the subject (page 126), lays down the general rule, and which is as applicable to special as to general agents, that, "where the acts of the agent will

bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him if made at the same time, and constituting part of the *res gesta*." He further observes that, "for most practical purposes, a party dealing with an agent who is acting within the scope of his authority and employment is to be considered as dealing with the principal himself. If it is the case of a contract, it is the contract of the principal. If the agent, at the time of the contract, makes any representations, declarations, or admissions touching the subject matter of the contract, it is the representation, declaration, or admission of the principal."

These principles are fully borne out by the several authorities referred to: are founded in good sense and with a just conception of the commercial and other business transactions of life from which they have been derived." This, we think, is a correct statement of the law. If a person is employed by a railway company in a special matter, as to procure signatures to a petition for the calling of an election to vote bonds in aid of such railway, the company will be bound by the representations of such agent made in any manner pertaining to his duties. In other words, a principal, by availing himself of the acts of an agent, must adopt the same *in toto*, and cannot adopt that which is beneficial, and reject that which is detrimental. This rule was recently applied by this court in *Donisthorpe v. Fremont, E. & M. V. R. Co.* (Neb.) 46 N. W. Rep. 240, and the company held responsible for the representations of the agent.

In the case at bar it is clearly shown that a number of the petitioners were induced to sign the petition by representations made on behalf of the railway company that the depot would be located on section 16. There is no pretense that the depot had been located on that section. The appellants contend that it was located on section 17, and therefore is more advantageous to some of the plaintiffs than if located on section 16. It is sufficient to say that the original proposition, under which a number of the plaintiffs were induced to sign the petition, was that the depot would be located on section 16. If the company may remove it to section 17, it may remove it to the extreme limits of the township. We cannot make a new contract for the parties. The plaintiffs are entitled to a performance of the condition under which they are induced to sign the petition for the election to vote the aid; and, as it is apparent that the company has not performed its part of the agreement, it is not entitled to the bonds.

It is contended on behalf of the appellants that fraud cannot be predicated on a promise not performed, and *Perkins v. Lougee*, 6 Neb. 220, is cited to sustain that position. That action was brought for the purchase money of the sale of a lot which the defendant had personally examined before purchasing, and he alleged, as a defense, that the plaintiff, to induce him to purchase the same, had falsely represented to him that he was about to erect a large brick hotel on a lot near that sold to the defendant. It was held that such promise was not actionable, and, as the party had personally viewed the lot before purchasing, that he

must pay for the same. In the case at bar, however, the inducement or consideration for signing the petition calling the election was the location of the depot on section 16. The case therefore differs from that of *Perkins v. Lougee*.

Some objection is made to a number of the signers of the petition, on the ground that they are not freeholders. It is unnecessary to examine this question. It is sufficient to say that it is indispensable that a petition requesting the calling of an election must be signed by at least fifty freeholders, and without such petition such commissioners have no jurisdiction.

The judgment of the District Court is right, and is affirmed.

Cobb, Ch. J., concurs. **Norval, J.**, having tried the case in the court below, took no part in the decision.

A rehearing was subsequently granted and on November 25, 1891, **Cobb, Ch. J.**, on behalf of the court, delivered the following opinion:

This cause was brought to this court on appeal from the District Court of Seward County, was argued and submitted at a former term, the judgment of the district court affirmed, and opinion filed, which is published in the thirtieth volume of our Reports, page 877. At the last term a reargument was granted upon the application of the defendant the Fremont, Elkhorn & Missouri Valley Railroad Company. The cause was again argued and submitted at the present term. The object of the action was to restrain and enjoin the issuing and delivery of \$10,000 of the bonds of K Town, in the County of Seward, claimed to have been voted by said town as a donation to the railroad company, at a special election held in said town for that purpose on the 25th day of February, 1887. The grounds of said action were: *First*. Fraudulent representations, promises, and inducements made by the defendant railroad company, its agents and aid solicitors, to induce sixteen of the petitioners who signed the petition asking the board of supervisors to call the special election submitting said question to the voters of said town, whereby they were induced to sign said petition, and without the signatures thus fraudulently obtained there were less than fifty legal freehold petitioners upon said petition. *Second*. That nine of the signers, and whose names appear on said petition, were not freeholders of said town, and that one of the names signed to said petition, to wit, John Draper, was that of an insane man, incompetent to transact any business, and that he did not sign the same, nor authorize any person to sign it for him. *Third*. Fraudulent representations and promises made by the agents, officers, employes, and aid agents of the defendant railroad company to voters of said K Town to vote the said bonds. Upon the trial, the finding of the court, although quite full, was general, and was equally applicable to either of the three grounds covered by the plaintiff's petition. The opinion of this court hereinbefore referred to is confined to the first proposition stated.

The statute makes it a condition precedent to the submission of a proposition to vote bonds to be donated to a work of internal improve-

ment that a petition praying for such submission be signed by not less than fifty freeholders of the town or other municipality by which the donation is to be made. It appears by the record that fifty-six petitioners signed the petition, which was presented to the county board of Seward County praying the submission of the proposition to vote bonds to the voters of Town K, in said county. The petition upon which the cause was tried alleged that more than sixteen of the petitioners on said petition were induced and prevailed upon to sign, and did sign, said petition solely and wholly upon the promises, representations, and agreements of the defendant Fremont, Elkhorn & Missouri Valley Railroad Company, through and by its officers, agents, attorneys, employes, and aid solicitors, that, in the event of the submitting of said proposition to and the voting by said Town K of the bonds contemplated, said company would, immediately upon the completion of its said road through said town, establish and locate a permanent freight and passenger depot on its said proposed line of road within one-half mile of the center of said town, and upon section 16 therein, with other averments to the effect that by virtue of the said petition a special election was called in said Town K; that at said election the said contemplated bonds were voted; that the said railroad had been constructed through the said town, but that said defendant company has failed and refused to locate and erect such depot at or near the center of said town, or upon said section 16. As stated in the original opinion, there is a large amount of evidence tending to prove that seven of the persons who signed the said petition were induced to do so solely by the promise of persons representing said railroad company that the depot in said Town K would be located at the point named in the petition in this action. This general proposition is scarcely denied or contested by counsel in the brief on the reargument; but they contend that the persons making these promises and inducements were not authorized to bind the railroad company thereby, and that such promises and agreements were not made at such times as to become and be a part of the *res gestae* of the signing of said petition by the said several petitioners. There was evidence before the district court from which it would have found, and doubtless did find, that four of the signers of the petition, to wit, Wullenwaber, Sorter, Hudson, and Barthold, were induced to sign the same by promises as to the location of the said depot, made directly to them severally by J. F. Goehner; that one of said signers, to wit, Fetton, was induced to sign the said petition by promises in relation to the location of said depot, made to him by said J. F. Goehner indirectly through his co-petitioner Wullenwaber; that one of said signers, to wit, Spahr, was induced to sign said petition by promises in relation to the location of said depot, made to them severally by the said J. F. Goehner indirectly through their co-petitioners Wullenwaber, Sorter, and Hudson, and that one of said signers, to wit, Rogge, was induced to sign said petition by promises made to him by the said J. F. Goehner indirectly through his co-petitioner Hudson. It is not contended that the said J. F. Goehner had direct authority from

the board of directors of the defendant railroad company to make the said promises, or any promises, to the said signers, or any of them, to induce them to sign the said petition; but it is contended, and is believed, that the evidence sufficiently proves that he was authorized by the last-named defendant, indirectly, through P. E. Hall, the superintendent of construction of the defendant railroad company, to procure the signatures of a sufficient number of the freeholders of said Town K to the petition for said election for voting bonds, and to do the necessary soliciting and electioneering for the accomplishing of that purpose; also that the petition calling for said election, and which was afterwards signed by the freeholders of said Town K, as hereinbefore stated, presented to the county board of Seward County, and upon which said election was in fact called, was, by the attorney of said company, who in concert with the said superintendent of construction was actively engaged in behalf of said railroad company in soliciting and procuring the donation of bonds to said company by the several towns upon the line of its road in Seward County, and especially of Town K, prepared and placed in the hands of said J. F. Goehner, with authority and instruction that he solely, or in connection with W. Q. Dickinson, procure the signatures of the freeholders of said Town K thereto, and take and use all of the necessary, proper, and expedient steps and measures for that purpose; and this, it is believed, conferred sufficient authority upon the said J. F. Goehner to bind the said defendant railroad company, by a promise to the signers of the petition, or those who would afterwards, in consideration thereof, become signers, that a depot of said road should be located at a designated point.

It follows, I think, that Mr. Goehner having authority as above stated, and the object to be accomplished being one of taxation of private property, yet nevertheless was of public township concern, in which one individual voter could alone accomplish but little, his authority was sufficient to operate through and by the aid of his associates, who were his neighbors, and but lately his fellow-emigrants from a foreign country. The promises, therefore, of Goehner made to Fetton, Spahr, and Rogge, through Wullenwaber, Sorter, and Hudson, were the promises of the defendant railroad company, made indirectly in two degrees by its superintendent of construction and attorney.

I might add that it appears from the evidence that many of the signers of the petition for the election were present at a public meeting, and heard the attorney of the railroad company, in a public speech, made within the general scope and plan of the company's solicitation of donations from the several towns of Seward County, and especially Town K, promise on the part of the railroad company that the said company would locate and build a freight and passenger depot within a half mile from the center of section 16, in said K Town, in Seward County. The appellant railroad company contends in the brief on rehearing that the statements and promises made to the petitioners, either directly or indirectly, by or through Goehner, are no part of the *res gesta*.

13 L. R. A.

In the limited time at my disposal, I have been unable to find any case where the declaration of an agent has been held to be not of the *res gesta* because made before the final consummation of a contract; and I concede that in most of the cases the test has been whether the declaration was made at the time or so soon after the transaction or event as to forbid the conclusion that it was made as the result of study or reflection, and in view of its effect as evidence. I cannot conceive that a declaration made in the course and progress of a negotiation, and for the purpose of effecting the consummation of an agreement, is any the less a part of the *res gesta* because of its being made at a previous interview, shortly before the one at which such declaration or inducement resulted in the consummation of the contract.

It is also contended that because the petition was kept in the store of Mr. Dickinson, and presented to the signers by him, the promises and inducements made and held out by Goehner to procure signers to that paper cannot be considered a part of the *res gesta*, although Dickinson and Goehner were engaged in the common work of soliciting petitioners and voters for the common purpose of obtaining the coveted donation by K Town to the railroad company. I cannot agree to this proposition. It is not deemed necessary to add to what is said in the original opinion, as to the ratification and adoption on the part of the railroad company of the means used by the persons acting as its agents, procurers, and promoters, further than to say that a careful examination of the opinion fails to cast a doubt upon it as a correct exposition of the law in that respect. I conclude, therefore, that there is sufficient evidence in the bill of exceptions to sustain the finding of the trial court that seven of the fifty-six signers of the petition upon which the election for the bonds was called in K Town were induced to become such signers by means of the false, and, in law, fraudulent, representations of the defendant railroad company, in respect to the location and erection of the railroad depot in Town K. This number of signers being eliminated from the petition, leaves but forty-nine signers, less than the number required by statute to authorize the calling of said election.

There is another branch of the case, which, though not treated in the original opinion, is worthy of some notice. It appears from the evidence that six of the signers of the petition upon and by virtue of which the election for the issuance and donation of the railroad bonds in Town K of Seward County, was called and held, to wit, Suddith, Muir, Miner, Pederson, Schultz, and Ebberpacher, were not, nor were either of them, freeholders of said K Town at the time or date of the signing of said petition and the calling of said election, and that one of the signers of said petition, to wit, Draper, was, at the time and date of the placing of his name to the said petition, insane, and legally an inmate of the state hospital for the insane, to which he had been legally committed, and from which he had never been discharged, but was at the time in fact undischarged. Moreover, that he did not sign the said petition, but that

his name was without authority written thereon by a Mr. Atwater. Thus it appears, and was evidently so found by the trial court, that there were not to exceed forty-two legal sign-

ers to the said petition. The judgment of the district court is again affirmed.

Maxwell, J., concurs. Norval, J., did not sit.

IOWA SUPREME COURT.

James McKEE, Admr., etc., of Joseph M. Brown, Deceased,

v.

CHICAGO, ROCK ISLAND & PACIFIC R. CO., Appt.

(.....Iowa.....)

1. All ordinary and reasonable care and supervision must be used by a railroad company to keep its roadway safe for its employes.
2. A rule that no lumber, wood, stone, materials, or tools shall be placed within five feet of the rail does not apply to a wing fence at a railroad cattle-guard.
3. Placing wing fences at a cattle-guard three feet ten inches from the rails at the bottom and inclining slightly outward at the top is not negligence which will render a railroad company liable for the death of a brakeman by coming in contact with one of them while hanging low on the side of a freight car looking under it to discover what was causing stones to fly therefrom, where no such accident had ever happened before on the road or had been anticipated and no complaint had been made of the fences.
4. A brakeman must be presumed to know the distance from the rails of wing fences at cattle-guards so as to charge him with the risk of hanging low on a ladder at the side of a car in order to look under it.

(Beck, Ch. J., dissents.)

(October 23, 1891.)

APPEAL by defendant from a judgment of the District Court for Wayne County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Freeland & Miles, Cummins & Wright and Thomas S. Wright, for appellant:

The fair intendment of the instructions is that defendant, while it must use ordinary care, must also secure a safe condition; not a reasonably safe condition; not ordinarily safe but a safe condition. Defendant is not bound to secure safety nor provide a safe roadbed.

Burke v. Witherbee, 98 N. Y. 565; *Wood, Mast. & Serv.* § 334; *Chicago, R. I. & P. R. Co. v. Londergan*, 6 West. Rep. 59, 118 Ill. 48.

Defendant was bound to anticipate, not only the emergency of a falling brake-beam, but

also that the train would not be stopped to investigate the difficulty, and that a brakeman would climb down on a side ladder and project his body out from the car in an unusual position. When the act or omission complained of is not in itself a distinct wrong and can only become a wrong to any particular individual through injurious consequence resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission, as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause. *Cooley, Torts*, pp. 69, 70.

The location and construction of the cattle guard fence was "not in itself a distinct wrong." The injurious consequences did not result "according to the ordinary course of events," but through the conjunction of an extraordinary event.

See *Ryan v. Railroad*, 10 Ont. Rep. C. P. Div. 745; *Skipp v. Eastern Counties R. Co.* 9 Exch. 226.

To make the Company liable for the location and construction of this cattle-guard, it should at the time have been aware that its employes, in the usual and ordinary discharge of their duties, would be required to expose themselves to the dangers incident to such location and construction.

Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224.

The duty resting upon the proprietor does not go to the extent of requiring him to make accidental injuries impossible.

Sjogren v. Hall, 53 Mich. 274; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519; *Beatty v. Central Iowa R. Co.* 58 Iowa, 248; *Wabash, St. L. & P. R. Co. v. Locke*, 11 West. Rep. 877, 112 Ind. 404; *Henry v. St. Louis, K. O. & N. R. Co.* 76 Mo. 288; *Clark v. Caledonian R. Co.* 5 Scotch, Sess. Cas. (4th series) 278; *Simons v. Great Western R. Co.* 18 C. B. 50; *Money v. Lower Vein Coal Co.* 55 Iowa, 671.

If defendant was bound to anticipate that brake-beams would get down and that brakemen would hang down on the car ladders to inspect while the train was in motion, then the liability for this to occur is and was a risk and duty incident to the service, which risk and duty deceased assumed when he entered the service.

Mayes v. Chicago, R. I. & P. R. Co. 63 Iowa, 569.

The question whether, under the circumstances, the position of the cattle-guard was

NOTE.—For liability of master for negligence in respect to servant's safety, see notes to *Lindvall v. Woods* (Minn.) 4 L. R. A. 798; *Georgia Pac. R. Co. v. Dooley* (Ga.) 12 L. R. A. 342.

As to assumption of risks, see notes to *Taylor v. Evansville & T. H. R. Co.* (Ind.) 6 L. R. A. 584; *Hunter v. New York, O. & W. R. Co.* (N. Y.) 6 L. R. A. 248; *Howard v. Delaware & H. Canal Co.* (Vt.) 6 L. R. A. 76; *Foley v. Pettee Mach. Works* (Mass.) 4 L. R. A. 51; *Pidcock v. Union Pac. R. Co.* (Utah) 1 L. R. A. 131. Also *Williamson v. Newport News & M. Valley Co.* (W. Va.) 12 L. R. A. 297.

the proximate wrongful cause of the accident, was one of law for the court.

Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224; *Illick v. Flint & P. M. R. Co.* 12 West. Rep. 440, 67 Mich. 632; *Lovejoy v. Boston & L. R. Corp.* 125 Mass. 79.

If deceased knew, or by the exercise of ordinary care might have known, of the danger, continuance in service without objection would result in a waiver and assumption of the risk.

Muldoney v. Illinois Cent. R. Co. 39 Iowa, 620; *Hoben v. Burlington & M. River R. Co.* 20 Iowa, 562; *State v. Hartzell*, 58 Iowa, 520; *Preston v. Dubuque & P. R. Co.* 11 Iowa, 15; *Wilson Sewing Mach. Co. v. Bull*, 52 Iowa, 554; *Conway v. Illinois Cent. R. Co.* 50 Iowa, 469.

There was error in admitting the rule under the head of "track repairers."

Baldwin v. St. Louis, K. & N. R. Co. 68 Iowa, 37; *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724; *Richardson v. Cooper*, 88 Ill. 270.

All that the law requires of a railroad company to protect itself against claims for personal injuries by its employés is reasonable care in providing safe cars, machinery, and appliances.

Conway v. Illinois Cent. R. Co. supra;

Messrs. **George Hall** and **C. W. Steele**, for appellee:

It was the duty of appellant to furnish appellee's intestate and its servant and employé a reasonably safe track, materials and structures and a safe place in which to work, and to keep the same in repair.

Chicago & N. W. R. Co. v. Sweett, 45 Ill. 201; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Drymala v. Thompson*, 26 Minn. 40; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Plank v. New York Cent. & H. R. R. Co.* 60 N. Y. 608; *Huhn v. Missouri Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440; *Deplin v. Wabash, St. L. & P. R. Co.* 4 West. Rep. 54, 87 Mo. 545; *Siela v. Hannibal & St. J. R. Co.* 82 Mo. 483; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Long v. Pacific R. Co.* 65 Mo. 225; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720, note; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 41, 42; *Honic v. Chicago, R. I. & P. R. Co.* 75 Iowa, 688.

The greater the peril and the risk of the employment, the greater must be the care and effort of the appellant in providing for the safety of employées.

Hough v. Texas & P. R. Co. 100 U. S. 217, 25 L. ed. 615; *Cayser v. Taylor*, 10 Gray, 274.

Appellant was guilty of negligence in constructing, and permitting its fence and cattle-guard to remain so close to its track as to endanger the life of appellee's intestate, while in appellant's employ, and aiding and assisting in running and operating its trains over that portion of its road.

Patterson, Railway Acc. Law, 307; *Beach, Contrib. Neg.* § 134; 1 *Shearm. & Redf. Neg.* 4th ed. § 198, note; *Baltimore & O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88, 23 Am. & Eng. R. R. Cas. 390; *Eames v. Texas & N. O. R. Co.* 68 Tex. 680, 23 Am. & Eng. R. R. Cas. 545; *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 84; *Chicago & A. R. Co. v. Johnson*, 2 West. Rep. 388, 116 Ill. 206; *Scanlon v. Boston & A. R. Co.* 147 Mass. 484; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701; *Lou-18 L. R. A.*

isville, N. A. & C. R. Co. v. Wright, 13 West. Rep. 798, 115 Ind. 378; *Ferren v. Old Colony R. Co.* 3 New Eng. Rep. 330, 143 Mass. 197; *Pidcock v. Union Pac. R. Co.* 5 Utah, 612; *Dorsey v. Phillips*, 42 Wis. 583; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Kearns v. Chicago, M. & St. P. R. Co.* 66 Iowa, 599; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Johnson v. St. Paul, M. & M. R. Co.* 43 Minn. 58.

It was the duty of appellant to know of the dangerous proximity of the fence to the track of its road, and whether it knew or not, it is liable if it could have known by the exercise of reasonable diligence.

Gibson v. Pacific R. Co. 46 Mo. 163, 2 Am. Rep. 497; *Hayden v. Smithville Mfg. Co.* 29 Conn. 549; *Chicago & I. R. Co. v. Russell, supra*; *Springfield v. Doyle*, 76 Ill. 202; *Chicago v. Fowler*, 60 Ill. 322.

It was not the duty of the deceased to investigate for himself, or determine the condition of the appliance furnished him, or the distance of the fence from the track. He was not required to know whether appellant's road had been safely and properly constructed, nor was he required to know of all defects and obstructions that existed on the line of road over which he run, but he had, without investigation, the right to assume that they were safe and sufficient for the purpose, and that appellant had discharged its duties towards its employées.

St. Louis, Ft. S. & W. R. Co. v. Irwin, *Dorsey v. Phillips*, *Gibson v. Pacific R. Co.*, *Snow v. Housatonic R. Co.* and *Chicago & N. W. R. Co. v. Sweett, supra*; *Faren v. Sellers*, 89 La. Ann. 1011, 4 Am. St. Rep. 256, note; *Porter v. Hannibal & St. J. R. Co.* and *Deplin v. Wabash, St. L. & P. R. Co. supra*; *Lewis v. St. Louis & I. M. R. Co.* 59 Mo. 506; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 806.

The deceased did not assume the risk caused by the dangerous proximity of the fence to the track unless he knew of the danger.

Scanlon v. Boston & A. R. Co., *Pidcock v. Union Pac. R. Co.* and *Honic v. Chicago, R. I. & P. R. Co. supra*.

The knowledge of the deceased as to the dangerous proximity of the fence cannot be presumed in proof of his contributory negligence but must be proven by appellant.

Rummell v. Dilworth, 1 Cent. Rep. 905, 111 Pa. 843; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Dorsey v. Phillips, supra*; *Swoboda v. Ward*, 40 Mich. 420; *Nadau v. White River Log. Co.* 76 Wis. 120; *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 525.

It was not negligence on the part of the deceased not to be on the lookout for the fence that caused his death unless he knew of its dangerous proximity to the track, and there is no evidence that he possessed such knowledge.

Kearns v. Chicago, M. & St. P. R. Co., *Chicago & I. R. Co. v. Russell* and *Chicago & A. R. Co. v. Johnson, supra*; *Northern Cent. R. Co. v. State*, 31 Md. 357; *Lewis v. Baltimore & O. R. Co.* 38 Md. 588; *Johnson v. St. Paul, M. & M. R. Co. supra*.

If there was any question as to whether the deceased had any knowledge as to the near proximity of the fence to the track of appellant's road, if there was any evidence tending

to show such knowledge or contributory negligence on his part, the determination of that question became a question for the jury, and was properly submitted to it by the court.

Wharton, Neg. § 217; Cooley, Torts, 661, and cases cited; *Rummell v. Dilworth*, supra; *Huddleston v. Lovell Mach. Shop*, 106 Mass. 282; *Coombs v. New Bedford Cordage Co.* and *Robel v. Chicago, M. & St. P. R. Co.* supra; *Thompson v. Chicago, M. & St. P. R. Co.* 14 Fed. Rep. 564; *Nadaw v. White River Log. Co.* and *Huhn v. Missouri Pac. R. Co.* supra; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 664, 665, 21 L. ed. 745, 749, 750; *Miller v. Union Pac. R. Co.* 12 Fed. Rep. 600; *Franklin v. Winona & St. P. R. Co.* 37 Minn. 409.

Although the deceased may have known of the near proximity of the fence in question to the track, that of itself could not prevent a recovery in this case, unless the same was so close, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to use the side ladder under the circumstances as shown in this case.

Perigo v. Chicago, R. I. & P. R. Co. 55 Iowa, 326; *Hosie v. Chicago, R. I. & P. R. Co.* and *Snow v. Housatonic R. Co.* supra; *Wood, Mast. & Serv.* § 327; *Huhn v. Missouri Pac. R. Co.* supra; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 370; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 500; *Devlin v. Wabash St. L. & P. R. Co.* supra; *Thorp v. Missouri Pac. R. Co.* 6 West. Rep. 671, 89 Mo. 650; *Stoddard v. St. Louis, K. C. & N. R. Co.* 65 Mo. 520; *Flynn v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 195.

Robinson, J., delivered the opinion of the court:

In September, 1888, Joseph M. Brown was in the employ of defendant as brakeman on a freight train. The division on which he worked extended from Trenton, in Missouri, to Eldon, in this State. On the 20th day of the month named, he left Trenton with his train. When it reached the vicinity of Numa he was in the caboose, and, observing stones which appeared to be thrown from the track under the second car from the caboose, he went forward to ascertain the cause. He first went down on the north side of the car, and then climbed back, and went down on the south side by means of the sideladder. While hanging low on the ladder, with his back towards the locomotive, looking under the car, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. This action is brought by the administrator of his estate to recover the resulting damages.

It is claimed by plaintiff that the defendant was negligent in allowing the fence to be placed so near the track as it was, and that decedent was killed in consequence, and without fault on his part. Defendant denies the alleged negligence on its part, and the alleged absence of negligence on the part of decedent, and alleges that he had been employed by defendant on the part of its road where the accident occurred for several years; that during that time the fence and cattle-guard of which complaint is made were not changed, and were like the other cattle-guards and appurtenances along

that part of its road,—all of which was well known to decedent long prior to his death.

1. The court charged the jury as follows: "It is the duty of a railroad company, as regards its employees, to use all ordinary care and supervision to keep its roadway, for the operation of its trains by its employes, in a good and safe condition, so that the employes may not be exposed to unnecessary hazards in the operation of its trains." "The deceased

had a right to assume that the defendant would use all reasonable care in the keeping of its road in a good and safe condition, for the operation of its trains by its employes.

"Defendant complains of the portions of the charge quoted, on the ground that they require defendant to keep its road in a safe condition, while the rule is that it must be kept in a reasonably safe condition. We do not think the jury would so understand the charge. It instructed them that it was the duty of defendant to use all ordinary and all reasonable care and supervision to keep its roadway safe, and that, we think, is the law. If the road could have been made safe by such means, then it was the duty of defendant to make it so.

2. The only charge of wrong against defendant is that it negligently placed the fence with which decedent came in contact too close to the track. That it was a proper appurtenance of the road is not questioned. The evidence shows that all the cattle-guards and cattle-guard fences along the line of defendant's railway, upon which decedent had been employed, were constructed substantially alike. As we understand the record, each cattle-guard was made by digging a pit across the roadbed, about eight feet wide and two feet deep. Across the pit were placed timbers, and on them were laid ties from twelve to fourteen feet in length. At each end of the ties was constructed a wing fence eight feet in length, parallel to the track. It was made of two posts, and boards nailed thereon and to its center was attached the right-of-way fence. The posts of the wing fences inclined outward somewhat, but, as a rule, were nearly perpendicular to the surface of the earth, and were from three feet five inches to four feet seven inches from the rails. The fence which caused the accident in question was three feet ten inches from the rail at the bottom, and inclined outward at the top three inches. There is no competent evidence that it was improperly constructed or located. Certain rules of defendant, designed for the guidance of its track repairers, were, however, introduced in evidence, over the objections of defendant. One of the rules so introduced is as follows: "(2) They must see that no lumber, wood, stone, materials or tools are placed, at any time, within five feet of the rail, and that all gravel and ballast is leveled so as not to endanger the safety of the trains." It is urged by appellee that this rule is evidence that a wing fence should not be placed within five feet of the track and it is claimed that, if the one in question had been placed that distance from it, the accident would not have occurred. But the rule cannot be given the effect claimed for it. It evidently does not refer to permanent structures, but to loose tools and materials. There

would be good reason for requiring articles which might be readily moved by the wind, by animals, or other cause, without the concurrence and against the wish of defendant, to be placed further from the track than appurtenances of the road, which are permanently attached to the earth or roadbed. Other rules required the track repairers to examine their sections daily to ascertain if the track was safe, and to observe closely the fences, and to keep them and the cattle-guards in good repair. It is not claimed that the fence in question was not in good order, and the rules gave the repairers no authority to move it. The rules were therefore improperly admitted. The jury were instructed that they could not presume negligence from the fact that the accident occurred, but there was no other evidence of such negligence.

3. It is said, however, that the cattle-guard and fence could, with reasonable care, have been so constructed that decedent would have passed the fence in safety. That may be conceded, and the question then arises whether the accident was of such a nature that defendant should have guarded against it. The stones and ballast which had attracted the attention of decedent, and caused him to descend the ladder on the side of the car, and look under it, were thrown out by a brake beam which was down and dragging. The evidence shows that, in operating trains, it sometimes happens that a brake-beam or other appurtenance of the trucks of a car gets out of order. When there are indications that such a state of affairs exists, it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and, if necessary, to stop the train. To make the required examination, it may be proper for the brakeman to descend the ladder at the end or on the side of a car, and look under it while the train is in motion. But the evidence does not show that such an event is of common occurrence, and it does show without contradiction that it is not customary for a brakeman to descend the side of a car while it is in motion between stations. It does not appear that any accident caused by the location of a wing fence had ever happened on the road of defendant before that in question, although its road had been operated many years.

The undisputed facts of this case bring it within the rule announced in *Koontz v. Chicago, R. I. & P. R. Co.*, 65 Iowa, 226. The facts involved in that case were substantially as follows: A train of the defendant was stopped on a bridge because the engineer supposed that some of the cars were off the track, or that one of the brakes was set. A brakeman who had been riding in the cab of the engine got down, and in the discharge of his duty proceeded to walk back beside the train to ascertain what cause, if any, there was, for stopping. While so engaged he fell through the bridge, and received injuries which caused his death. This court held that it was not the duty of the railway company to plank every bridge and cattle-guard to prevent accidents to its employes, although it might have anticipated that trains would be required to stop at other than the usual stopping places; and it was said that

"ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur." That such is the rule applicable to cases of this kind is well settled by the authorities.

In *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, it is stated as follows: "The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident."

In *Loftus v. Union Ferry Co.*, 84 N. Y. 459, the material facts involved were as follows: A child six years of age fell from a bridge or float adjoining the passageway for passengers going upon or leaving the ferry-boat, into the water, and was drowned, in consequence of an alleged defect in the guard at the side of the bridge or float. The guard, at the time of the accident, was in the condition it had been in for years. Many people had passed that place yearly, and no accident like that complained of had happened before. The court held that the ferry company was bound to provide suitable and safe accommodations for the landing of passengers, and that the rule of strictest diligence in that respect was the only one consistent with a due regard to the value of human life, and with the relations of the company to the public. It further held that "the rule does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence." The company was held not liable, because it appeared that it had no reason to apprehend an accident like that for which it was sought to make it liable, and that the arrangements it had made were such as experience had, up to that time, shown to be safe and suitable, and sufficient to meet the requirements of its duty.

In *Spogren v. Hall*, 53 Mich. 274, a case in which an employe in a steam saw-mill sought to recover for injuries sustained in the course of his employment, the Supreme Court of Michigan said it was the duty of the mill-owner to guard against probable dangers, not to make accidental injuries impossible. It was further stated, in effect, that the fact that the employe who was not wanting in intelligence nor incapable of judging of probable danger, continued to expose himself without hesitation, and apparently without fear to such risks as those were, was very conclusive proof either that the employer was not culpable in the matter complained of, or that the employe was inexcusably careless of his own safety. It was further

said, in effect, that the fact that, after the accident occurred, it was seen that it could have been easily guarded against, was no reason for holding the employer liable.

To have guarded against the accident in controversy, it was necessary for defendant to foresee that something might occur to one of its moving trains which would make it proper for an employé to descend a car to look beneath it, and that he would descend, and swing himself out from the car while passing a wing fence, to make the desired examination. It is undoubtedly true that defendant might readily have known that such a combination of circumstances was possible, but it is apparent that it was not likely to occur. So far as the record shows, the accident in question was so improbable, and it was due to causes of such rare occurrence, that defendant, in the exercise of reasonable diligence, was not required to provide against it. It is readily seen now how it could have been avoided, but it does not appear that anyone anticipated it, or anything of that nature. It is not shown that complaint of the wing fences was ever made to the defendant, nor that it had any reason to anticipate accidents from them. They were properly constructed, so far as the record discloses, and defendant had reason to believe, from the length of time during which it had operated the road without accident from them, that they were properly located.

4. Another objection to a recovery by plaintiff on the record submitted is that it clearly appears the accident would have been avoided by the use of ordinary care on the part of decedent. He had been employed as brakeman on the division on which the accident occurred in all about three years, and his runs were usually made in daylight. On that division there were about 400 wing fences, all of which were substantially like that in question, as to plan of construction and distance from the track. The distance between the wing fences and the sides of passing box-cars was about two feet, and it is shown without contradiction that the side ladders could be used with safety in examining as to the condition of trains in passing the wing fences in question. But it must have been apparent to anyone who had observed the width of the spaces between the fences and passing cars, that a person could not safely swing out from a car while passing such a fence, on its level, more than two feet, and that an attempt to do so would be apt to result in serious injury. It is said that there is no evidence that decedent knew the distance of the fence from the passing car, but that claim is in conflict with the approved rules of evidence. It was said in *Muldoney v. Illinois Cent. R. Co.*, 39 Iowa, 630, that "the means of knowing by ordinary care is evidence of knowledge." If it be shown that a given statement was made in the presence and hearing of a person possessed of the ability to hear, the presumption, conclusive in the absence of a showing to the contrary, is that he heard it. If it be shown that an event, capable of being seen by any ordinary observer, occurred in the presence of a person possessed of the ability to see, and that his attention was at the time directed to it, it will be presumed, until the contrary appears, that he saw it. So a person

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engaged in a particular employment will be presumed to have that knowledge of the dangers incident to his employment which he could have acquired by the use of ordinary diligence.

In *Mayer v. Chicago, R. I. & P. R. Co.*, 63 Iowa, 568, it was shown that the plaintiff's testate was a switchman or brakeman in the employment of the defendant, and that his death was caused by the negligence of defendant in failing to place blocks between the rails and the guard-rails at the switches. It was said by this court, in effect, that the knowledge of defects possessed by an employé, and his ability in the exercise of ordinary diligence to acquire knowledge thereof, are questions of fact to be determined on the evidence submitted in cases where the defects or dangers are not open and obvious to everyone serving in the capacity of an employé; but that the rule was not applicable to that case, for the reason that the decedent had worked over the track in question for six weeks, and must be presumed to have known of the defect, and that it was dangerous. The plaintiff in *Money v. Lower Vein Coal Co.*, 55 Iowa, 671, sought to recover for injuries received from a falling roof while working as a miner in the mine of defendant. This court held as follows: "The true rule is that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk, and cannot recover." In *Muldoney v. Illinois Cent. R. Co.*, *supra*, this court approved the following: "When an employé has the means of acquiring knowledge, by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to or protesting against the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition." The court cited a large number of cases as supporting the rule. In *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 276, it appeared that the defendant had erected a coal platform between two of its tracks at Winterset, and, for convenience in unloading and taking on coal, placed it so near one of the tracks that a passenger-car, moving along the track, passed within seven inches of the platform at one end, and within four and a half inches of it at the other end. The platform had been in the position described two years, when a baggage-man in the employment of the defendant, while engaged in the discharge of his duties in helping to make up a train, was knocked off the car by the coal platform, thereby receiving injuries which resulted in his death. He had been in that employment for more than two years, and had assisted in making up the train during nearly every day of that time. In considering an instruction in which the rule under consideration was stated, the court said: "It is now the established doctrine of this court, in harmony with the current of authority elsewhere, that an employé who knows, or by the

exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby."

The rule, as thus stated, was approved in *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa, 524. The facts involved in that case were that the plaintiff's intestate was a brakeman in the employment of defendant, and had been so engaged for more than four years upon that part of its road where the accident occurred. He was killed by being knocked from the top of a freight train by the timbers of a bridge over which the train was passing. The bridge timbers with which he came in contact were a little more than five feet above the top of the car, while he was more than six feet in height. There were other bridges of like construction and height on that part of the road, over which he had often passed. In the opinion written by Beck, J., it was held that an instruction embodying the rule under consideration should have been given. It was also said, in regard to the dangers of the employment, that "the knowledge of the intestate and his failure to make objections may be shown by circumstances and inferred from his conduct. Direct proof on these points is not required. The knowledge of the dangerous character of the bridge may be inferred from opportunities of obtaining such knowledge in the exercise of ordinary care."

In *Gould v. Chicago, B. & Q. R. Co.*, 66 Iowa, 590, it appeared that the plaintiff's intestate, a locomotive engineer in the employment of the defendant, was fatally injured while in the discharge of his duties. He had been instructed to make a certain trip without stopping at any station, unless signaled or specially directed so to do. It was the duty of the conductor or brakeman to make signals to the engineer from the rear end of the train when passing stations. While the train was passing a station on the trip the engineer went to the fireman's side of the engine, and leaned out of the gangway, looking back for the expected signal. He was almost instantly struck by a water crane, and injured as stated. The water crane, or the frame supporting it, was about two feet from the floor of the gangway upon which the engineer was standing when he was struck. This court approved an instruction to the effect that, if the crane was so located as to be reasonably safe for trainmen operating trains in a reasonably safe and prudent manner, then the defendant was not guilty of negligence in the location of the crane, and disapproved one which stated, in effect, that, if the crane was placed in such close proximity to the track as to be dangerous to the persons operating the trains, then defendant might be found guilty of negligence in locating and erecting it. In considering that instruction, the court, again speaking by Beck, Ch. J., stated that "it is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things for use in the operation of their roads, for the reason that they are dangerous to the persons operating the trains. 18 L. R. A.

Indeed, the whole business of operating trains is dangerous. It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the things from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it."

The rule under consideration is too well grounded in reason and authority, and has been too long followed by this court without dissent, to be now abandoned. When applied to the facts in this case, its effect cannot be a matter of doubt. The decedent during his long term of service on the road in question, could not have failed to observe, in the use of ordinary diligence, that the wing fences were too near the track to permit a person to swing out from the bottom of the passing car with safety. This is especially true if the trainmen were required to descend the sides of moving cars, and look beneath them, as was done in this case, so frequently that defendant should be charged with knowledge of such examinations, and be required to provide for them. Decedent may not have known the exact distance of any wing fence from the track, but he could not have avoided knowing that he could not safely do that which he attempted if he had given the matter that attention which his duty to his employer and to himself demanded. The accident occurred at about noon of a pleasant day. The track where it occurred was straight. There were no obstructions, and decedent could have seen the fence which caused his death, from his position at the bottom of the ladder, for a distance of 930 feet before it was reached. There was nothing in the condition of the car which he sought to examine, as it appeared at the time, to justify him in exposing himself to any unusual risk. There was nothing to indicate such an impending danger to the employes or property of defendant, nor to passengers, as justified decedent in acting without regard to his own safety. It appears that a break-beam or lever, or a break loose and dragging, might have thrown the stones from the track, or that a swing-beam might have thrown them from ballast filled in too full. It is not shown that when stones were thrown as were those in question it was regarded as indicating unusual danger, or anything of a serious nature, although it made an examination as to the condition of the train necessary. That decedent was not alarmed by what he saw is shown by what he did. It was his duty to report to the conductor if he saw anything wrong with the train. He made no report in this case, but proceeded without orders, evidently not for the purpose of averting an apparent and impending danger, but to ascertain if one existed. The conductor and a fellow-brakeman were near him in the caboose when he left it, but he did not regard the cause of his leaving of sufficient importance to call their attention to it.

In *Hosie v. Chicago, R. I. & P. R. Co.*, 75 Iowa, 686, it appeared that a brakeman was injured in attempting to set a brake in obedience to a signal which was unusual, and indicated that prompt action was required. It was held

that under the facts of that case, the brakeman was justified in attempting to obey the signal, although in so doing he knowingly incurred risk to himself; but the rule of that and similar cases has no application to this case. It clearly appears from the undisputed facts of the case and the authorities cited that defendant is not shown to have been negligent in the provision it has made for the safety of its employes in the matter in controversy. The case of *Loftus v. Union Ferry Co.*, *supra*, is even authority for the conclusion that it has exercised that higher degree of care which a passenger might have demanded. On the other hand, it appears that, had decedent used reasonable care to ascertain and avoid the danger to which he exposed himself, the accident which caused his death could not have occurred. What we have said disposes of all questions discussed by counsel which are likely to arise on another trial.

For the reasons indicated the judgment of the District Court is reversed.

Beck, Ch. J., dissenting:

1. The undisputed evidence shows that plaintiff's intestate, Joseph M. Brown, had been for several months employed as a brakeman upon trains running on that part of the road where the accident resulting in his death occurred. The deceased, being in the cupola of the caboose, while the train was running in daylight under ordinary conditions, saw stones flying from the ballast of the roadbed, so that they could be seen by him from the cupola. He knew from this indication that some part of the car was coming in contact with the roadbed, and thereupon went upon the top of the car, thence down its side upon the ladder, and returned to the top, went down the ladder on the other side, and swinging himself from the ladder so that he could do so, looked under the car to see what part of it was dragging upon the roadbed. While in this position, his head came in contact with the upright part of a cattle-guard, and he was instantly killed. There was a panel of fence extending along the cattle-guard on the side furthest from the track, to the middle of which the fence was attached. The fence was three feet ten inches from the rail at the bottom, and four feet and one inch at the top. Other cattle-guards varied, as to the distance from the rails, but little one way or the other from this measurement. It was found that a brake-beam was down, and was dragging upon the roadbed, which caused the stones to be thrown off the track. The deceased was looking backward when he was killed. He was not directed by the conductor to examine and report as to the cause of the stones flying from the track. There was evidence tending to show that an ordinary freight-car projects about two feet beyond the rail, and that it was the duty of a brakeman, upon observing indications of a brake-beam or the like being down, to examine into the matter and ascertain the cause of the indications, and this could be done only by looking under the car in the manner deceased attempted.

2. Was it the duty of deceased, upon observing indications of parts of the car or machinery near the track being out of order, to ascertain what was the cause of the indications

in order to prevent injury to the train from the defective parts of the car? Evidence was submitted to the jury to the effect that upon such an occurrence it was customary for the brakeman to do just as the deceased attempted to do, namely, descend the ladder, and obtain a view of the parts under the car, so that whatever was necessary to avoid danger could be done. A witness for the defendant testified that it was the duty of deceased to report the fact to the conductor, and from him have orders to descend the side of the car. But, if it be assumed that he should have pursued this course, it does not follow he was negligent in acting without the conductor's orders. It was a case of the discharge of duty without waiting for orders. It is very plain that the emergency required prompt action; that the deceased acted just as the emergency required. Now to hold that the deceased, because he did the act he would have been required to do had he reported to the conductor, was negligent, would condemn him for prompt intelligence and faithful services, intended to protect the property of defendant and the lives of himself and other trainmen. But we cannot hold that, in such a case, a trainman must, before he acts, report for orders. Such a rule would often expose life and property to destruction, for in the management of trains which move at a high rate of speed promptness and celerity of action are to be commended, indeed required, in the right discharge of duty by the trainmen. I need not further present reasons for holding that the deceased, in the discharge of his duty, descended the ladder, and attempted to see the parts of the car out of order. But I may repeat what I have before intimated, that preservation of human life and protection to the property of defendant required deceased to do this duty, and do it promptly.

3. Now if it were the duty of deceased to descend the ladder and look under the car, it cannot be doubted that defendant was required to construct the cattle-guards so that his life would not be destroyed in the discharge of duty. Therefore, if the parts of the cattle-guard were so near the car as to expose the body of deceased to contact therewith, they were negligently constructed. A great deal more could be said upon these points, but I refrain from continuing their discussion.

4. It is insisted that, as the act done by defendant was rarely demanded, the indications—the flying of the stones—were something unusual, and the defendant was not required to anticipate the occurrence, and so provide that danger to its employes would not result therefrom. We cannot say, as a matter of law, that the occurrence of the brake-beam or other timber under the car being down is so unusual that it could not or ought not to have been anticipated. Indeed the evidence tends to show that such things were quite familiar to at least one witness who had been a trainman; and it is a matter of common knowledge that the timber and irons of the machinery and trucks are exposed to breaking, and from other causes they become out of order. Timbers, irons or stones, not connected with cars may become fastened to parts of the trucks, and other things of this character may occur, all of which would, if not removed, cause destruction of property

and of life. The character of these dangers can only be known by a view under the cars. Now, surely the defendant ought so to construct its track, cars and cattle-guards that a trainman may in safety so act when such occasions arise that life and property will be protected. The evidence in this case shows that the part of the cattle-guard was about two feet and two inches from the side of the car, and probably even less from the ladder upon which deceased was supporting himself when he was killed. The jury were authorized to find that deceased was killed while in the discharge of his duty, and that the discharge of that duty, and duty of that character, may be required at any time, or at any place, upon a moving train, and therefore that danger from cattle-guards so near the track should have been anticipated and provided against by defendant. The cases and authorities cited in the majority opinion are not in conflict with these views and conclusions.

5. It was the duty of defendant to so construct the cattle-guard as not to endanger the safety or life of the employes operating trains on the railroad, and, under familiar rules, intestate was authorized to believe that defendant had done its duty in this regard and to believe that no danger of the character caused by the cattle-guard existed. He could rest in this belief, and act accordingly until he obtained actual knowledge that the danger existed. *Muldrowney v. Illinois Cent. R. Co.* 86 Iowa, 468; *Kearns v. Chicago, M. & St. P. R. Co.* 66 Iowa, 599; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Gibson v. Pacific R. Co.* 46 Mo. 163; *Faren v. Sellers*, 39 La. Ann. 1011; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701; *Dorsey v. Phillips*, 42 Wis. 588; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Lewis v. St. Louis & I. M. R. Co.* 59 Mo. 506; *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 306, 8 West. Rep. 297; *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545, 4 West. Rep. 54.

6. If deceased knew, or could have known in the exercise of reasonable diligence, the danger to which he exposed himself by attempting to discharge the duty he undertook to protect defendant's property, by descending the ladder in

order to discover the cause of the stones from the roadbed flying out from under the car, and thus voluntarily put his life at hazard, he was negligent, and thereby contributed to the injury resulting in his own death, and his representative cannot recover. But there is no evidence tending to show that he had such knowledge, or that in the exercise of reasonable diligence he could have acquired it. It is not shown that he or any other employe of defendant knew the distance the fences of the cattle-guards were from the cars or the rails, nor that he or they knew just what distance between the car and the fence would enable one to do what he attempted to do with safety, or what distance would render the act dangerous. It is not shown that any employe of defendant or the deceased had any reason to believe that he exposed himself to danger from the fences by attempting to look under the car. It is a case where the employes and witnesses of defendant are exceeding wise after a life has been sacrificed and measurements have been made. No one appears to have thought of the danger before. This very view is taken in the opinion of the majority to excuse defendant's negligence, namely, that the accident was so improbable and unexpected that defendant cannot be regarded as negligent in maintaining the fence so near the car; but the victim of the accident is to be held by the majority of the court to have been negligent for not knowing the danger, while the defendant is to be held free of negligence because the accident could not have been anticipated. I protest against such discrimination in favor of defendant. The simple facts are that the fence was dangerously near the track, and there is no evidence tending to show that the intestate knew it, or that in the exercise of reasonable diligence he could have acquired knowledge of such fact. The considerations distinguish the case from *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 562; *Gould v. Chicago, B. & Q. R. Co.* 66 Iowa, 590; *Wells v. Burlington C. R. & N. R. Co.* 56 Iowa, 524, and other like cases cited in the majority opinion as applicable on this point.

In my opinion the judgment of the district court ought to be affirmed.

NEW HAMPSHIRE SUPREME COURT

Jennie JACQUES

v.

GREAT FALLS MANUFACTURING CO.

(.....N.H.....)

1. A nonsuit is properly refused in an action to recover damages for personal injuries where the evidence shows that plaintiff was a weaver having charge of looms in defendant's mill; that a shuttle could not fly out of a loom unless the machinery was defective or out of repair; that plaintiff had no knowledge of and was not permitted to meddle with the machinery but in case it appeared out of repair must inform a person employed for the purpose of repairing looms; that on the day of the accident one of the looms did not work right, the shuttle flying out and sticking; that the loom-fixer was called three

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times to repair the loom, and after making what repairs he thought necessary each time again set the loom running; that plaintiff watched the loom more closely than the others because afraid of its action, and that shortly after it was fixed the last time a shuttle flew out inflicting the injury complained of.

2. A loom-fixer in a cotton mill, whose duty is to look after the looms and keep them in proper repair, is not the fellow servant of weavers employed at the looms, within the rule that the master is not liable for injuries received through the negligence of a fellow servant.

(July 31, 1891.)

EXCEPTIONS by defendant to rulings of the trial term of the Supreme Court for Strafford County (Carpenter, J.) made during

the trial of an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Exceptions overruled.*

Plaintiff was employed by defendant as a weaver in its cotton mills having charge of six looms.

The further facts sufficiently appear in the opinion.

Messrs. W. S. & D. R. Pierce, for defendant:

In *McAndrews v. Burns*, 89 N. J. L. 117, *Mr. Justice Dalrimple* defined common employment to be service of such kind that, in the exercise of common sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants it may probably expose them to injury.

Thompson, in his work on Negligence, vol. 2, § 87, p. 1084, adds, after citing the above definition: "The more general view seems to be, that all servants in the employ of the same master, under the same general control, and engaged in promoting the same common object,—such as operating a railroad or a mine,—are to be deemed fellow servants engaged in the same common employment; and if so, the fact that they are engaged in different departments of the same service does not take the case out of the rule."

John C. Burke, the loom-fixer, having been engaged in the same common employment with the plaintiff, was a fellow servant.

McGee v. Boston Cordage Co. 189 Mass. 445; *Johnson v. Boston Tow-Boat Co.* 185 Mass. 209; *King v. Boston & W. R. Corp.* 9 Cush. 112. See *Gilman v. Eastern R. Co.* 13 Allen, 441; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *Killea v. Faxon*, 125 Mass. 485; *Colton v. Richards*, 123 Mass. 484; *Kelley v. Norcross*, 121 Mass. 508; *Hanley v. Grand Trunk R. Co.* 62 N. H. 281; *Nash v. Nashua I. & S. Co.* 62 N. H. 407; *Fifield v. Northfield R. Co.* 42 N. H. 225.

Messrs. Russell & Boyer, for plaintiff:

The question of negligence is one of fact to be found by the jury from the evidence submitted under proper instructions from the court.

Stark v. Lancaster, 57 N. H. 88; *Daniels v. Lebanon*, 58 N. H. 285; *Ruland v. South Newmarket*, 59 N. H. 291; *Paine v. Grand Trunk R. Co.* 58 N. H. 611; *Deerson v. Eastern R. Co.* 58 N. H. 181; *Gordon v. Boston & M. R. Co.* 58 N. H. 396; *Paine v. Grand Trunk R. Co.* 1 New Eng. Rep. 841, 63 N. H. 623.

The evidence was sufficient to raise a reasonable presumption of guilt on the part of the defendants in the minds of the jury.

Moynihan v. Hills Co. 6 New Eng. Rep. 286, 146 Mass. 591; *White v. Boston & A. R. Co.* 4 New Eng. Rep. 267, 144 Mass. 406.

It was the corporation's duty to keep the loom in a reasonable state of repair and free from defects.

Gibson v. Pacific R. Co. 46 Mo. 163; 2 Thomp. Neg. pp. 946, 947, p. 973, § 8, p. 979, § 9; *Shearm. & Redf. Neg.* §§ 194-197, and cases cited.

Burke was not the fellow servant of the plaintiff.

He to whom the corporation delegates any

duty it has to perform towards its servants while in the performance of such duty stands in the place of, and, as to those affected by that duty, is the corporation itself to all intents and purposes.

Beach, Contrib. Neg. §§ 110, 112; 2 Thomp. Neg. § 36, p. 1082; *Shearm. & Redf. Neg.* § 204; *Anderson v. Bennet*, 16 Or. 515, 8 Am. St. Rep. 311; note to *Fisk v. Central Pac. R. Co.* (Cal.) 1 Am. St. Rep. 29.

A corporation cannot escape its duty by delegating it to an agent and then disclaiming all responsibility.

Bushby v. New York, L. E. & W. R. Co. 10 Cent. Rep. 238, 107 N. Y. 374; *Moynihan v. Hills Co.* 6 New Eng. Rep. 286, 146 Mass. 586.

That defendants would perform this duty imposed by law, to the plaintiff in respect to the supply and maintenance of proper machinery, was a part of their contract with the plaintiff, implied by law from the relation of master and servant, existing between plaintiff and defendants.

2 Thomp. Neg. p. 972, § 3, p. 1032; *Shearm. & Redf. Neg.* § 194; *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311. See *Shanny v. Androscoggin Mill*, 66 Me. 420; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 26, 44 Am. Rep. 573.

The facts are not sufficient to charge the plaintiff with contributory negligence in continuing to run the loom after she began to be afraid of it.

Sleeper v. Worcester & N. R. Co. 58 N. H. 520; *Griffin v. Auburn*, 58 N. H. 123.

To have that effect it must appear that she fully realized the danger to herself, if any.

Wharton, Neg. § 215; *Myhan v. Louisiana Elec. L. & P. Co.* 7 L. R. A. 172, 41 La. Ann. 964, 17 Am. St. Rep. 436; *Galveston H. & S. A. R. Co. v. Garrett*, 78 Tex. 262, 15 Am. St. Rep. 781.

Clark, J., delivered the opinion of the court:

The motion for nonsuit presents the question whether the jury could properly find a verdict for the plaintiff upon the evidence submitted. *Paine v. Grand Trunk R.* 58 N. H. 611. The evidence produced by the plaintiff—that the shuttle would not fly out of a loom unless the machinery was defective or out of repair; that the plaintiff had no knowledge of the machinery, and was not allowed to meddle with it, and, in case it did not operate properly, was required to call on Burke, a loom-fixer employed by the defendant to look after the looms operated by the plaintiff, and keep them in proper repair; that the shuttle flew out of one of her looms about 10 o'clock in the forenoon of the day of the injury, and she notified Burke, who examined it, made whatever repairs he thought necessary, and set it running; that at 11 o'clock the shuttle caught in the "binder" or in the "picker" and she again called on Burke, who again examined the loom, repaired it, and put it in operation; and shortly after, and before 12 o'clock, the shuttle flew out, and struck her, putting out one of her eyes; and that she had watched the loom more closely than the others, because its action made her afraid of it,—was evidence tending to show that the plaintiff, exercising reasonable care, was injured by the defendant's negligence in

failing to provide suitable machinery for her use; and, in the absence of rebutting evidence, was sufficient to sustain a verdict for the plaintiff. The motion for a nonsuit was properly denied.

The defendant excepted to the refusal to instruct the jury that Burke, the section-hand and loom-fixer, being engaged in the same common employment and under the same general control, was a fellow servant of the plaintiff, and that the defendant was not liable for his negligence. As the servant assumes the ordinary risks of his employment, including the negligence of his fellow servants, the master is not responsible to the servant for injuries happening from that cause. But the rule of law which exempts the master from responsibility for such injuries does not relieve him from the duty which he owes to the servant to provide suitable and safe machinery and appliances for the use of the servant in his employment. *Fifield v. Northfield R.* 42 N. H. 225; *Hanley v. Grand Trunk R. Co.* 62 N. H. 274; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 260; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612. This duty may be, and in case the employer is a corporation must always be, discharged by agents and servants; and that the agent or servant charged with its performance, whatever his rank of service may be, stands in the place of the employer, who thereby becomes responsible for the acts and chargeable with the negligence of such agent or servant. In many kinds of service the care and keeping of tools and machinery in a condition of safety requires merely the attention and repairs occasioned by ordinary use and wear, and is properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery, and the means of making needed repairs, and the duty of making the repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant. *McGee v. Boston Cordage Co.* 189 Mass. 445. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servants from injury; and for any failure to exercise proper care and skill the employer is accountable.

The question who are fellow servants, within the rule exempting the employer from consequences of the negligence of fellow servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow servants, whatever their grade of service; and a servant, of whatever rank, charged with the performance of the master's duty towards his servants, is, as to the discharge of that duty, a vice-principal, for whose acts and neglects the master is responsible, because he has invested him with the responsibility of doing that which the master is bound to have carefully performed. *Moynihan v. Hills Co.* 146 Mass. 586, 593, 6 New Eng. Rep. 13 L. R. A.

286; *Daley v. Boston & A. R. Co.* 147 Mass. 101, 114, 6 New Eng. Rep. 349; *Fuller v. Jewett*, 90 N. Y. 46; *Davis v. Central Vermont R. Co.* 55 Vt. 84; *Tierney v. Minneapolis & St. L. R. Co.* 83 Minn. 811; *Cincinnati H. & D. R. Co. v. McMullen*, 117 Ind. 439; *Ell v. Northern Pac. R. Co.* (N. Dak.) 48 N. W. Rep. 222.

The test whether the plaintiff and Burke were fellow servants was not whether they were engaged in the common employment of manufacturing cotton cloth under the same general control and paid by the same principal, but whether Burke represented the defendant in the responsibility or performance of any duty which it owed to the plaintiff. It was the duty of the defendant to furnish suitable machinery, and keep it in suitable condition, for the plaintiff's use. The duty of keeping the looms in proper repair required experience and the exercise of mechanical skill, and was specially intrusted to Burke, and, so far as the discharge of that duty was concerned, Burke represented the defendant, and any negligence on his part in the performance of that duty was the negligence of the defendant. It is immaterial that Burke exercised no control or authority over the plaintiff. The negligence of the defendant complained of was not in ordering the plaintiff into a place of danger, but in failing to use ordinary care to prevent the exposure of the plaintiff to unusual hazard in her ordinary employment.

Exceptions overruled.

Carpenter, J., did not sit. The others concurred.

CONNECTICUT RIVER LUMBER CO.
et al.

v.

OLCOTT FALLS CO.

(65 N. H. 280.)

1. The right of a riparian owner to construct dams and divert for manufac-

NOTE.—Navigable waters; floatage of logs.

Early Massachusetts decisions sustain the conclusions of the principal case and hold that property rights situate near water highways are subject to the rights and equities of the general public in so far as free passage to and from on the waters of the stream are concerned. *Com. v. Essex Co.* 13 Gray, 248; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Alger*, 7 Cush. 100.

A similar contention has been sustained by the supreme courts of both Maine and New Hampshire. *Parks v. Morse*, 52 Me. 280; *Veazie v. Dwinel*, 50 Me. 479; *Lanoe v. Clifford*, 54 Me. 487; *Treat v. Lord*, 42 Me. 552; *Knox v. Chaloner*, 42 Me. 150; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 558.

It is within the province of the Legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide-waters and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. Where the full enjoyment of two public rights threaten to interfere with each other, it is for the Legislature to determine which shall yield, and to what extent; and such question will ordinarily be determined by the preponderance of public necessity and con-

turing purposes, the water of a stream which is used by the public for floating logs is limited by the extent to which it can be done without interfering with the public rights, which are measured by the capacity of the stream in its natural condition.

2. The right of the public to float logs on a stream will not be presumed to have been relinquished by the grant of a charter to a manufacturing corporation, giving power to purchase and hold real estate on the stream, improve the water-power, and make and maintain on or across the stream the works necessary to accomplish the corporate objects, unless such relinquishment is absolutely necessary to the exercise of the corporate franchises.
3. The mere fact of the insertion in certain corporate charters of a prohibition to interfere with the navigation of streams is no ground for construing a charter which does not contain such prohibition as authorizing such interference where it would be advantageous to the corporation.
4. Legislative authority to a manufacturing company to purchase, hold, and enjoy the powers and privileges of a corporation which had been organized to con-

struct a canal around the falls in a stream used by the public for floating logs, subject to the duties and liabilities binding on said "rights, powers, and privileges," will subject the manufacturing corporation to a limitation which had been imposed upon the company not to interfere with the free passage of lumber down the stream.

5. The abandonment by the State of the public right to float logs down a stream when it grants a manufacturing corporation the right to make use of the water-power thereon, will not be inferred from the fact that the manufacturing business may be more important than the lumber business.
6. The mere conveyance by the State of the bed of a stream, which has been used by the public for floating logs, will not operate as a relinquishment of the public right. To have that effect the intention must be distinctly expressed.
7. Equity has jurisdiction of a bill to determine as between the public and riparian mill-owners the proper form, dimensions and place in a mill-dam of a sluice for running logs on the stream; and the suit is not barred by the fact that the dam is already erected.
8. If a judicial location of a log-way

venience. The most common case is that where each is required to yield in part, as in the case of a bridge over a navigable river, furnished with a draw, to be raised for the passage of vessels, at the expense of the bridge owners, or by the navigators desiring to pass it. *Com. v. Essex Co.* 79 Mass. 230.

The public right of floatage, and the private right of the riparian proprietors, must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage, he must submit to as incident to his situation upon navigable waters. *Middleton v. Flat River Boom Co.* 27 Mich. 533.

Each right modifies the other, and may, perhaps, render it less valuable; but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint. *Gould v. Boston Duck Co.* 13 Gray, 452; *Snow v. Parsons*, 28 Vt. 450. To the same effect is *White River Log & Boom Co. v. Nelson*, 45 Mich. 578. See also *People's Ice Co. v. The Excelsior*, 44 Mich. 229; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

The right to float logs on navigable streams is recognized in *Lorman v. Benson*, 8 Mich. 32; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 344; *Middleton v. Flat River Boom Co.* 27 Mich. 533; *Atty-Gen. v. Ewart Boom Co.* 34 Mich. 462; *Brig "City of Erie" v. Canfield*, 27 Mich. 482.

The right of navigation is superior to all other rights. *Brown v. Chadbourne*, 31 Me. 9; *Morgan v. King*, 35 N. Y. 458; *Moore v. Sanborne*, 2 Mich. 526; *Treat v. Lord*, 42 Me. 552.

The question what is a reasonable use of a right depends on the subject matter and the attendant circumstances. *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Davis v. Winslow*, 51 Me. 295; *Underwood v. Waldron*, 38 Mich. 220; *Weise v. Smith*, 3 Or. 445; *Scrapps v. Rellly*, 38 Mich. 27.

What constitutes a navigable stream.

One thing appears perfectly clear, that the common law of England on this subject is not the common law of America. Rules which reason and convenience may have dictated in reference to such streams as the Thames and the Avon, may be wholly inapplicable to the Mississippi, the Ohio and the Hudson. The timber trade alone, on such a river as the Hudson, running through immense primeval forests, would of itself create an excep-

tion. In granting the public lands of such a State, bounded on such a river, to private individuals, no Legislature, without express words, could be presumed to have intended to divest itself of the power of protecting so important a public interest. *Lowber v. Wells*, 13 How. Pr. 454.

None of the adjudications cover the precise question here involved. In Maine, where the right to float logs in such streams as are suitable is so important, the same general doctrine which was accepted and declared in *Moore v. Sanborn* (2 Mich. 519) has been repeatedly acted upon. *Brown v. Chadbourne*, 31 Me. 9; *Treat v. Lord*, 42 Me. 552. And see *Veazie v. Dwinel*, 50 Me. 484; *Gerrish v. Brown*, 51 Me. 256; *Davis v. Winslow*, 51 Me. 297.

The true rule is, that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the product of the forests, or mines, or of the tillage of the soil upon its banks. It is not essential to the right, that the property to be transported should be carried in vessels, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being navigated against its current as well as in the direction of its current. If it is so far navigable or floatable as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream should be continuous, or that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water and navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. *Morgan v. King*, 35 N. Y. 459. See also same case in the supreme court, —18 Barb. 284, and 30 Barb. 9; *Shaw v. Crawford*, 10 Johns. 236; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

No case goes further than these, and they carefully restrict the public easement within the bounds of a capability for use in the ordinary and natural condition of the watercourse. The possibility of occasional use during unusual and brief freshets certainly could not make a stream a pub-

over a dam which has been erected for manufacturing purposes becomes necessary, the convenience of the mill-owners will be consulted so far as it reasonably may be without a violation of the public rights.

(December 2, 1890.)

BILL in equity to restrain defendant from maintaining a dam across the Connecticut River at Olcott Falls in Lebanon, without providing suitable sluiceways for the passage of logs floated by plaintiffs down the river. *Case discharged.*

The facts are fully stated in the opinion.

Messrs. Aldrich & Remich and Drew & Jordan, for complainants:

The Connecticut River is by nature a public highway.

Scott v. Wilson, 3 N. H. 821; *Thompson v. Androscooggin River Imp. Co.* 54 N. H. 548; *Barnes v. Heath* (unpublished op.); Gould, Waters, §§ 107-109; Angell, Highways, §§ 55, 56, 67-72.

The Connecticut River being a natural public highway, the individual or private rights along its banks are "held subject to the risks

(and uses) incident to the exercise of the public right."

Thompson v. Androscooggin River Imp. Co. 54 N. H. 558; *Barnes v. Heath* (unpublished op.); *Knox v. Chaloner*, 42 Me. 150; *Treat v. Lord*, 42 Me. 552; *Dwinel v. Veazie*, 44 Me. 187; *Parks v. Morse*, 52 Me. 260; *Lancey v. Clifford*, 54 Me. 487; *Veazie v. Dwinel*, 50 Me. 479; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Alger*, 7 Cush. 100; *Com. v. Essex Co.* 13 Gray, 248.

The owner of a mill-dam on such a river is bound to provide a suitable and reasonably convenient passageway for commerce; and if he fails to do so his dam becomes a nuisance, and may be abated by any member of the public having occasion to use the same.

Dwinel v. Veazie, *Parks v. Morse* and *Lancey v. Clifford*, *supra*; Wood, Nuisances, § 756, p. 858, also §§ 488, 484, 753, 757-762.

Courts of equity will interfere to restrain and prevent threatened public nuisances at the suit of a private person who may suffer a special injury thereby, as well as to abate those already existing.

Cooley's Bl. Com. bk. 3, 219, 220, note 7; *Adams, Eq.* 485, 487, note 1; *Jeremy's Mitf. Eq.*

lic highway. It is so held in *Hubbard v. Bell*, 54 Ill. 110, a case which unnecessarily criticises the Maine and Michigan cases as exceptional, though they may well stand with that upon its facts.

Nature is competent, it has been said, to make a navigable river without the aid of the Legislature (*Martin v. Bliss*, 5 Blackf. 35); and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact. *Hale, De Jure Maris*, chaps. 2, 8; *Williams v. Wilcox*, 8 Ad. & El. 814, 838; *Barney v. Keokuk*, 94 U. S. 342, 24 L. ed. 229; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; The "Daniel Ball," 77 U. S. 10 Wall. 567, 19 L. ed. 999; The "Montello," 87 U. S. 20 Wall. 480, 442, 22 L. ed. 391, 394; *Carter v. Thurston*, 58 N. H. 104, 106; *Thompson v. Androscooggin River Imp. Co.* 54 N. H. 545, 58 N. H. 106; *Brown v. Chadbourne*, 81 Me. 9; *Moor v. Veazie*, 32 Me. 343; *Spring v. Russell*, 7 Me. 273, 290; *Wadsworth v. Smith*, 11 Me. 278; *Adams v. Pease*, 2 Conn. 481; *Ingraham v. Wilkinson*, 4 Pick. 298; *Com. v. Chapin*, 5 Pick. 199, 202; *Palmer v. Mulligan*, 3 Cal. 307; *People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90; *Canal Comrs. v. People*, 5 Wend. 423; *Morgan v. King*, 35 N. Y. 454, 30 Barb. 2, 18 Barb. 277; *Munson v. Hungerford*, 6 Barb. 265; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Rhodes v. Otis*, 38 Ala. 573, 598; *Cox v. State*, 3 Blackf. 103; *Weise v. Smith*, 3 Or. 445, 448; *Godfrey v. Alton*, 12 Ill. 29; *Memphis v. Overton*, 3 Yerger, 389; *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clark*, 2 Swan, 15; *Sigler v. State*, 7 Bart. 493; *Yates v. Judd*, 18 Wis. 118; *Hickok v. Hine*, 28 Ohio St. 523; *Selman v. Wolfe*, 27 Tex. 68; *Gould, Waters*, § 54.

The law of the State recognizes the right of the public to use such streams, though private property, for rafting and floating logs, as far as necessary for public accommodation. *Palmer v. Mulligan*, 3 Cal. 315; *Shaw v. Crawford*, 10 Johns. 237; *Ex parte Jennings*, 6 Cow. 518; *Browne v. Scofield*, 8 Barb. 239; *Morgan v. King*, 18 Barb. 232, 35 N. Y. 459; *Brown v. Chadbourne*, 81 Me. 9; *Moore v. Sanborne*, 2 Mich. 519.

The riparian owner has a right to use the stream in all ways and for all purposes which are not inconsistent with its use by the public. *Lorman v.* 13 L. R. A.

Benson, 8 Mich. 18, 77 Am. Dec. 435; *Lancey v. Clifford*, 54 Me. 491, 52 Am. Dec. 561; *Morgan v. King*, 18 Barb. 277; *Scofield v. Lansing*, 17 Mich. 437; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 994; 6 Lawson, Rights, Remedies & Practice, § 2932.

He may use the water for the purpose of manufacture. He may erect dams across the stream provided he leaves room for the passage of logs and other products. *Scofield v. Lansing*, 17 Mich. 437; *Thurman v. Morrison*, 14 B. Mon. 387; *Douglas v. State*, 4 Wis. 387. 6 Lawson, Rights, Remedies & Practice, § 2932.

Equity will recognize and enforce the rights of riparian proprietors.

By the exercise of the equitable jurisdiction courts may abate a nuisance, at the instance of a party who is a sufferer in a special or particular manner distinct from that suffered by him in common with the public at large; but this injury must be real and such that the legal remedy of damages would not be adequate. 3 Pom. Eq. Jur. § 1349, citing *Soltan v. De Held*, 2 Sim. N. S. 138; *Atty-Gen. v. Sheffield G. C. Co.* 3 DeG. M. & G. 304; *Atty-Gen. v. Cambridge G. C. Co.* L. R. 4 Ch. 71, 80; *Pettibone v. Hamilton*, 40 Wis. 402; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Osborne v. Brooklyn City R. Co.* 5 Blatchf. 366; *Hartshorn v. South Reading*, 8 Allen, 501; *Rowe v. Granite Bridge Corp.* 21 Pick. 844; *Bigelow v. Hartford Bridge Co.* 14 Conn. 563; *Milbau v. Sharp*, 27 N. Y. 611; *Knox v. New York*, 55 Barb. 404; *New York v. Baumberger*, 7 Robt. 219; *Peck v. Elder*, 3 Sandf. 129; *Corning v. Lowerre*, 6 Johns. Ch. 429, 2 L. ed. 173; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 278; *Allen v. Monmouth Co. Board of Chosen Freeholders*, 13 N. J. Eq. 68, 74; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479; *Hamilton v. Whitridge*, 11 Md. 128; *Savannah A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Green v. Oakes*, 17 Ill. 249; *Ewell v. Greenwood*, 25 Iowa, 377.

Incidentally this topic has received extended treatment in several notes appended to cases reported in this series. See *Fulmer v. Williams* (Pa.) 1 L. R. A. 608; *Harold v. Jones* (Ala.) 3 L. R. A. 406; *Gaston v. Mace* (W. Va.) 5 L. R. A. 382; and *Swanson v. Mississippi & Rum River Boom Co.* (Minn.) 7 L. R. A. 673. F. & R.

Pl. 144, 145; 2 Story, Eq. Jur. §§ 101, 102, 924, 926; Gould, Waters, §§ 121, 218; High Inj. 760-763, 768, 769, 791, 794, 804, note 2, 812-815, 818; Angell, Highways, §§ 283, 284; Wood, Nuisances, 777-779; Daniell, Ch. Fr. 1635, 1636; Pom. Eq. Jur. § 1849, note 1; *Sampson v. Smith*, 8 Sim. 272; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Lane v. Newdigate*, 10 Ves. Jr. 198; *Corning v. Lowerre*, 6 Johns. Ch. 489, 2 L. ed. 178; *Pettibone v. Hamilton*, 40 Wis. 402; *Rosser v. Randolph*, 7 Port. (Ala.) 288; *Barnes v. Racine*, 4 Wis. 454; *Walker v. Shepardson*, 4 Wis. 486; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Knox v. New York*, 55 Barb. 404; *Smith v. Lockwood*, 13 Barb. 209; *Ewell v. Greenwood*, 26 Iowa, 377; *Hamilton v. Whitridge*, 11 Md. 128; *Soltau v. De Held*, 9 Eng. L. & Eq. 104; *Spencer v. London & B. R. Co.* 8 Sim. 193; *New York v. Baumberger*, 7 Robt. 219; *Hudson River R. Co. v. Loeb*, 7 Robt. 418; *Savannah A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Knox v. Chaloner*, 42 Me. 150.

The Supreme Court of New Hampshire has asserted its full equitable jurisdiction to restrain or abate nuisances in all cases where legal remedies are impracticable or inadequate.

Pom. Eq. § 308; *Coe v. Winnipiseogee Lake C. & W. Mfg. Co.* 37 N. H. 254; *Webber v. Gage*, 39 N. H. 182; *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426.

In such cases the right of trial by jury does not exist. *Bellows v. Bellows*, 58 N. H. 60.

The plaintiffs ask for an injunction against the defendants' maintaining a dam across the Connecticut River without providing suitable sluiceways for the reasonable passage of timber. Such an injunction would be mandatory in character, but has been repeatedly granted by courts of equity.

Pom. Eq. § 1359, note 2; *Robinson v. Byron*, 1 Bro. Ch. 588; High. Inj. 2d ed. §§ 792-804, note 2; *Rankin v. Huskisson*, 4 Sim. 13; *Spencer v. London & B. R. Co.* 8 Sim. 193; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Lane v. Newdigate*, 10 Ves. Jr. 198; Gould, Waters, §§ 552-555.

The construction of their charter claimed by the defendants would be contrary to the well-defined policy of New Hampshire, as expressed by repeated Acts of the Legislature. A construction abridging a public right will not be given to a legislative Act unless such intention is expressly and distinctly stated therein.

Hooksett v. Amoskeag Mfg. Co. 44 N. H. 106; *Treat v. Lord*, 42 Me. 552.

Mr. W. S. Ladd, with **Mr. Jeremiah Smith**, for defendants:

There was not at the time of the adoption of our Constitution, and is not now, any remedy by private suit in equity in a case like the present; the only remedy was, and is, by public proceeding on behalf of the State; in such public proceeding there was at the time of the adoption of the Constitution an unquestioned right of trial by jury; and the Legislature has 13 L. R. A.

not attempted to take away this right, and could not if it would.

The plaintiffs at the time of filing the bill could not have maintained an action at law.

Bowden v. Lewis, 18 R. I. 189, 43 Am. Rep. 21; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 593.

At the time of commencing this suit, the plaintiffs not only had suffered no damage, but apprehended no damages save the loss of a public right which they were privileged to enjoy only in common with the rest of the public.

Rose v. Groves, 5 Man. & G. 613.

Undoubtedly a riparian owner has, like every other citizen, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public.

Lyon v. Fishmongers Co. L. R. 1 App. Cas. 662.

These plaintiffs complain solely of injury to a public right, and the damage liable to be suffered by the plaintiffs differs only in degree, and not in kind, from that liable to be suffered by the rest of the community.

O'Brien v. Norwich & W. R. Co. 17 Conn. 372; *Seeley v. Bishop*, 19 Conn. 128; *Harvard College v. Stearns*, 15 Gray, 1; *Brayton v. Fall River*, 118 Mass. 218; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Houck v. Wachter*, 84 Md. 265, 6 Am. Rep. 332; *San José Ranch Co. v. Brooks*, 74 Cal. 463; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 593; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Dover v. Portsmouth Bridge*, 17 N. H. 200.

The weight of New Hampshire authority is decidedly against the maintenance of a bill in equity to restrain or abate an alleged nuisance, until after the right has first been established in a suit at law (where there would, of course, be a trial by jury upon all questions of fact).

See *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Perkins v. Foye*, 60 N. H. 496; *Parker v. Winnipiseogee Lake C. & W. Co.* 87 U. S. 2 Black, 545, 17 L. ed. 838. See also *Motley v. Downman*, 3 Myl. & C. 1; *White v. Cohen*, 1 Drew. 312; *Deohirat v. Wrigley*, Coop. Fr. Cas. 319.

Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had.

Parker v. Winnipiseogee Lake C. & W. Co. *supra*; *Irvine v. Dixon*, 50 U. S. 9 How. 28, 13 L. ed. 33; *Varney v. Pope*, 60 Me. 192.

At common law, when the alleged offense consisted simply in obstructing the public passage, and did not involve an invasion of the proprietary right of the crown, the case was not finally disposed of until after a jury trial.

Atty-Gen. v. Cleaver, 18 Ves. Jr. 211; 2 Story, Eq. § 928; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Atty-Gen. v. Richards*, 2 Anstr. 603.

The present case is not a case of purpresture, or invasion of the soil of the State. The bed of the Connecticut River at Lebanon and Norwich belongs to the riparian owners, and not to the State.

Gould, Waters, § 56, p. 118; *Kimball v. Schoff*, 40 N. H. 190.

It is clear that, before recent statutory changes in the law of procedure, this controversy could not have been constitutionally decided adversely to the defendants until after a jury trial. These enactments do not have the effect of depriving the defendants of the constitutional right of trial by jury which they previously had, such a result is beyond the power of the Legislature.

Powers v. Raymond, 137 Mass. 488. See also *Merchants Nat. Bank of Newburyport v. Moulton*, 3 New Eng. Rep. 784, 143 Mass. 545; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. 488.

The grant of the right to build a dam necessarily implies the right to cause some obstruction to the passage of logs; but the grant must be regarded as subject to the implied limitation that the dam shall be so built as to create no obstructions except such as are reasonably necessary to the beneficial maintenance and use of the dam for manufacturing purposes. In determining this question of reasonable necessity, a jury is to take into account not only the requirements and convenience of floatation, but also the requirements and convenience of manufacturing.

See *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Pearson v. Rolfe*, 76 Me. 886.

The jury, in passing on the question of the reasonable sufficiency of the sluiceway, are not to proceed upon the theory that the public right of floatation is superior to the public right of manufacturing. The reasonableness of the sluiceway is to be determined, not solely in view of the interest and convenience of the log-owner, but in view, also, of the interest and convenience of the manufacturer.

See *Rindge v. Sargent*, 4 New Eng. Rep. 523, 64 N. H. 294; *Foster v. Seareport S. & B. Co.*, 5 New Eng. Rep. 286, 79 Me. 508.

We may safely concede that the power conferred by the charter of the manufacturing company must be so exercised as not to injure the interests of others more than is reasonably necessary to accomplish the purpose for which the charter was granted. But this concession only shows that the harm likely to be caused by the dam was intended to be mitigated, so far as reasonably consistent with its erection and beneficial use, and not that the dam was to be so built as to present no material obstruction to navigation.

See *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525.

The Legislature may fairly be supposed to have taken into account the fact that the stream at the place in question, though in a certain sense navigable, is not capable of general or extended navigation.

Pearson v. Rolfe, 76 Me. 886.

The right of floating is not paramount to the use of water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with proper regard to the existence and preservation of the other.

Gould, Waters, § 110; *Middleton v. Flat River Boom Co.*, 27 Mich. 533; *Ensworth v. Com.*, 52 Pa. 320.

Defendants are not under legal obligation to provide a public way for the passage of logs over their dam, better than would be afforded by the natural condition of the river unobstructed by their dam. A mill-owner is under 13 L. R. A.¶

no legal obligation to furnish any public passage for logs over his dam at a time when the river at such place, in its natural condition, does not contain water enough to be floatable if unobstructed by mills, although the river is generally of a floatable character.

Pearson v. Rolfe, 76 Me. 880.

Blodgett, J., delivered the opinion of the court:

In the original bill the Lumber Company were sole plaintiffs. Their complaint is that they annually exercise the public right of floating logs down Connecticut River, and that the defendants have obstructed the way by a dam at Olcott Falls. The prayer is for a decree restraining the defendants from maintaining the dam without suitable sluiceways, for a provision in the decree determining the dimensions and character of the sluiceways, and for general relief. The defendants demurred on the ground that the alleged grievance is a public nuisance for the abatement of which a suit cannot be maintained by a private person. This objection has been avoided by an amendment joining the attorney-general as plaintiff, and the demurrer is overruled without considering the question whether the bill can be maintained by the Lumber Company. *Dover v. Portsmouth Bridge*, 17 N. H. 200, 215; *Griffin v. Sanborn-ton*, 44 N. H. 246; *Smith v. Putnam*, 62 N. H. 369, 373; *Milarky v. Foster*, 6 Or. 378, and notes in 25 Am. Rep. 533; *Pennsylvania v. Wheeling & B. Bridge*, 54 U. S. 13 How. 518, 561, 562, 564, 566, 567, 14 L. ed. 249, 267, 268, 269; *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382; *Steam-Boat Co. v. South Carolina R. Co.*, 80 S. C. 599; Gould, Waters, §§ 121-127, 547; Wood, Nuisances, §§ 645-701, 819.

If that question becomes material in the progress of the case, it will be examined when its decision is necessary. The mode of trial on a bill in equity for the abatement of a nuisance is not an open question. *State v. Saunders*, 66 N. H. —.

"The channel of a public navigable river is properly described as a public highway." *Colchester v. Brooke*, 7 Q. B. 339, 373.

"A stream may be a public highway for floatage when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use. . . . It is a public highway by nature, but one which is such only periodically, and while the natural condition permits a public use. . . . The public right is measured by the capacity of the stream for valuable public use in its natural condition." *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 343-345; *Guston v. Mace*, 33 W. Va. 14; *Koopman v. Blodgett*, 70 Mich. 610, 14 West. Rep. 909; *State v. Gilmanton*, 14 N. H. 467, 479; *Carter v. Thurston*, 58 N. H. 104; *Collins v. Howard*, 65 N. H. 190; Gould, Waters, §§ 54, 86, 107-113; Angell, Highways, §§ 53-73.

The Connecticut River is a natural highway for floating logs. *Thompson v. Androscooggin River Imp. Co.*, 54 N. H. 545, 548, 549; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286, 287.

At Olcott Falls the public has a right of passage for logs as free and convenient as would be afforded by the river in its natural condition, unless the highway has been wholly or par

tially discontinued by law. The riparian proprietors, incorporated or unincorporated, in the exercise of their private rights, may change the natural condition of the stream so far as changes are possible without an infringement of the public right. The riparian title, including a right of altering the channel and using the water, does not include a right of total or partial discontinuance of the changeable way of which the capacity of the stream in its natural condition is the measure. "Any person owning the land upon both sides of such a river can maintain a ferry or bridge or dam for his own use, provided he does it so as not to interfere with the public easement, without any authority from the Legislature, and even in defiance of a legislative prohibition. In such case he would not be making a proper use of his own property. . . . What rights did the Legislature give the plaintiff by its Act of incorporation? It made it a corporation, and gave it the corporate right to build its bridge. For that purpose only a corporation was not needed, nor was legislative sanction needed. But, being authorized by the Legislature to build the bridge, it could not be complained of for any necessary interference with the public easement which was under legislative control; for that which is authorized by law cannot be a public nuisance. . . . The Legislature did not empower it to interfere with the stream except so far as it was necessary for the building and maintenance of its bridge." *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 185, 186; *Groat v. Moak*, 94 N. Y. 115, 128; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171, 177; *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105, 110; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 160; *Com. v. Cushman*, 53, 99; *Angell, Highways*, §§ 287-241.

"The Statute gives a general authority to the sessions to lay out highways; but the Statute must have a reasonable construction. This authority, therefore, cannot be extended to the laying out of a highway over a navigable river, whether the water be fresh or salt, so that the river may be obstructed by a bridge. A navigable river is, of common right, a public highway; and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public." *Com. v. Coombs*, 2 Mass. 489, 492; *Arundel v. McCulloch*, 10 Mass. 70; *Com. v. Charlestown*, 1 Pick. 180.

In Connecticut, under a general power to lay out highways, a road may be laid across navigable water where a suitable bridge will not be a serious obstruction to navigation. *Groton v. Hurlburt*, 22 Conn. 178, 186-189; *Brown v. Preston*, 38 Conn. 219.

Such cases are consistent with the rule that authority to lay out a new highway does not warrant an unnecessary obstruction of an old one. A toll-gate of a turnpike, unnecessarily obstructing a free road, is a public nuisance. *Wales v. Stetson*, 2 Mass. 143. A franchise to build a railroad between certain points does not include a right to build it unnecessarily on or along a street. *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Comrs. on Inland Fisheries v. Holyoke Water P. Co.* 104 Mass. 446, 449.

The charter of the Franklin Falls Company authorizes it to establish and carry on various

manufactures "in the improvement of the water-power of the Winnipiseogee River." Laws 1868, chap. 2797. In *State v. Franklin Falls Co.*, 49 N. H. 240, it was held that the defendants could not lawfully maintain a dam that would prevent the passage of migratory fish from the sea to the lake. Its right to carry on manufacturing business "in the improvement of the water-power" included a right to maintain such a dam and make such a diversion of the water from the natural channel as would not infringe any public right of way. Sometimes the water was "not more than sufficient to carry the machinery," and the company's works could not be enlarged to such an extent that no water would ordinarily run over the dam. But the requirements of their business were not held to be material. They could build a stairway for the ascent of fish, as they could build a sluiceway for the descent of logs. The necessity of building a dam and diverting the water to their wheels was not deemed a necessity of discontinuing the public right of a fish-way. The right of riparian owners to improve and use the power of the river, with or without a charter, was undisputed; but it was not suggested by the defendants that their charter discontinued the right of way or authorized its discontinuance; and such a construction not being claimed, the legal ground on which it must be rejected is not stated in the decision whether a river is a highway for fish, or for logs, or for both, a grant of the advantages of a corporate organization to persons engaged in the improvement and use of the water-power for manufacturing purposes does not show that a total or partial discontinuance of the way was intended by the Legislature. *Com. v. Essex Co.* 13 Gray, 289, 243; *Commissioners on Inland Fisheries v. Holyoke Water P. Co.* 104 Mass. 446, 450. It merely shows that the franchise asked by the grantees and given by the State is a corporate capacity to exercise common-law rights of riparian owners. A grant to these defendants of a right to do as an incorporated body what they could do as unincorporated partners was necessary, because "corporations are artificial persons, created for specific purposes, and invested with such, and only such, powers as are conferred by law. While natural persons may do with themselves and their property whatever is not forbidden, artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being." *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 150, 2 L. R. A. 489; *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

An Act authorizing certain persons merely to form themselves into a corporation would be useless. Without an authority conferred by statute upon the Olcott Falls Company to do something, it could do nothing. *Pierce v. Emery*, 32 N. H. 484, 512. In addition to a mere Act of incorporation, a grant of power was indispensable to enable it, as a corporation, to engage in the improvement and manufacturing use of Olcott Falls. Without such a grant it would be restrained by injunction, at the suit of one of the members, from carrying on that business; and on quo warranto, brought by the State, its unanimous usurpation of corporate franchises would be sup-

pressed. It is a corporation for a manufacturing purpose, and can purchase and hold a limited amount of real estate, improve the water-power, make and maintain on and across the river at the falls all such works as are necessary and proper to accomplish the object of its incorporation, and carry on such kinds of manufacturing business as it choose. Laws 1848, chap. 674; Laws 1881, chap. 188.

In the grant of power, without which it could not lawfully acquire or lawfully exercise the private riparian rights that are subject to the public easement, there is no incidental relinquishment or diminution of the easement. The language of such a grant would be the same if the river were not a highway. Of itself alone, it has no tendency to prove that the subject of highway discontinuance was in the mind of the Legislature. If the question of discontinuance is presented to that body and decided in the affirmative, there will naturally be some clear and positive evidence of the decision in the Statute. It cannot be assumed that an exercise of the discontinuing power is concealed, either accidentally or designedly, under an ordinary grant of corporate capacities, expressed in terms equally appropriate whether the river is or is not a highway. The Acts from which the defendants derive their powers contain no express discontinuance of the Connecticut easement, and no express grant of power to discontinue it, either wholly or partially. Their incidental power of discontinuance cannot be implied from anything less than necessity; and the case shows no ground for the implication of a discontinuance, or a grant of discontinuing power. In the method of finding the fact of legislative intention by weighing competent evidence, and not by applying technical rules (*Boody v. Watson*, 64 N. H. 162, 189), there is no occasion to resort to the authorities that employ a strict rule to confine business corporations to the privileges plainly given them in their charter. Under that rule the defendants claim that the public right has been affected by their Acts of incorporation could not be sustained. *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 544-548, 9 L. ed. 773, 822-824; *Jersey City Water Comrs. v. Hudson*, 18 N. J. Eq. 420, 425; *Selman v. Wolfe*, 27 Tex. 68; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 169, 5 L. R. A. 546; *Sedgw. Stat. & Const. L.* 291-296.

Under authority given by statute, an owner of a lot situated on the margin of the tide-water of East River extended the dry land into the water. Before the extension a street had been laid out over the lot to the river. It was held that the filling of the river by the land-owner "carried with it a necessary and legal extension of the street over the new made land" to the edge of the water. The ground of decision was that the Legislature intended to confer a privilege on the owner of the land, but not to destroy the right of the public to reach the river through the street; that the Act should not "be so construed as to work a public mischief unless required by words of the most explicit and unequivocal import;" that the language of the Act did not necessarily or naturally import that the right of passage from the street to the river should be destroyed by fill-

ing up the river; that "in an Act designed chiefly, if not exclusively, to subserve individual interests, the words used must leave no doubt that the Legislature intended to annihilate or abridge an important public right, before a court should put such a construction upon it as would have that effect;" and that public rights are not to be destroyed by equivocal words or provisions. *People v. Lambier*, 5 Denio, 9, 15-17. Whether the extension of the street was rightly or wrongly implied, it illustrates the tendency of the authorities to employ the doctrine of necessary implication in the maintenance, rather than in the abridgment, of public rights. As the Statutes do not show a legislative assent to a total or partial discontinuance of the Connecticut highway, an assent implied from necessity, if it can be shown from extraneous evidence in some cases, must, to say the least, be satisfactorily proved; and, as the facts of a case of necessity are not alleged in pleading, there is no issue on which such evidence is admissible.

In the answer the defendants say that the "falls, when the river ran in its natural course there, were impassable in low stages of the water by logs; that the defendants' works, by ponding back the water, entirely cover and flow out a bad and rocky fall above, where otherwise logs would lodge upon and among the rocks, forming great jams, requiring great labor and expense to break, all which is saved to them in the way described;" that the defendants did, "at very large expense, construct in said dam, in the best place for the passage of logs, a sluiceway of ample and convenient size and construction, being eighteen feet wide and four inches deep at the top of the dam, and fitted the same with an apron of plank thoroughly covered with iron plates, so designed and located as to conduct logs safely into the deep-water channel below; and in the iron facing on the top of their dam, throughout its entire length, made holes for the insertion of iron pins to hold flashboards of any width desired, and at each side of said sluiceway, at the top of the dam, they inserted ring bolts for the attachment of booms to guide logs into said sluiceway; and so it is, by means of the appliances thus provided in the construction of their dam and sluiceway, all the water flowing in the river may at any time, with trifling labor and expense, be turned and compelled to pass through the sluiceway, whereby logs will be easily and conveniently floated over the dam and falls, and passed into the deep water below;" and "that the works of the defendants, in their present condition, greatly facilitate, rather than impede, the passage of logs over said falls, and diminish, rather than increase, the expense thereof." By these averments the defendants deny the necessity of constructing the dam in such a manner as to abridge the public right of log floatation. On this disclaimer it is assumed that the dam with a sluice (including an apron) of proper form, size, and location, and other suitable appliances for turning logs and the whole river through the sluice, would not injure, but would improve, the way for the use made of it by the Lumber Company in June of each year; and, as the benefit that might be derived from a manufacturing diversion and use of the water

is no more a necessity of highway discontinuance in this case than it was in *State v. Franklin Falls Co.*, there seems to be no occasion for serious controversy.

If the consent of the State that "highways may be laid out across any stream or body of water" (Gen. Laws, chap. 87, § 10) had been unqualified, it might have been claimed that it included authority to impair the right of navigation. For that reason, the Legislature added the prohibition: "But no road or bridge shall be so laid out if the reasonable and proper construction thereof may prevent the use of such waters for navigation for boats or rafts, or for running timber." The charters of the Concord, the Northern, and the Boston, Concord & Montreal Railroads, authorizing the erection of bridges across certain rivers, contain a proviso that the bridges shall be so constructed as not unnecessarily to impede navigation. Act of June 27, 1835, § 15; Laws 1844, chap. 190, § 2, 191, § 2. Such provisos may be useful for the purpose of avoiding the question of interpretation. They would be serious defects if they introduced the erroneous construction that, without them, unnecessary obstruction of highways would be authorized by the general law, and by ordinary acts of incorporation.

The Act of 1807, incorporating the White River Falls Company, contains a proviso that nothing in that Act shall authorize the company "to erect any dam . . . so as to prevent the free passage of lumber down Connecticut River as heretofore used and enjoyed." It is alleged in the bill that the defendants derive their powers from that Act, and from the Acts of 1848 and 1881. In their answer the defendants say they constructed their works in the exercise of the powers granted by the Acts of 1848 and 1881, but they do not deny or explain the fact, well alleged in the bill, that they derive their corporate powers from the Act of 1807, as well as the Acts of 1848 and 1881. "All facts well alleged in the bill, and not denied or explained in the answer, will be held to be admitted." Chancery Rule 8, 56 N. H. 605.

There was a special reason for reserving the right of free passage in the Act of 1807. That Act incorporated a canal company, and gave them power to improve the navigation at the falls by a locked canal, and to take toll for the use of the artificial way. But, for the benefit of all who should prefer a free passage in the old way to the use of a canal on payment of toll, the right of free passage in the old way is reserved. It is recited in the preamble that the "erecting locks and cutting canals on White River Falls" (now called "Olcott Falls") "and Connecticut River, so that the same shall be navigable for boats for the transportation of lumber, goods, wares, and merchandise, would be of great public utility," and that "Mills Olcott, of Hanover, has petitioned the general court for the exclusive privilege of locking the same." Thereupon it is "enacted that the said Mills Olcott and his associates, their heirs and assigns forever, be invested with the exclusive privilege of cutting canals and locking said falls, and rendering said Connecticut River navigable for boats and lumber, from the head of said falls at the upper

bar, so called, to the foot of the falls, at the lower bar of the same, commonly called 'Phelps Bar.'" It was apparently feared that under their exclusive powers the canal company would claim a right to levy toll upon all lumber passing down the river at that point, and to make such alterations in the channel as would compel lumbermen to resort to the canal for the use of which the company is entitled to a toll. The avoidance of all controversy on this subject is the apparent purpose of the reservation of the public right to a free passage of lumber in the old way. From the abundant caution exercised in the insertion of a proviso to prevent all possible contention between the canal company and the lumberman on the question of highway discontinuance, it does not follow that the old highway for logs would have been discontinued if it had not been expressly reserved. However that may be, the reservation in the charter of the canal company has no tendency to show that the subsequent grants of corporate power for manufacturing purposes are a total or practical discontinuance of the old way. Under those grants, which did not authorize the grantees to exact toll, there was no reason to anticipate a claim of toll, and therefore no occasion for such a reservation of the right of free passage as was made in the grant of canal powers. The Act of 1848, chap. 674, § 3, contains the proviso "that this grant shall not be held or construed to impair any rights, powers, and privileges heretofore granted by the Legislature of this State within the limits aforesaid." The same section shows that the limits are the "falls, from the head thereof at the upper bar to the foot of the same at the Phelps bar, so called." The fourth section of the Act is: "Said corporation is hereby authorized and empowered to purchase, hold, and enjoy all the corporate and other rights, powers, and privileges heretofore granted and now enjoyed within the limits of this grant, subject to all the duties and liabilities now legally binding in said corporate rights, powers, and privileges." Upon the proviso, saving the powers granted by the charter of 1807; the grant of authority to the defendants to purchase, hold, and enjoy those powers, subject to all the duties and liabilities by which they continued to be restricted in 1848; and the admission of the defendants, in pleading, that their powers are derived from the Act of 1807 as well as the Acts of 1848 and 1881,—the conclusion seems to be inevitable that the defendants are holders of corporate powers granted by the charter of 1807, and that this power is subject to the reservation of the public right of free passage of lumber down the river as usually enjoyed before 1807. In the absence of evidence, there was no presumption of law or fact that the natural highway was altered before 1807; and until evidence of a change is introduced the continuance of the natural state of things may be inferred.

The defendants contend that the phrase, "subject to all the duties and liabilities now legally binding on said corporate rights, powers, and privileges," does not include the inability to "erect any dam . . . so as to prevent the free passage of lumber down Connecticut River as heretofore used and enjoyed."

They argue that "all the duties and liabilities" thus retained and perpetuated are obligations of an affirmative nature,—to permit logs to pass through the canal on payment of toll, to pay debts, and the like,—are not restrictions of authority. But it would be a violent construction to draw a line between the affirmative and the negative duties and liabilities of the canal company, and hold that by "all the duties and liabilities now legally binding on said corporate rights, powers, and privileges" only those of an affirmative nature were designated. It is not probable that the Legislature employed that inferential distinction as an implied release of the canal company's grantee from one of that company's incapacities, and an implied grant of power to discontinue the highway. Whatever else the proviso in the Act of 1848 may mean, it must be held to express the legislative will that the defendants, if they bought the powers of the canal company, would hold them subject to the proviso of 1807, and that, as a canal company, they should erect no dam so as "to prevent the free passage of lumber down the Connecticut River as . . . used and enjoyed" before the grant of the canal company's charter. The words "subject to all the duties and liabilities now legally binding on said corporate rights, powers, and privileges" do not specially refer to that company's duty of allowing a free passage of lumber, but evince a general resolve to annul none of the limitations of their powers; and among those limitations is the public right of free passage of lumber down the river. By purchasing the old company's franchises, the new company acquired no authority to erect a dam that would infringe that right. This lack of authority is among the incapacities unnecessarily re-enacted by the fourth section of the charter of 1848. The defendants could not obtain, by purchase from the canal company, a power of highway discontinuance that had not been granted to that company. As a canal company, the defendants can build a dam that will turn the whole stream into a canal for the use of which they are entitled to toll; but, if a lumberman chooses a free logway which they choose not to give him in the canal, he is entitled to one over, through, or around the dam, as good as he would have in the old undammed channel at the time he is ready to use it. As a manufacturing company, the defendants can also turn the river to their wheels through a flume. How much of it shall run through the canal for a transportation purpose, how much through the flume for a manufacturing purpose, and how much over the dam, is for them to decide, with this qualification: their control is subject to any public right of way that the Legislature have not relinquished.

On the question whether any such right has been released by grants of manufacturing powers, the intention of the Legislature can be seen in a supposed case in which the defendants use a canal as a canal company, and a flume as a manufacturing company. At the lower end of the flume they have a saw-mill in which one man is employed. In June a lumberman arrives at the falls with a drive. There is water enough to carry his logs over the falls in the natural channel if there was no dam there. All

the water, turned into the canal, would afford a more convenient passage. All the water, turned into the flume, would work the saw-mill. The whole of it is necessary for either of the three purposes to which it may be applied. The flume gate is open, and the mill in operation. There is no water in the canal, and none running over the dam. The lumberman demands a passage through the canal, and tenders the toll. His demand must be complied with. The canal, like a turnpike or a railroad, is a highway. As a canal company, the defendants have not been relieved from the highway duties and liabilities of their predecessors. The canal gate must be opened, and the flume gate must be shut, although for a time the mill will be stopped, and its operator thrown out of employment. As soon as the defendants have performed this canal duty, another lumberman arrives, and demands a passage for his logs without payment of toll. Whether the defendants furnish it in the canal, or through a sluice over the dam, the flume gate remains shut, and the mill and its operator remain idle, while the highway demand of the second lumberman is complied with. Whether the number of his logs is ten or ten million; whether their passage stops their mill an hour or a month; and whether the number of mill operators is one or one thousand,—the lumberman is entitled to a free way as good as he would have if no dam had been built, and no water had been diverted from the ancient channel. There is nothing in the Statute to indicate an intention that the public right shall be restricted to the passage of a fixed number or a reasonable number of logs, or shall depend upon the extent of the defendants' manufacturing industry and the number of persons engaged therein. If the Legislature had meant the public right might be indefinitely impaired, as it would be if a judicial tribunal were authorized to decide each case upon the comparative importance of the logging business of the lumbermen and the manufacturing business of the defendants, it is not probable that they would have been silent on that subject. The reduction of the highway from one measured by the power of the undiverted stream to carry logs over the unobstructed falls to one measured in each particular case, or in this case, by an appraisal of the logging and manufacturing interests, is a piece of legislation that cannot be inferred from the fact that the statutes contain no allusion to so extraordinary an alteration.

On the question whether a wharf in the port of Newcastle is a nuisance, evidence is not admissible to show that the public inconvenience caused by its obstruction of the Tyne is balanced by the public benefit derived from the delivery of coal in the London market in a better condition and at a reduced price in consequence of the shipping facilities afforded by the wharf. The contrary doctrine maintained by a majority of the court in *King v. Russell*, 6 Barn. & C. 566, 569, 570, 590, 591, 593, 594, 597, 598, and by a minority in *Pennycuik v. Wheeling & B. Bridge*, 54 U. S. 13 How. 518, 591, 605, 14 L. ed. 249-280, 286, has not prevailed. The true view was presented by counsel in *Rex v. Ward*, 4 Ad. & El. 384, 394: "Nor is the principle a just one that a nuisance in

one place may be compensated by any degree of benefit conferred in another; as if a gasometer created a nuisance in Southwark, and it was answered that the gas-lights connected with it were beneficial to a street in London. No comparison can be instituted between accommodation to one set of persons and loss of rights to another." The necessity of slaughter-houses in this country does not legalize the diffusion of an intolerable stench from a structure of that kind in the center of Manchester. The violation of a public right enjoyed by a portion of the community is not justified by offsetting an advantage accruing to others. The State's abandonment of the whole or a part of the Connecticut easement, in consideration of the receipt of a public benefit of equal or greater value, is an exchange which the riparian owners cannot make without the State's consent. *Rez v. Ward*, 4 Ad. & El. 384; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62, 88; *Atty-Gen. v. Terry*, 20 L. T. N. S. 716, on appeal, L. R. 9 Ch. App. 423, 432; *Pennsylvania v. Wheeling & B. Bridge*, 54 U. S. 13 How. 518, 577, 14 L. ed. 249, 274; Gould, Waters, § 94; Angell, Tide-Waters, 203-228; Angell, Highways, §§ 233, 235.

A bridge across a navigable river may be a more important highway than the river, and "it is for the municipal power . . . to decide which shall be preferred, and how far either shall be made subservient to the other." *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 718, 729, 18 L. ed. 96, 99; *Re Clinton Bridge*, 77 U. S. 10 Wall. 454, 19 L. ed. 969; *Miller v. New York*, 109 U. S. 385, 394-398, 27 L. ed. 971, 974-976.

"The Legislature alone could determine the question of comparative public convenience, and either refuse to lay out a highway which would impede navigation, or grant it upon terms, conditions, and reservations, as the public interests might in their judgment require for the protection of the navigation." *Charlestown v. Middlesex County Comrs.* 3 Met. 202, 206; *Com. v. Essex Co.* 13 Gray, 239, 247; *Com. v. Charlestown*, 1 Pick. 180, 185, 187.

By an exercise of legislative power, authority can be given to wholly or partly discontinue a public way on land or water. The Connecticut easement is public property that can be abandoned by due action of the government. But no power has been conferred on the defendants or the court to exchange any part of it for public benefits derivable from the defendants' manufacturing enterprise.

The forests formerly owned by the State were held by the body politic in trust, in a certain sense, for the common benefit of the people. When the State sold them, the proceeds, like money raised by taxation, went into the vendor's treasury for public, not for private, use. When the title was in the State, it was not held for the several benefit of everybody who desired the timber for the construction of houses or ships. The public right of navigation in navigable water, salt or fresh, is held by the State in a different trust. It is a right that all may exercise for private profit. The State, as trustee, holds the legal title. The State, and the people, as individuals, have the use. The object of the trust is evidence tending to show that the common right of naviga-

tion is not unnecessarily extinguished by a mere conveyance of land, or a mere creation of an imaginary being called a corporation. "The dominion and property in navigable waters" is "held by the king as a public trust." "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soil under them, for their own common use." *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 401, 410, 10 L. ed. 997. "By the principles of the common law, the title to navigable waters and the soil beneath is vested in the crown in trust for the public. . . . And by the charters under which these colonies were planted there was vested in the grantees not only the crown's title to the lands granted, but its rights and jurisdiction in and over the navigable waters and seashores, to be held, as by the crown, in trust for the public." *Clement v. Burns*, 43 N. H. 609, 616, 619. "By the common law, the king was held to be the owner and proprietor of the soil under the sea, its shores, and all tide-waters, and as such could grant the right of property therein to a subject, though this was not usually done without the previous execution and return of a writ *ad quod damnum*, to ascertain whether such grant would cause any injury to any public right. But it was further held at common law that, beyond a right of property, the king's prerogative extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights in the navigation and fisheries; that these were among the regalia or incidents of sovereignty, which could not be alienated by royal grant alone. . . . Supposing, then, that the Commonwealth does hold all the power which exists anywhere to regulate and dispose of the seashores and tide-waters, and all lands under them, and all public rights connected with them, . . . it must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient. . . . Two distinct rights are regarded, viz.: (1) The *jus privatum*, or right of property in the soil, which the king may grant, and which may be held by a subject, and the grant of which will confer on the grantee such privileges and benefits as can be enjoyed therein subject to the *jus publicum*. (2) The *jus publicum*, the royal prerogative, by which the king holds such shores and navigable rivers for the common use and benefit. This royal right, or *jus publicum*, is held by the crown in trust for such common use and benefit, and cannot be transferred to a subject, or alienated, limited, or restrained, by mere royal grant, without an Act of Parliament. The king's grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance, as the case may be." *Com. v. Alger*, 7 Cush. 53, 82, 83, 90. "The king takes this right of soil in trust for the public, so far as fishing is concerned; and, although the king may grant away this right of soil to another, yet his grantee will take it subject to

the same trust; and by such grant, however comprehensive in its terms, the public . . . cannot be deprived of their common rights." *Weston v. Sampson*, 8 Cush. 347, 352; *Dunham v. Lamphere*, 3 Gray, 268, 271; *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 151; *Free Fishers & D. v. Gann*, 11 C. B. N. S. 387, 417; *Angell, Tide-Waters*, 2d ed. 22-25, 27, 64; *Gould, Waters*, §§ 17, 18, 20, 21.

"The right of soil . . . must in all cases be considered as subject to the public right of passage, . . . and any grantee of the crown must of course take subject to such right." *Colchester v. Brooke*, 7 Q. B. 389, 374.

A legal reason for the king's inability to surrender navigation is the establishment of the trust by usage and universal understanding for the maintenance of the common right. For the same reason, the right is not destroyed by the State's conveyance of the basin or bed in which the navigable waters rest, or through which they flow. No federal question being raised, this case is to be determined by the local law which regards the people and the State as holding the beneficial interest in an easement, the legal title of which is vested in the State as trustee. Acting as a body politic and trustee, the beneficiaries, by their legislative agents, can authorize an extinguishment of the trust and an abandonment of the trust estate. *Wales v. Stetson*, 2 Mass. 143, 146; *Com. v. Charlestown*, 1 Pick. 180, 185. But there is a natural presumption that, if the Legislature intend to do this, their purpose will be distinctly expressed, as in the provisions for the discontinuance of highways, and the assessment of damages therefor. Gen. Laws, chap. 71. "An intention to discontinue such a highway [as the Androscoggin] cannot be inferred from a public grant of the land under and around it,—a mere alienation of the ownership of the soil by an ordinary form of conveyance. A sale by the State of all its ungranted land could not be construed as a relinquishment and abolition of the public rights of navigation in Piscataqua River or Lake Winnipiseogee." *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 548. Such a sale was authorized by chapter 42, Laws 1867. When the soil under the Connecticut at Olcott Falls passed from the king or the State to the first grantees (under whom the defendants claim), it did not cease to be subject to the easement. An express reservation of the public trust and common use was unnecessary. And the nature of the trust which would have made that reservation superfluous in a state grant of the land to the defendants had the same effect in grants of corporate capacities deemed appropriate for other purposes than the total or partial discontinuance of the highway. Like the riparian rights comprised in the land title, the franchise of their artificial body to exercise those rights is subject to the easement held in trust for common use.

The express refusal of the Legislature to allow the defendants, as a canal company, to extinguish the old free way, if they furnished a new and better one, through a canal subject to tolls, has no tendency to show that the Legislature intended, for the sake of the most insignificant mill, to authorize them to stop the

old way without providing a new one. If they can stop the passage of logs a single day in the dry season because they need all the water on that day for an up and down saw, they can discontinue the old way entirely by building and operating mills large enough to require all the water every day. They do not claim a power of total and absolute discontinuance; and in the statutes on which they rely there is no mention of any discontinuance, total or partial, permanent or temporary, to be accomplished by a manufacturing diversion of the water. There is no expression of a legislative intent to introduce such an uncertainty and such a prolific source of litigation as a corporate power of discontinuing the highway to some extent by turning a reasonable amount of the water from the natural channel for manufacturing purposes. The Acts of 1848 and 1881 enable the defendants to act as a corporate body in the exercise of riparian rights that existed before those Acts were passed, and do not curtail the measure of the public right of floatation which the common law finds in the natural capacity of the stream. If a temporary interruption is unavoidable in the erection or repair of a dam, the right of incorporated or unincorporated riparian owners to bar the way for that purpose without such a license from the State as is given by municipal governments for the occupation of streets during the erection or repair of buildings is a question that need not now be considered. The general rights of the riparian owners and the public may be subject to various qualifications. So far as this suit is concerned, the public right of way is not impaired by the Acts of 1807, 1848, and 1881. It is a right to a way of which the floating capacities of the undiverted river, in its natural channel, is the measure. The defendants' right is to use the river and its bed without an invasion of the public easement. Both rights are established by law. Neither of them can be altered by the trial and determination of any issue of fact. The only question of fact is as to the manner in which the public and the defendants can enjoy their several titles, and exercise their indisputable rights. The prayer of the bill is for a necessary regulation of the common use of the river for commercial and manufacturing purposes by a specific decree that cannot be rendered in a suit at law.

When the defendants were preparing to build the dam, the question necessarily arose by what sluice and what appliances they could avoid an infringement of the public right, and this question they were not compelled to decide at their peril. On their amicable bill, in which the attorney-general, as the representative of the State, would be defendant (*Samson v. Smith*, 3 Sim. 272; *Tinker v. Lord*, 64 N. H. 279, 283), and of which notice would be given to persons specially interested, the defendants could have obtained a provisional decree of regulation operating like a partition, marking the boundary line between the public and the private right, and enabling them to construct their works in a manner authorized by law. The proceeding would have been in the nature of an *ad quod damnum*. *King v. Montague*, 4 Barn. & C. 598; *King v. Russell*, 6 Barn. & C. 566, 588, 600; *Nichols v. Boston*, 98 Mass. 39, 41; *Gould, Waters*, §§ 21, 43. The decree,

virtually laying out a logway over the projected dam would have afforded adequate protection against suits at law for damages, and efforts to abate an alleged nuisance by chancery suits, criminal prosecutions, and force without legal process. If it were found by experiment after the completion of the dam that either or both of the water-rights required an alteration, justice would be done on application of either party. An unalterable adjudication would not be made in a matter in which changes might be rendered necessary by results and circumstances that could not be foreseen and provided for. Either party might be plaintiff, and either party might be defendant. And, if this bill is necessary for a regulation of the manner of exercising the common rights by constituting and using a sluice and other appliances, it is not barred by the defendants' erection of a dam. "Courts of equity have jurisdiction of that class of cases where there is an admitted common right among several owners of the same privilege to regulate the common use, to determine the extent of their respective rights, and the proper mode of exercising and enjoying them, as tending to prevent litigation, and as affording a more complete and perfect remedy than could be obtained at law, and as furnishing, in fact, the only adequate means of ascertaining and determining the respective rights of the parties." *Burnham v. Kempton*, 44 N. H. 78, 100; *Ranlet v. Cook*, 44 N. H. 512-515; *Bean v. Coleman*, 44 N. H. 589, 542; *Larson v. Menasha Wooden-Ware Co.* 59 Wis. 398; Gould, Waters, § 540, and cases there cited. The ground of equity jurisdiction in many other cases is the want of an adequate process at law for finding lost boundaries (Story, Eq. Jur. chap. 11), and locating private ways. In *Gardner v. Webster*, 64 N. H. 520, 6 New Eng. Rep. 894, the defendant had conveyed land, reserving a right of way across to "the point so-called." In the opinion, the court says: "The locations and limits of the reserved ways are not specified. . . . The defendant is entitled to a reasonable, convenient, and suitable way, across the land conveyed, to the point. . . . The defendant's right of way through the plaintiff's pasture does not authorize him to pass over all parts of the pasture at his pleasure. Its route through that lot is determined, not by the sole interest of either of the parties, but by the reasonable convenience of both. If its location were contested, the controversy might not be settled by the negative result of many actions at law. Both parties, or either of them, might need a decree in equity that would fix the route affirmatively and specifically."

In the present case, on the question of proper form, dimensions, and place of a sluice, the jurisdiction of equity is as plain as a partition of water-power between mill-owners, the ascertainment of lost boundaries, or the laying out of a private way. At the trial term, the court can cause the logway to be located and defined by a jury, and put upon them the duty of drawing a report containing a specification for the construction of a dam and sluice. But it has not been shown that the law of any county requires such work to be done by twelve unanimous persons. If a judicial location of a logway over a dam is necessary, the convenience

of the defendants will be consulted so far as it reasonably may be without a violation of the public right to a way as good as the stream would furnish in its natural condition, and the location will be alterable, at any future time, on application of either party. No location will be made unless a necessity for it is shown. It would seem that this question of necessity will be best tried and decided upon the experiments annually made at the falls. How long the bill should be retained for a satisfactory settlement of this point is a matter to be considered at the trial term. As either party can obtain equitable relief in vacation without this suit, it is possible that the case will be properly disposed of at the next trial term, or after another annual experiment, by dismissing the bill without costs and without prejudice except so far as equity may require a decree for the adjustment of expenses that have been incurred by either party under interlocutory orders.

If a logway is laid out in this suit, the public will have a right to a reasonable use of it. A controversy as to what would be a reasonable use of it, or of the stream in its natural condition, will not be a dispute about the public right in any sense that will require the right to be settled by the trial of a question of fact before the bill can be maintained for the laying out. As a fee-simple in land is, for many purposes, nothing more than a right of exclusive possession and reasonable use (*Bassett v. Salisbury Mfg. Co.* 48 N. H. 569, 577; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 551, 552, 555; *Com. v. Alger*, 7 Cush. 53, 84, 87); so an ordinary public or private right of way is a right of using land or water or both as a way, reasonably and with due care (*Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *George v. Fisk*, 32 N. H. 32; *Graves v. Shattuck*, 35 N. H. 257; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 555, 58 N. H. 108; *Hall v. Brown*, 54 N. H. 493, 495; *Carter v. Thurston*, 58 N. H. 104, 107; *Varney v. Manchester*, 58 N. H. 430; *Collins v. Howard*, 65 N. H. 190; Gould, Waters, §§ 95, 96, 110). The entire natural capacity of the river for floatation is public property. The lumbermen, as travelers on the highway, are entitled to a reasonable and careful use of the estate. Reasonableness of use and care, attached as a limitation to the ownership and enjoyment of corporeal and incorporeal property, does not permit the lumberman to injure the defendants' works by negligence or an unreasonable use of the entire natural floating power of the river, nor allow the defendants to deprive the lumbermen of the reasonable use of any part of the power. Both parties are bounded by the line established between the incorporeal rights of the public and the other rights of which the defendants' title is composed. There is no question of right or title, in the sense in which these words are used, when it is said that the legal right must be established at law before it is specially enforced in equity. If it is necessary to lay out the undeniable public way over the dam, one question may be how narrow the sluice should be, at different times, to secure a sufficient depth of water. The defendants are apparently as much interested as the lumber company in an economical solution

of such questions. In cases like this and *Gardner v. Webster*, the owner of the servient tenement may sometimes be more relieved than the other party by a laying out of the easement. An equitable power employed in the measurement, location, and adjustment of legal rights before an attempt is made to exercise them is often more useful than any remedial

course that can be taken after controversy has arisen on this alleged violation. In this case, the rights of all parties being known, a regulating process may not be needed.

Case discharged.

Carpenter, J., did not sit. The others concurred.

GEORGIA SUPREME COURT.

Mattie E. GRESHAM, *Plff. in Err.*,

v.

EQUITABLE LIFE & ACCIDENT INSURANCE CO.

(.....Ga.....)

***If both parties engage willingly in a personal encounter**, it is a mutual combat or fight, and death resulting therefrom is not included in a policy of accident insurance which

*Head note by BLECKLEY, Ch. J.

excepts from the risk death or injury which may have been caused by fighting. It makes no difference, in such case, whether the slayer was sane or insane.

(July 13, 1891.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts sufficiently appear in the opinion.

NOTE.—*Death resulting from a violation of law avoids an insurance policy.*

A difficult question arises in determining what is the test of death in the violation of law. Obviously the circumstances of any given case are so different in detail from those of any other case that it is impracticable to lay down other than a general rule; and perhaps no better rule can be stated than that the act in violation of law, and the act causing death, must be part of "the same continuous transaction." And it is not clear that an essentially different rule need be applied where the exception is expressed as "in consequence of the violation of law;" though an exception in the last-mentioned form would clearly admit of greater remoteness in time and distance. *Cooke, Life Ins. § 48.*

The breach of law must not only be proximate as a cause of the death, it must be adequate also. If it be inadequate to produce the result, it is not the cause. 3 Kent, Com. 802; Arn. Ins. 784; *Williams v. Suffolk Ins. Co.* 3 Sumn. 276; *New York L. Ins. Co. v. Graham*, 2 Duv. 506; *Livie v. Janson*, 12 East, 648; *Ionides v. Universal M. Ins. Co.* 14 C. B. N. S. 259.

A known violation of a positive law avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a "violation of law," whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequences of the act does not increase the risk. The cases all agree that the wrongful act must have been the proximate cause of the death. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred. Whether the "violation of law" was the proximate cause of death and whether it was an act increasing the risk, must be determined from the facts. There must be some causative connection between the act which constitutes the "violation of law" and the death of the assured. So where the assured robbed the state treasurer and while leaving the building was killed by a policeman, the court held that the words meant death in the actual violation of law, and that as the act had been completed, and the death occurred afterwards, there was no forfeiture. *Griffin v. Western Mut. Ben. Asso.* 20 Neb. 620; *Bacon, Ben. Soc. & L. Ins. § 339*; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 3 Lans. 341; *Murray v. New York L. Ins. Co.* 98 N. Y. 614; *Traveler's Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 531, 22 L. ed. 155.

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The provision excluding liability for injury received while committing an unlawful act refers to such injuries as may happen as the natural consequence of the act,—as its probable and to be anticipated consequences; and the reference to injury received "in consequence of any unlawful act" is to those injuries which flow naturally from the act committed, as its effect or resulting consequence. Attempts to murder, in which lawful resistance may occasion death; attempts to injure or rob the wife or child or parent of another, in which injury might be expected from defense of that other; engaging in a horse-race where horse-racing is unlawful, and where the injury results during the race, or in the efforts to stop one of the horses in its progress; and the like,—are acts illustrating what is meant by "injuries received while insured was engaged in or in consequence of an unlawful act." The law is properly and well settled that such provision does not extend to exempt the insurer from liability because of the infraction by the insured of the law when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy, not recognized or adopted as law. It has been held, too, that the unlawful act committed must be criminal, and not a mere violation of a civil right or infraction of a law not criminal. *Adams v. Cowles*, 14 West. Rep. 779, 95 Mo. 506; *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422.

The contrary has been held, so far as it relates to the violation of a positive rule of civil law which proximately leads to the injury, when it is such an act as increased the risk and naturally led to the death. *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478; *Accident Ins. Co. of N. A. v. Bennett*, (Tenn.) June 6, 1891.

A policy of insurance is to be construed most liberally in favor of the assured. *Palmer v. Warren Ins. Co.* 1 Story, 360; *Yeaston v. Fry*, 9 U. S. 5 Cranch, 335, 3 L. ed. 117; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422.

And an exception in a policy is to be taken strongest against the assurer. 1 Duer, Ins. 161; *Huidekoper v. Douglass*, 7 U. S. 3 Cranch, 1, 2 L. ed. 347; *Breasted v. Farmers L. & T. Co.* 8 N. Y. 305; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405. See note to *Blackstone v. Standard L. & A. Ins. Co.* (Mich.) 3 L. R. A. 493.

F. S. R.

Messrs. J. D. Cunningham, J. A. Austin and Broyles & Sons for plaintiff in error.
Messrs. Candler & Thomson for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

The policy covered bodily injuries inflicted by external, violent, and accidental means. It excepted, however, various classes of accidental injuries which might be embraced in these general terms,—among them, those caused by dueling, fighting, wrestling, etc., and those happening in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or while engaged in, or in consequence of, any unlawful act, and all injuries, the result of design, either on the part of the claimant or any other person. It may be conceded that the homicide was accidental, within the meaning of the policy, as such policies have generally been construed by the courts. *Ripley v. Railway Pass. Assur. Co.* 2 Bigelow, Ins. Cas. 788; *Hutchcraft v. Traveler's Ins. Co.* 87 Ky. 300; *Phelan v. Traveler's Ins. Co.* 38 Mo. App. 640; *Richards v. Traveler's Ins. Co.* 89 Cal. 170; *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 133, 1 West. Rep. 861; notes to *Paul v. Traveler's Ins. Co.* (N. Y.) 8 Am. St. Rep. 765; *Bliss*, Ins. §§ 396, 397; 5 Lawson, Rights, Rem. & Pr. § 2140 et seq.; 1 Am. & Eng. Encyclop. Law, 87 et seq.; 7 Am. Law Rev. 585; same article, 8 Alb. L. J. 85.

It may be conceded also that, though the killing was manifestly willful on the part of the slayer, it was open to question whether it was the result of design,—that is, of rational design,—inasmuch as there was some evidence tending to show that the slayer might have been insane. It may likewise be conceded that, had the case turned alone on the question whether at the time the insured was shot he was engaged in an unlawful act, there was some evidence for consideration by the jury. The evidence as a whole might warrant a negative finding on this point, according to some of the authorities, though not so, perhaps, according to the spirit of others. *Cluff v. Mutual Ben. L. Ins. Co.* 18 Allen, 308; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422; *Harper v. Phoenix Ins. Co.* 19 Mo. 506; *Traveler's Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 532, 22 L. ed. 155; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478.

But, if the view we entertain of the law is correct, the matter on which after close study there could be no two opinions, no reasonable doubt in impartial and intelligent minds, is that the injury which resulted in death was caused by fighting. Shooting caused the injury, and fighting caused the shooting. The cause of the cause was the real cause of the event. Fighting may cause death by causing a contemporaneous act which causes death. In such case, the first causal agency is not too remote, though the event be related to it only in the second degree of lineal descent. It is not every fight, however, in or from which a mortal injury might be received by the insured, which could be regarded as the cause of the injury or of death resulting therefrom. A faultless and unwilling conflict by the insured

—one which he neither provoked nor invited, one which he did not accept when formally or informally tendered, one in which he was forced to engage for self-defense alone, and from which he withdrew, or endeavored in good faith to withdraw, when his defense was accomplished—ought not to, and would not, be treated as a causative fight on his part, within the meaning and intent of the policy, but would be regarded as right and proper resistance to aggressive or offensive violence. To protect his life from destruction or his person from injury might be as much a matter of duty to the insurance company as of interest to himself. Means of resistance which it would be reasonable for him to employ for his own safety, he could not be excused for neglecting, if an efficient use of them were shown to be within his power. It would be no objection to their use that they involved "fighting back" in order to repel the violence of an assailant. The stipulation against liability for injuries caused by fighting refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity—fighting for which he is partly responsible, either as a volunteer or as a rash speaker or wrong-doer. It could not be the purpose of the stipulation to cut off the right of self-defense by the use of force,—the right to repel violence with violence of like nature. The exercise of this right might be mutually beneficial to both of the contracting parties, and that either of them had any purpose to restrict a fair and reasonable exercise of it is in the highest degree improbable.

In order to attribute to the insured anything caused by the fight, he must have some voluntary agency in causing the fight itself. If he had such agency, if by improper speech or voluntary conduct he was a material factor in bringing on the fight, he was, as between himself or his wife and the Insurance Company, chargeable with the consequences. If the fight was the cause of the mortal injury, and he was the cause of the fight, whether in whole or in part, he was, to that extent, the cause of his own death. If he begat the fight, and the fight begat the shooting, and the shooting begat the injury, he bore an ancestral relation to the last offspring as well as to the first. At all events, being father to the fight, neither he nor his wife, under the terms of this policy, could profit by the fight or by what it brought forth. That, according to the evidence in this case, there was a fight, admits of no possible question. There was hostile contact, physical collision, an attempt by each combatant to hurt the other; blows were given by one, which took effect; strokes were made by the other, which missed their aim. The origin of the fight is equally manifest. It was not born of the passion of one of the parties, but of a conjunction of the passions of both. It proceeded from an altercation in which each party used rash and insulting language; language calculated to excite anger and provoke conflict. Both being in the same room, but some distance—say twenty feet—apart, the other party spoke abusively of secret societies and their members, referring to them in general terms; no particular society or member (so far as appears) being mentioned. This speech was

made in the hearing of the insured and several others, but was not addressed to him. Some of the others, who were nearer to the speaker, remonstrated with him upon the impropriety of his animadversions. Shortly afterwards, as the speaker was passing by the insured on his way out, the latter, without rising from his seat, said to him mildly, in a tone of mortified resentment: "I heard all you said about secret societies; that no gentleman would belong to a secret society." The other answered: "Yes, I said it; and, by G—d, it is true. Do you want to take it up?" The insured replied, "Well, it's a lie," or "a damned lie;" adding, "Yes, I do." Then followed a blow from one of them, probably the former, and the latter "tumbled off his seat," possibly as the result of receiving the blow. They backed towards one of the entrances to the room, several feet, and the insured was stricken by his antagonist several times with a small walking cane, which was broken over his shoulders. The insured struck back with his hands without effect, several of his blows missing their aim. Then, while the other maintained his position close to where the fight took place, the insured moved back ten or twelve feet to the seat which he had occupied, and looked for and inquired after his hat, which had fallen or been knocked from his head. The other combatant, without changing his position, then drew a pistol, and fired the fatal shot. Before anything above referred to was said or done, the parties were aware of each other's presence in the room; they had spoken together in a friendly way, each calling the other by his first, or Christian, name. In substance, this is the whole story of the quarrel, the fight, and the homicide, as told by the testimony. The first insult came from the slayer, attended with a challenge to fight. The question, "Do you want to take it up?" propounded in anger, does not, according to the common understanding of it in Georgia, import a proposal to debate or discuss, but a challenge to the arbitrament of force, or a trial of the issue by the personal prowess of the disputants. It is the end, not the beginning, of argument. It is no less significant of defiance than was the ceremony of throwing down the glove as a preliminary to trial by battle. The insult was returned by the insured by responding in words of foul opprobrium,—words so irritating that gentlemen rarely address them to their equals, except when they intend to back them with their courage; and, to make the intent clear in this instance, the challenge was accepted in the superadded phrase, "Yes, I do." Instantly active hostilities commenced, each party having thus declared his willingness to champion his side of the trivial and needless quarrel. Had not both of them acted with hot-headed rashness in passing insults, there would have been no fight. Had the insured squarely objected to fighting, and tried to keep out of it, there is no reason to suppose he would have failed of success. Instead of so doing, he provoked his adversary by giving him the lie, most probably with a profane prefix to the offensive imputation; and, instead of pursuing a pacific policy, he accepted what he must have understood as a challenge to fight. No doubt he was under the influence of strong

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passion, but this is no excuse for him in the present litigation. The fighting was in a public place,—that is, a place to which a portion of the public habitually resorted. It was a room occupied and used as a saloon and restaurant, in the City of Atlanta. The fight, merely as such, was a joint offense, and would be classified, under our Code, as an affray. Code, § 4515. This is true, notwithstanding the evidence indicates none of the blows dealt by the insured took effect, and that the first blow, as well as all others which reached their object, came from his antagonist. In so far as the constituents of a fight are concerned, the consent of both parties makes the consequent violence of either chargeable to both. "We think the judge was in error in saying there must be mutual blows to constitute a mutual combat. There must be a mutual intent to fight. But we think, if this exists, and but one blow be stricken, that the mutual combat exists, even though the first blow kills or disables one of the parties." *Tate v. State*, 46 Ga. 157, 158 (McCay, J.). To the like effect is a dictum by Chief Justice Pearson, of North Carolina, who says: "Is it necessary that both parties should give and take blows, or is it sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent? To illustrate: Suppose Rippy had not been killed. Upon an indictment for an affray, would he not have been convicted? Two men go out to fight. One is knocked down on the 'first pass,' and that is the end of it. Are they not both guilty of an affray?—that is, 'a fight by mutual consent.'" *State v. Gladden*, 78 N. C. 155.

We are no less certain that the fight was a mutual combat, in the legal sense, than if it had been so found by the verdict of a jury under a full and proper charge from the presiding judge; and the palpable truth that fighting caused the shooting, and therefore the injury, needs confirmation by verdict just as little. The evidence is all one way; but one rational inference is possible. The shooting is accounted for easily and naturally by ascribing it to the fight. This is the proper explanation of it, whether it be regarded as a part of the fight proper or as a sequel to it. It was certainly embraced within the *res gestae* of the combat. It took place on the same stage and within the atmosphere of the antecedent performance. The homicide could well be treated as the culmination of the final scene,—the catastrophe of the drama. At the very least it was a bloody epilogue and not an independent afterpiece. Nor is it material that it was not down on the bill, but was wholly unexpected by one or both of the actors. Rarely, if ever, can the incidents or the result of a personal encounter be foreseen. A deadly weapon may make its appearance at the last moment, and a homicide be the result, although the fight intended and begun was one with "fist and scull" only. To fight at all is dangerous. When the combative passions are aroused and get a taste of gratification, what momentum they will acquire, and to what extremes it will carry them in their lust for more, is always uncertain. Even friendly wrestling is a door by which anger and a mortal wound may come in. Knowing the hazards attendant on physical

competition and contention, this Insurance Company declined to assume the risk of accidental injury or death caused by fighting or wrestling. The insured might fight if he pleased, but he was not allowed to indulge his combative propensities at the expense of the Company; that kind of indulgence was to be at his own risk. Not that the Company might not have borne the risk for him if it had chosen to do so. In the language of *Judge Scott*, in *Harper v. Phoenix Ins. Co.*, 19 Mo. 509, *supra*: "Unless it is otherwise stipulated, the insurer takes the subject insured, with his flesh and blood and passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance." But in the policy before us the Company had "otherwise stipulated." By so doing it has narrowed the range of the policy over the emotions so as to shut out all those of a pugnacious character. If both combatants contributed to bring on the fight, their relative blame or guilt has nothing to do with the relation of cause and effect between it and the homicide. Nor is it of any moment to consider whether the offense committed in the end was murder or manslaughter. With or without malice, in the technical sense of criminal law, the homicide was caused by the fight, as causation is understood and regarded in the law of contracts. The fight occasioned it, for the fight produced the shooting as a direct and

immediate consequence. Who can doubt that the shooting grew out of the fight,—sprang from it directly and immediately? Had there been no fight, there would have been no shooting and no killing. It was the fight that excited the homicidal impulse, generated the desire and the purpose to kill. There was nothing else to do it. Even if the slayer was insane, or subject to homicidal mania, the mania alone was harmless; it required the superadded excitement of the fight to render it destructive. Had the insured abstained from provoking the fight or accepting a challenge, had he contributed nothing towards bringing on a useless combat, there is no probability whatever that he would have been slain. And he could no more provoke a crazy man, or accept his challenge, at the expense of the Insurance Company, than he could so deal with a sane man at the Company's expense. Indeed, it would be more hazardous to engage in an affray with a madman than with a rational being; and any reason for protecting the company against the consequences of the less dangerous fighting will apply with increased force to the more dangerous. Injuries caused by rash or needless fighting with any description of combatant are excluded from the scope of the policy. The nonsuit was properly awarded, and we have stated our reasons very fully for so deciding.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Catharine S. MILES
v.
CITY OF WORCESTER.

(.....Mass.....)

A municipal corporation cannot escape responsibility for the nuisance on the ground that the structure is solely for public use, where by filling a school-yard several feet above its natural level it has pushed over the retaining wall so as to encroach upon and overhang the premises of an adjoining owner.

(October 24, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for injuries to plaintiff's property by reason of the alleged improper construction and maintenance of structures on the surface of defendant's land, which resulted in a verdict in favor of plaintiff. *Overruled.*

Defendant's land was devoted to the use of a school-house and grounds. A retaining wall was built by defendant next to, and several feet higher than the surface of, plaintiff's land. The surface of defendant's land was then raised, by filling in earth, as high as, or higher than, the wall. The evidence tended to show that

the wall was originally built on defendant's land but that at the time of the trial it was over the line onto plaintiff's premises in some places a foot at the bottom, and that it had gradually leaned and bulged over so as to overhang plaintiff's premises about a foot. This condition was caused by the weight of earth behind the wall or by the action of surface water or frost.

Mr. Frank P. Goulding, for defendant:

The wall was built and maintained as a part of the estate purchased for and appropriated by the City to the maintenance of a public high-school under the Statutes.

Pub. Stat. chap. 44, §§ 2, 51.

The City is not liable to an action on account of the condition of the wall.

The wall was built and maintained solely for the public use, and with the sole view to the general benefit, and under the requirement of general laws.

In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service.

Howard v. Worcester, 12 L. R. A. 160, 158 Mass. 426, and cases cited; *Hill v. Boston*, 122 Mass. 344.

The fact that the injury is to property, whether real or personal, instead of to the person, establishes no distinction.

Hawks v. Charlemont, 107 Mass. 414; *Tindley v. Salem*, 137 Mass. 171.

If cases of trespass committed in the course

NOTE.—As to liability of municipality for a nuisance, see notes to *Chapman v. Rochester* (N. Y.) 1 L. R. A. 206; *Seymour v. Cummins* (Ind.) 5 L. R. A. 126; *Bates v. Westborough* (Mass.) 7 L. R. A. 156. 13 L. R. A.

of the discharge of a public duty might be distinguished from the general rule, that would not avail the plaintiff.

The count is in case and not in trespass. And the proof is of a consequential injury resulting from a defective performance of a lawful act.

1 Chitty, Pl. 117, 118.

There is no liability for the consequences of a structure falling or encroaching on another's land if it was properly built on the defendant's own land.

The doctrine of *Fletcher v. Rylands*, L. R. 1 Exch. 265, has never been adopted in this Commonwealth, at least in the extreme application of it found in *Nichols v. Marsland*, L. R. 10 Exch. 255.

Gorham v. Gross, 125 Mass. 232, 239; *Smith v. Boston Gas-Light Co.* 139 Mass. 318; *Bryant v. Bigelow Carpet Co.* 131 Mass. 491, 499.

Messrs. W. S. B. Hopkins and Frank B. Smith, for plaintiff:

The line of cases of which *Hill v. Boston*, 122 Mass. 324, and the much later case of *Howard v. Worcester*, 12 L. R. A. 160, 158 Mass. 426, are types, does not apply. They are actions for personal injury sustained either on the public land or, if off the public land, as the immediate result of an act done thereon in the execution of work to adapt it for public use, or in the performance of acts for the public safety or enjoyment.

Tindley v. Salem, 187 Mass. 171; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Bigelow v. Randolph*, 14 Gray, 541; *Benton v. Boston City Hospital*, 140 Mass. 13; *Clark v. Waltham*, 128 Mass. 567.

The question here is between adjacent land-owners and relates to their mutual rights as such. If the encroachment on adjacent land depriving its owner of its use and doing him damage "is not necessarily incident to the accomplishment of the public object but to the improper and unskillful manner of doing it, such damage to private property is not warranted by the authority under color of which it is done and is not justifiable by it. It is unlawful and a wrong for the redress of which an action of tort will lie."

Perry v. Worcester, 6 Gray, 544; *Haskell v. New Bedford*, 108 Mass. 208; *Sprague v. Worcester*, 18 Gray, 193.

The same principle applies to the negligent and improper maintenance of public works and makes the damage resulting therefrom an actionable tort, especially when it results in trespass or nuisance on real estate.

Childs v. Boston, 4 Allen, 41; *Bates v. Westborough*, 7 L. R. A. 156, 151 Mass. 174; *Proprs. of Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lovell*, 11 Gray, 345.

No new or different principles govern this case because this public land was bought by the City instead of being acquired under an exercise of the right of eminent domain.

Wilson v. New Bedford, 108 Mass. 261.

Where there is a physical appropriation and no statutory taking the action of tort lies.

Lund v. New Bedford, 121 Mass. 286.

When, in consequence of a taking of land for public use, injury results to a landowner which is not to be contemplated and does not fall 13 L. R. A.

within the general rule of compensation, an action of tort will lie.

In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.

Northern Transp. Co. of Ohio v. Chicago, 90 U. S. 635, 642, 25 L. ed. 836, 338; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504; *Sinnickson v. Johnson*, 17 N. J. L. 129.

An injury of that class need not be intentional or contemplated, and does not inevitably necessarily any perpetual or permanent occupation of, or right in land, or that any title to it is acquired by the taking. What deprives the owner of the ordinary use and enjoyment of his land is a taking and appropriation.

Cooley, Const. Lim. § 544; *Hooker v. New Haven & N. Co.* 14 Conn. 146; *Canal Appraisers v. People*, 17 Wend. 571, 604; *Lackland v. North Missouri R. Co.* 81 Mo. 180; *Ashley v. Port Huron*, 35 Mich. 296, 301; *Arimond v. Green Bay & M. Canal*, 31 Wis. 316; *Thurston v. St. Joseph*, 51 Mo. 510, 516; *Nevis v. Peoria*, 41 Ill. 502, 510; *Stetson v. Faxon*, 19 Pick. 147, 158; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 808, 321; *Pettigrew v. Evansville*, 25 Wis. 223; *Dodson v. Cincinnati*, 34 Ohio St. 276; *East Pennsylvania R. Co. v. Schollenberger*, 54 Pa. 144.

Although it has been decided that the Legislature has constitutional power to permit and suffer certain acts to be done which, but for such legislative permission, would amount to a private nuisance, this doctrine has never been carried so far as to extend to a case where the nuisance is so great as practically to deprive the owner of private property of the use and enjoyment of his property.

Sawyer v. Davis, 136 Mass. 239, 342; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Crump v. Lambert*, L. R. 3 Eq. 409; *Com. v. Kidder*, 107 Mass. 188.

Allen, J., delivered the opinion of the court:

It is obvious that the defendant's wall, in its present position upon the plaintiff's plan, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman v. Evans*, 7 Allen, 431; *Nichols v. Boston*, 98 Mass. 39, 43; *Fay v. Prentice*, 1 C. B. 828.

The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit, and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass. 344, and ending with *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160.

We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defend-

ant's sole charge, and if it is a nuisance the defendant is responsible. *Staple v. Spring*, 10 Mass. 72, 74; *Nichols v. Boston*, *supra*. Such an occupation of the plaintiff's land cannot be excused, for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid. But if by the action of the elements, or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance, for which the defendant is responsible, and so are the authorities. *Gorham v. Gross*, 125 Mass. 282, 289; *Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 424; *Eastman v. Meredith*, 36 N. H. 284, 296; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* Id. 163; *Weet v. Brockport*, 16 N. Y. 161, 172, *in note*; *St. Peter v. Denison*, 58 N. Y. 416, 421; *Cumberland v. Willison*, 50 Md. 183; *Harper v. Milwaukee*, 80 Wis. 385; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 168, 181, 20 L. ed. 557, 561; *Dillon*, Mun. Corp. § 985.

The case is distinguishable from *Middlesex Co. v. McCue*, 149 Mass. 103, where soil from the defendant's land upon a hill-side was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way.

Exceptions overruled.

Hugh FRANKLIN

r.

Delia May FRANKLIN.

(.....Mass.....)

A divorce will not be denied to a man in case of his wife's adultery by reason of the fact that he married her while under arrest on bastardy process, merely to have the child born in wedlock and on an agreement with her that they should never live together, which they have kept.

(October 24, 1891.)

EXCEPTIONS by libellant to a ruling of the Superior Court for Worcester County dismissing his libel filed to obtain a divorce from his wife because of her alleged adultery. *Sustained.*

The evidence proved that the libellant had had sexual intercourse with the libelee before marriage: that the libelee was pregnant as the result of such intercourse, and the libellant was under arrest, upon a bastardy process, instituted by the libelee, at the time of their marriage; that the libellant married the libelee for the purpose, as he testified, "to give the child a name" and to have it born in lawful wedlock, and under an agreement, made with the libelee, that they should not live together as

husband and wife; that immediately after the marriage the parties separated and have never lived together as husband and wife; that the marriage was performed in this Commonwealth and the libellant has resided here more than five years next preceding the filing of his libel; that since the marriage the libelee had committed the crime of adultery as charged in the libel.

Upon the foregoing evidence the court ruled that the libel could not be maintained, and dismissed it.

Messrs. W. S. B. Hopkins and Frank B. Smith, for libellant:

I. Although the parties married under an agreement that they should not live together as husband and wife, the marriage was legal and binding, and the collateral agreement "not to live together as husband and wife," was a mere nullity, so far as the legality of the marriage was concerned, as contrary to the policy of the law.

Barnett v. Kimmell, 35 Pa. 13; *Harrod v. Harrod*, 1 Kay & J. 4, 16; *Brooke v. Brooke*, 60 Md. 524.

Consensus non concubitus facit matrimonium.

Dumarest v. Fishly, 3 A. K. Marsh. 368; *Jackson v. Winne*, 7 Wend. 47; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Sottomayer v. De Barros*, L. R. 5 Prob. Div. 94, 98.

The mere present consent constitutes marriage, except that by statute law certain specific forms may or must be superadded and subsequent copula is not material.

Eaton v. Eaton, 123 Mass. 276; *Lindo v. Belisario*, 1 Hagg. Consist. 216; *Patrick v. Patrick*, 3 Phillim. 496; *Walton v. Rider*, 1 Lee, Eccl. 16; *Potier v. Barclay*, 15 Ala. 439; *Graham's Case*, 2 Lew. C. C. 97; *State v. Patterson*, 24 N. C. 346.

II. The agreement to separate and the living apart do not bar a decree for subsequent adultery.

The fact that the separation was by agreement and mutual consent negatives any finding of desertion on his part.

Thompson v. Thompson, 1 Swab. & T. 231; *Cooper v. Cooper*, 17 Mich. 205; *Lea v. Lea*, 8 Allen, 419; *Crow v. Crow*, 23 Ala. 583.

If libellant has not committed the offense of desertion, this case is taken out of that line of cases which hold that a suitor for a divorce cannot prevail, if open to a valid charge of any matrimonial offense of equal grade under the Statute with that which is the cause for the divorce sought.

Handy v. Handy, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386.

Agreements of separation are interpreted to be on the condition that the parties should live chastely.

Gandy v. Gandy, L. R. 7 Prob. Div. 77, 168, L. R. 30 Ch. Div. 57.

So a divorce may be maintained against either who afterwards commits adultery.

Morrall v. Morrall, L. R. 6 Prob. Div. 98; *Anderson v. Anderson*, 1 Edw. Ch. 390, 6 L. ed. 179; *Galusha v. Galusha*, 50 Hun, 185; *Beeby v. Beeby*, cited in 1 Hagg. Consist. 142, *note*; *Woodcock v. Woodcock*, cited in 1 Hagg. Consist. 143, *note*; *Durant v. Durant*, 1 Hagg. Consist. 733; *Parkinson v. Parkinson*, L. R. 2 Prob. & Div. 25, 27; *Mortimer v. Mortimer*,

NOTE.—The briefs and opinion in this case present the authorities on the question involved so fully that a note thereon would be superfluous.

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2 Hagg. Consist. 818; *J. G. v. H. G.* 38 Md. 401.

The consent of either party to the agreement to live separate is revocable at pleasure, and if one of them, otherwise blameless, seeks to renew cohabitation and the other declines, such refusal constitutes desertion.

Hunt v. Hunt, 32 L. J. Mat. N. S. 168; *Hills v. Hills*, 6 L. R. 174; *Lea v. Lea* and *Durant v. Durant*, *supra*.

While husband and wife are living apart under circumstances rendering him liable for her support, if she commits adultery, his liability ceases.

Cooper v. Lloyd, 6 C. B. N. S. 519; *Atkyns v. Pearce*, 2 C. B. N. S. 763.

To hold that this state of facts does not warrant a decree of divorce would be to license adultery of a wife living separate and apart from her husband by agreement between them and jeopardize property rights, by allowing her to impose spurious issue on her husband.

Morrall v. Morrall and *Beby v. Beby*, *supra*.

Especially is this so under the stringent Massachusetts rule, which holds that the presumption of the legitimacy of a child born in lawful wedlock can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not have been the father.

Phillips v. Allen, 2 Allen, 453; *Sullivan v. Kelly*, 3 Allen, 148.

No appearance for libelee.

Knowlton, J., delivered the opinion of the court:

The libelant and libelee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage or its effect upon the status of the parties should be in any way affected by their preliminary or collateral agreements. *Barnett v. Kimmell*, 35 Pa. 18; *Harrod v. Harrod*, 1 Kay & J. 4, 16.

The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the Statutes in relation to the solemnization of marriages. *Eaton v. Eaton*, 122 Mass. 276; *Jackson v. Winne*, 7 Wend. 47; *Dumaresny v. Fishly*, 8 A. K. Marsh. 368; *Patrick v. Patrick*, 3 Phillim. 496; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54.

The libelant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and on the facts reported neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the Statutes in relation to divorce. *Lea v. Lea*, 8 Allen, 419; *Thompson v. Thompson*, 1 Swab. & T. 281; *Cooper v. Cooper*, 17 Mich. 205.

Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce. *Morrall v. Morrall*, L. R. 6 Prob. Div. 98; *Beby v. Beby*, cited in 1 Hagg. Consist. 140, *note*; *Mortimer v. Mortimer*, 2 Hagg. Consist. 810; *J. G. v. H. G.* 38 Md. 401; *Anderson v. Anderson*, 1 Edw. Ch. 880, 6 L. ed. 179.

The court has jurisdiction, notwithstanding that the parties have never lived together as husband and wife within this Commonwealth. The continuous residence of the libelant in the Commonwealth for more than five years next preceding the filing of his libel brings the case within the exception stated in Pub. Stat., chap. 146, § 5.

On the facts stated in the bill of exceptions the divorce should have been granted, and the entry must be, *exceptions sustained*.

KENTUCKY COURT OF APPEALS.

Edward ROBERTS *et al.*, *Appls.*,

v.

CITY OF LOUISVILLE *et al.*

(.....Ky.....)

1. An injunction against the passage of a municipal ordinance to authorize the ille-

gal transfer to an insolvent board of commissioners of a wharf owned by the city in trust for the public, may be granted at the suit of taxpayers who by reason of their business have a special or peculiar interest in its use, where the prevention of the transfer might not be possible if the ordinance were passed and its consummation would result in irreparable injury to plaintiffs.

NOTE.—*Injunction to prevent passage of a municipal ordinance.*

The decisions generally deny the power of a court to enjoin the passage of a municipal ordinance. *Harrison v. New Orleans*, 33 La. Ann. 222; *Crescent City L. S. L. & S. H. Co. v. Jefferson Police Jury*, 32 La. Ann. 1192; *People v. New York*, 32 Barb. 35, 9 Abb. Pr. 254, 10 Abb. Pr. 144; *Warwick v. New York*, 23 Barb. 223; *Chicago v. Evans*, 24 Ill. 52.

This proposition has been qualified by adding the proviso that the proposed ordinance is not beyond 18 L. R. A.

the scope of the corporate powers and will not work irreparable injury. *Murphy v. East Portland*, 42 Fed. Rep. 308.

And it has been expressly held that an injunction may be granted to prevent the board of supervisors of a city from passing an ordinance which is outside of the scope of their powers where it would work an irreparable injury. *Spring Valley Water-Works v. Bartlett*, 8 Sawy. 559, 16 Fed. Rep. 615.

But supervisors will not be restrained by injunction from paying illegal claims if it is not in excess

2. Withdrawal of an illegal ordinance
after commencement of the suit will not defeat
the right to an injunction against its passage.

(October 8, 1891.)

APPEAL by complainants from a decree of the Louisville Chancery Court in favor of defendants in a suit brought to enjoin the passage of a municipal ordinance. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Lane & Burnett and T. L. Burnett for appellants.

Mr. H. S. Barker for appellees.

Lewis, J., delivered the opinion of the court:

There was introduced in the general council of the City of Louisville, referred to a joint committee of the board of aldermen and board of councilmen, and a report agreed, by a majority of that committee, to be made in favor of passage of the following ordinance: "That the mayor be and he is hereby authorized to convey by deed of special warranty to the commissioners of the sinking fund of the City of Louisville all of the real property fronting on the Ohio River acquired and held by the City for wharf purposes. Said commissioners are to hold said property upon the same trusts and for the same purposes as it is now held by said city, and to have the same power over, and authority to sell, convey, lease, or otherwise dispose of, the same, or part thereof, which said City now has. This ordinance to go into effect from and after its passage."

But, before the ordinance was reported back by the committee, though on the same day of a regular meeting of the general council, the plaintiffs, now appellants, commenced this action against the City of Louisville, mayor, members of the general council (sued by names), and commissioners of the sinking fund, to obtain an injunction, which was granted temporarily, restraining the general council passing, and the mayor approving, that or any ordinance for like purpose, and the City of Louisville conveying, and commissioners of the sinking fund taking possession of, controlling, or interfering with, any property acquired or

held by the city for wharf purposes. The plaintiffs, who are numerous, state they are residents and owners of property in said City subject to municipal taxation, and engaged there in commercial business; that the City of Louisville has heretofore, by virtue of Acts of the Legislature, and with money procured by taxation, acquired at various places within its corporate limits along Ohio River, land to be held and used, and which has so far been kept and maintained, in aid of its commerce and trade, for public wharfs, those using them for business purposes being required to pay wharfage; that, although the City of Louisville holds said property for public use, without right to transfer to another its power and duty to preserve and maintain public wharfs, and the commissioners of the sinking fund are without right to acquire or hold it for any purpose, yet the general council, mayor, and commissioners of the sinking fund have wrongfully and unlawfully agreed and conspired together for the City of Louisville to abdicate its right to and possession of said property, refuse hereafter to preserve and maintain it for the purpose intended, and by deed convey it to the commissioners of the sinking fund, with a view and to the end the latter may sell, convey, or transfer it at discretion to private individuals, thereby preventing public use of the wharfs, which is indispensable to the business of plaintiffs and others similarly situated. They further state that said ordinance, already prepared and sent by the mayor to the general council, in pursuance of the scheme mentioned, will be at once passed, followed by immediate transfer of the property, and irreparable injury thereby done to the plaintiffs, unless the injunction be granted; and, the commissioners of the sinking fund being insolvent, there will be no adequate remedy at law. No answer was filed by the mayor, nor any member of the general council, except A. S. Stoll, of the board of aldermen, who, denying he was in favor of the passage of the ordinance, yet admitted it had been sent by the mayor to the general council for passage, and would have passed both boards thereof, if the injunction had not been granted. The City of Louisville by the city attorney, answered, denying its alleged want of power

of their jurisdiction. *Merriam v. Yuba County*, 72 Cal. 517.

The rule that the legislative action of a municipal corporation cannot be enjoined applies to prevent an injunction against the passage of an ordinance allowing gas companies to lay pipes in streets in violation of an exclusive privilege previously given to another company. *Montgomery Gaslight Co. v. Montgomery*, 4 L. R. A. 618, 87 Ala. 245; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505.

In the absence of bad faith a municipal council cannot be restrained from passing an ordinance within the scope of their authority to vacate a street. *Meredith v. Sayre*, 32 N. J. Eq. 557.

And an ordinance within the scope of the power of the municipality to provide for the payment of money without providing means of payment will not be enjoined although the amount of the proposed indebtedness will exceed the lawful limit. *Murphy v. East Portland*, 42 Fed. Rep. 308.

In California the Statute prohibits an injunction to prevent a legislative Act by a municipal corporation. *Alpers v. San Francisco*, 32 Fed. Rep. 503.

But the grant of a franchise by a city council, 18 L. R. A.

although it takes the form of a resolution, may be restrained by injunction. *People v. Sturtevant*, 9 N. Y. 233; *Davis v. New York*, 1 Duer, 451.

And tax-payers may enjoin the acceptance of an ordinance by a street railway company which would complete a contract in abuse of the corporate powers of the city. *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 291.

An injunction *in limine* will not lie to prevent a mayor from signing an ordinance passed by the municipal council purporting to repeal a previous ordinance which constituted a contract. *New Orleans Elev. R. Co. v. New Orleans*, 39 La. Ann. 127.

And an injunction will not issue to restrain the approval of an ordinance or resolution declining a trust for a charity where the city is not required by charter or ordinances to accept and administer it. *Dailey v. New Haven (Conn.) post*, —.

On the same principle that applies to ordinances the proceeding of a council to impeach a city officer is beyond the reach of an injunction. *State v. Orleans Civil Dist. Ct. Judges*, 35 La. Ann. 1075.

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to transfer to another the wharf property; and, though it was averred the ordinance had, since commencement of the action, been withdrawn, there was no denial it was introduced, referred to a committee, and would have been at once passed, and the purpose of it carried out, but for the injunction. The commissioners of the sinking fund in their answer denied that the free and uninterrupted use of the wharves is, as alleged in the petition, indispensable to prosecution of the business of the plaintiffs, and, in substance, averred existence of power in the City of Louisville to transfer, and not only its own power, but, because charged with payment of the City's bonded debt, also its right to hold and control, the wharf property, and revenues arising therefrom.

It seems to us the pleadings in this case, independent of any testimony, placed beyond question that the mayor, members of the general council, or a majority of them, and commissioners of the sinking fund did agree upon the scheme mentioned in the petition for a transfer of the wharf property, and, if not restrained, would have carried it out; and if the power to make such transfer does not exist that scheme was, as charged, wrongful and unlawful; but whether the injunction sought was, in whole or in part, the proper remedy is the question for determination. The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the Legislature; of course to be exercised within the limits and upon conditions of the grant. Dillon, *Mun. Corp.* § 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies duty of the municipality, through its governing head, to maintain and preserve wharf property for benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the City of Louisville has been acquired under Act of the Legislature, and paid for by taxation; and in no case is there evidence of legislative intention that it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the City of Louisville cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties. *Id.* §§ 96, 97. It is even more manifest that "the commissioners of the sinking fund," which is a distinct corporation, created by that name for specified purposes, and invested with limited power, cannot hold or control the wharf property, authority to do so being nowhere given by its charter; nor would it be either provident or consistent with the purpose of its creation to so invest it.

We thus have a case where the defendants have either admitted, or failed to deny, they

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were about to jointly do an act, not only, in our opinion, illegal, but of so serious a nature as transfer of the title of real property, held in trust by the City of Louisville, and change of its control from the general council, that has its powers and duties in respect thereto prescribed and defined, to a corporation, without right to own or hold it, and which, according to an uncontroverted charge in the petition, is insolvent. It is moreover apparent there would be, in case of such transfer, great danger of the wharf property being so managed as to impair its usefulness to the public, and seriously injure, if not prevent altogether, the successful prosecution of the business of plaintiffs and others; for it is hard to see what is the purpose of the commissioners of the sinking fund in seeking or accepting possession and control of the property, if not to increase revenue therefrom, by increasing wharfage beyond the present, and, it may be assumed, reasonable, rates, or else, by lease or transfer to particular persons, who, in consideration of special privileges or advantages, not enjoyed generally, would pay more than now received. The plaintiffs in this case are engaged in buying and shipping stove coal to Louisville for sale and delivery, which has to be landed at the city wharves, and the free use thereof, at reasonable charges, is obviously indispensable to their business. Consequently they would suffer a special and peculiar injury, distinct from that of the public, in case of either excessive wharfage or obstruction of free public use of the wharf property. "It is," says Dillon, "the prevailing and almost universal doctrine in this country that property holders or taxable inhabitants have the right to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the tax-payers: such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments." Section 914. And, though the question of power to enjoin illegal and wrongful disposition of corporate property has not been, at the suit of tax-payers, directly presented to and decided by this court, the power of equity, in such action, to restrain the levying and collecting void and illegal taxes, which is founded on the same principle, has been distinctly recognized and sustained. Therefore, if, when this action was instituted, the ordinance in question had been already passed, it could undoubtedly have been maintained against the mayor and commissioners of the sinking fund, restraining the former from conveying, on behalf of the City of Louisville, title of the property, and the latter from taking possession of or interfering with it: for the plaintiffs had legal capacity to bring and prosecute the action. An act not only illegal, but of irreparable injury to them, was intended, and about to be committed, and they would have had no adequate remedy at law.

But it is contended in argument, and seems to have been the ground for dismissing the action, that a court of equity will not enjoin passage by a municipal body of an ordinance or resolution. In *High on Injunctions* (§ 1248),

relied on by counsel, it is said: "It is unquestionably true that purely legislative Acts, such as the passage of resolutions or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere with the proceedings of municipal bodies in matters resting within their jurisdiction, or to control in any manner the exercise of their discretion. A distinction, however, is properly drawn between the case of restraining an alleged act attempted under the authority and sanction of a municipal body and restraining the corporation itself from granting such authority." But in the same section it is conceded that "the question of equitable interference by injunction with the legislative action of municipal bodies has given rise to some apparent conflict of authority, and is not wholly free from doubt." It is said by Dillon (§ 808) "to be settled that it is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature of the State;" and in a note cases are cited in which is stated the general proposition that courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. Of course, if every municipal ordinance has the quality and force of a law of the State Legislature, courts of equity would be without power to enjoin or otherwise interfere with passage of any; because, on account of the peculiar structure of the state government, each of the three departments thereof is distinct and acts in its own sphere, independent of the others. But the power delegated to a municipality to legislate is not, as to all subjects, absolute even within corporate limits. On the contrary, it is not only restricted by statute, but also subordinate to settled principles of law and equity, in view of which it is presumed to be delegated; for such a corporation is created for a double purpose, and consequently has a dual character,—one governmental or public, the other private or proprietary. As said in *Oliver v. Worcester*, 102 Mass. 489: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed on them by the Legislature for their public benefit, and for acts done in what may be called their 'private' character, in the management of property and rights voluntarily held by them for their own immediate profit and advantage as a corporation, although inuring, of course, ultimately for the benefit of the public." It was in reference to its governmental or public character that it was, in the case of *Louisville v. Com.*, 1 Duvall, 295, held that a city or town in this State, "to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky, through the agency of that municipality."

But a municipal corporation, when holding,
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in its private or proprietary character, property or funds in trust for taxpayers and inhabitants within its limits, occupies towards them a relation like that of a purely private corporation to its *cestuis que trustent*, who are its shareholders; for in each case the corporation or its governing body is a trustee. And, if creditors or shareholders may maintain an action against the board of directors (the governing body of a private corporation) to prevent or avoid an illegal and wrongful act, as unquestionably they can do, why may not taxable inhabitants maintain one against a municipal corporation and its governing body, the city council or board of trustees, to prevent, as well as avoid, an act, illegal and wrongful, done or about to be done in relation to property, or funds held in trust? In *High on Injunctions* (§ 1241) is this language: "The restrictions thus placed upon equitable interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power, but are limited to cases of a conceded jurisdiction, within the bounds of which the municipal power is acting; and, while it is thus shown equity will not enjoin the action of municipal corporations while proceeding within limits of their well-defined powers, as fixed by law, it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts *ultra vires*." Though it is not quite clear from the language used whether the test of jurisdiction is meant to apply to acts of municipal corporations done as well in their public as private character, it is manifest such restraining power, to be effectual, must operate upon the general council of a city or board of trustees of a town; for acts done in excess of authority, or *ultra vires*, cannot be committed by a corporation except by its governing body or head; and such must have been intended to be the meaning and scope of the proposition, for several leading cases in England are cited in which the power of a court of equity to enjoin passage of an illegal ordinance is distinctly recognized.

The case of *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, cited by counsel, was as to the power of equity to enjoin passage of an ordinance repealing a former one, under which a contract had been made with the plaintiff. It was held by the court that the municipal council had, in reference to the matter, discretionary power, and was acting within the scope of it, and was neither violating a trust nor doing an irreparable injury to the plaintiff; and, though it was there said, in general terms, that the ordinance in question had the force of an Act of the Legislature, and could not be enjoined, it was still conceded that one creating a public nuisance might be, because it could not be a rightful subject of legislation, and the mischief therefrom might be irreparable, which was in effect a concession of the power in every case of like conditions.

In *People v. Dwyer*, 90 N. Y. 402, it was upon principle and authority of previous decisions in that State, held that, while equity will not ordinarily interfere with matters resting largely in the discretion of municipal authorities, when the threatened action will produce irreparable injury, and consist in an

illegal grant or the disposition of property, by devoting it, in whole or in part, to the use of a private corporation, or where an illegal grant is threatened, or the action attempted is corrupt and fraudulent, and an abuse of trust, the court may interfere by injunction to restrain passage of an ordinance for the purpose. In our opinion, the general proposition, a court of equity may not enjoin passage of a municipal ordinance, must be confined in its application to subjects over which the corporation, in its governmental or public character, has discretionary authority; and, if it be conceded taxable inhabitants have a right to resort to equity at all to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventive remedy may be applied at the inception of a wrongful act, in fact when it is about to be done, or is threatened. There may, however, be subjects in relation to which the municipal corporation has discretionary power to legislate, and with which courts of equity, upon grounds of expediency and policy, will not interfere in the absence of fraud or breach of trust. But this is not such case, for the plain legal duty is imposed upon the general

council to hold, control and manage the wharf property for use of the public, which cannot be evaded by transfer of it, or otherwise. Yet passage of the ordinance in question might have been, if it was not, actually intended to be followed so soon by transfer of the property as to put it out of the power of the plaintiffs, and all other parties aggrieved, to prevent consummation of the wrongful act. We think a court of equity has not only the power to restrain passage of an ordinance authorizing an illegal or wrongful disposition of property acquired and held, as is the case of the wharf property, but, if needful, to compel the general council to perform the duty of preserving, protecting and maintaining it for the purpose intended, though of course leaving it to the discretion of that body as to the manner of discharging its trust.

It is stated in the answers that the ordinance was withdrawn after commencement of the action, and was not before the general council when the trial was had. But, as the plaintiffs had a cause of action, withdrawal of the ordinance did not have effect to defeat their right to the relief sought, especially as another ordinance of the same character may be hereafter introduced and passed, unless the right to do so be perpetually enjoined. *The judgment dismissing the action, being, as already indicated, erroneous, is reversed, and cause remanded for proceedings consistent with this opinion.*

MICHIGAN SUPREME COURT.

John COLE

v.

John ROWEN, Appt.

(.....Mich.....)

Each hackman may be assigned a separate stand at the depot ground of a railroad company, and may be ejected from the stand as-

signed to another for refusing to leave it if no unnecessary force is used.

(October 30, 1891.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged assault and battery. *Reversed.*

NOTE.—*Rights of hackmen and other solicitors of patronage at depots, wharves, etc.*

Most recent American decisions deny the right of a carrier to grant a monopoly of the hack, bus, or baggage business at its depot; thus, the exclusive right to use the platform of a railway company for receiving and discharging passengers cannot be granted by the company to one hack owner. *Montana Union R. Co. v. Langlois*, 8 L. R. A. 753, 9 Mont. 419.

Neither can the exclusive use of the more convenient and accessible portion of a platform be given to one bus line, even if the owner has at his own expense constructed an additional platform for such use. *Cravens v. Rodgers*, 101 Mo. 247, 42 Am. & Eng. R. R. Cas. 656.

Neither can a monopoly of a railroad company's grounds for a hack and bus stand and the solicitation of passengers be granted to the owner of one line of hacks. *Kalamazoo H. & B. Co. v. Sootsma*, 10 L. R. A. 819, 84 Mich. 194. *Contra*, *Com. v. Carey*, 6 New Eng. Rep. 371, 147 Mass. 41.

This same rule against a monopoly is denied by a Massachusetts decision in the case also of a baggage expressman. *Old Colony H. Co. v. Tripp*, 6 New Eng. Rep. 366, 147 Mass. 36.

The majority of the English cases, especially the 18 L. R. A.

earlier ones, are in accord with these Massachusetts decisions. Thus it was held that a bus proprietor is not entitled as a matter of right to drive into a station yard, although such privilege is accorded to others. *Barker v. Midland R. Co.* 18 C. B. 16.

And that a railroad company may give an exclusive privilege to one line of public carriages to come within its station yard unless the railroad commissioners have made an order to the contrary, *Hole v. Digby*, 27 Week. Rep. 284.

And an injunction was refused to prevent the exercise of an exclusive privilege sold by a railroad company to the proprietor of public carriages within its station yard where no substantial injury to the public was shown. *Readell v. Eastern Counties R. Co.* 2 C. B. N. S. 502; *Painter v. London, B. & S. C. R. Co.* 2 C. B. N. S. 702.

But in another case it was held that an exclusive privilege to one bus proprietor of using the station yard of a railroad company is, in the absence of special circumstances to show it to be reasonable, a breach of the prohibition made by 17 & 18 Vict., chap. 31, §2, against granting undue and unreasonable preference. *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499.

Preference by a railroad company to its own carrying vans as against other carriers by receiving

The facts are stated in the opinion.

Messrs. Ashley Pond and Henry Russell, with Messrs. Edwards & Stewart, for appellant:

The Michigan Central Railroad Company had authority to make and enforce reasonable rules to restrain hackmen, on its station grounds, from committing offenses against the good order of said grounds, and for regulating their conduct while thereon; and its rules so made and enforced for that purpose, were reasonable.

1 Redfield, Railways, 87, par. 1-4 inclusive; *Com. v. Power*, 7 Met. 596; *Markham v. Brown*, 8 N. H. 523.

Messrs. Hawes & Luby for appellee.

Long, J., delivered the opinion of the court:

This is an action for damages for assault and battery, which cause was commenced in justice court, where plaintiff had judgment for \$6 damages and \$3.25 costs of suit. Defendant appealed to the Circuit Court for the County of Kalamazoo, where the cause was tried before a jury on March 6, 1891, and plaintiff had judgment for \$40 damages and costs of suit. Defendant brings case to this court by writ of error. The plaintiff was a hackman, and went to the depot of the Michigan Central Railroad Company in pursuit of his legitimate business of soliciting the carriage of passengers from the incoming trains to the hotels and private residences in the city. He was in the employ of a Mr. Waud, who owned the hack and outfit. Arriving at the depot on the day upon which the assault was committed, he took a place upon the depot grounds of the railroad company with his hack, and, upon being told by the depot master that that place had been assigned to another hack, he refused to yield the

place. The defendant is the depot master at that depot. The depot grounds occupy the space covered by the railroad track of the Michigan Central Railroad Company in what was formerly a street, and which had been vacated for the construction of the railroad. The grounds also include the entire north part of block 15 in the city, bounded north by the vacated street, and south by an alley. The title to this north part of block 15 is in the railroad company, and these are the lands upon which the plaintiff entered and stood with his hack, and from which he refused to remove to another part of said grounds. It appears that the railroad company on April 25, 1890, made certain rules for the management of its depot grounds, and for the regulation of hack and bus drivers thereon, and for assigning stands for their vehicles in their business of soliciting passengers. These rules were promulgated by the depot master, who located the stands for the hack and bus men, telling each where to stand his vehicle. The stands located were indicated by numbers from 1 to 9, respectively, and 1 to 7 had been assigned and occupied by different hackmen prior to the occurrence complained of, and there was space yet left upon said grounds unassigned, which plaintiff might have occupied on that day. On September 15, 1890, plaintiff drove onto the grounds for passengers, and took possession with his hack of stand No. 8, which was not assigned to him, and which he knew had been assigned to another under the rules of the company. The defendant, the depot master, requested him to vacate the stand for a party who wanted and was entitled to it. This plaintiff refused to do, and the defendant pulled him from his hack, and ejected him from that place, offering to assign him another place upon the company's

goods at later hours is an undue and unreasonable preference under the same Act. *Re Palmer*, L. R. 6 C. P. 194.

So as to discrimination between its own agent and others, by requiring a special order from the others describing the particular goods to be delivered to him for a consignee instead of recognizing a general order for the delivery of all goods received for the consignee. *Re Parkinson*, L. R. 6 C. P. 554.

An unlicensed hack driver specially ordered for a steamboat passenger is not a trespasser in going to meet him, with his carriage, upon a wharf used by the steamboat company to discharge passengers, although the rules of the wharf forbid any but private carriages or licensed hacks to stand upon it. *Griswold v. Webb*, 7 L. R. A. 302, 16 R. I. 649.

Exclusion from car, vessel or inn.

A carrier which has established for its own profit and the convenience of passengers on its car or vessel an agency for the delivery of baggage can exclude all other persons from entering its own car or vessel to solicit orders in competition. *Barney v. Oyster Bay & H. S. B. Co.* 87 N. Y. 301.

A steamboat company has also been upheld in refusing to take on board as a passenger the agent of a line of stage coaches who sought passage merely to solicit business where the company had made a reasonable contract with another line for the transportation of all its passengers who chose to go on that line. *Jencks v. Coleman*, 2 Sumn. 221.

An inn-keeper cannot exclude one stage driver and admit his rival to solicit business in the inn, 18 L. R. A.

but it is otherwise if the driver forfeits his right by misconduct. *Markham v. Brown*, 8 N. H. 523.

General regulations; exclusion from depot or platform.

A railway company cannot suspend the operation at its depot of a municipal ordinance prohibiting licensed hackmen and porters from soliciting business at railway depots. *Chillicothe v. Brown*, 38 Mo. App. 600.

But an ordinance prohibiting hackmen from going within twenty feet of a train at a depot has been held invalid as against a privilege granted to a hackman by the railroad company. *Napman v. People*, 19 Mich. 362.

A railroad company cannot exclude a hackman from every part of the depot while he has a check for baggage of a passenger, although it may eject him from a room other than the baggage room in which he is soliciting business against the rules of the company. *Summitt v. State*, 8 Lea, 413.

The solicitation of the business of passengers by inn-keepers on railroad platforms may also be prohibited. *Com. v. Power*, 7 Met. 596.

And an inn-keeper or his agent soliciting patronage against the rules of the company may be ejected from the platform of a railroad depot. *Landrigan v. State*, 31 Ark. 50.

Injury from defect in platform.

A railroad company is liable to a hackman to the same extent that it would be liable to a passenger for an injury from a defect in the platform when he came there in the prosecution of his business. *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183. B. A. R.

grounds, which plaintiff refused. It is apparent from the record that the defendant used no more force than was necessary to eject the plaintiff from that particular place. The defendant was acting, in thus ejecting plaintiff from that part of the grounds, under the rules of the railroad company. These rules were as follows: "(1) Location for omnibuses and hacks will be assigned to parties, who will occupy them while standing at the depot to get passengers. (2) Drivers must take the stands which are assigned to them, and will not be allowed to take places assigned to others. (3) The positions assigned must not be occupied more than twenty minutes previous to the arriving of passenger trains. (4) Each driver must remain by his hack or omnibus when soliciting passengers. (5) No hacks or omnibuses will be allowed to stand in the porch longer than necessary to load or unload passengers. (6) The drivers of hacks and omnibuses will not be allowed in waiting rooms, except on business. (7) Profane, obscene, boisterous language, or quarreling, will not be allowed on the depot grounds. (8) Only one transfer wagon will be allowed to stand at the baggage-room, which will be the baggage-wagon that is hired by the railroad companies to transfer baggage between the different depots."

The court below charged the jury that "it would be competent for the railroad company to make such a rule as is included in these,—that the hackmen should not come to the station for passengers earlier than twenty minutes before train-time. That rule would be good, and could be enforced. The company could also make a rule that the hackmen should not stand within a certain distance of the platform of the station. That rule would be good. But, without enlarging upon these, there is one rule which the court, as a matter of law, following what the court conceives to be a decision of the supreme court on the same matter, holds is not good, and that is the rule that hackmen should be assigned places at the platform for the receipt of passengers, and that these places assigned should be occupied by no others. This the court holds, as a matter of law, is not good." It appeared upon the trial that the plaintiff at the time of the assault was not engaged in making any disturbance, or using any boisterous, vulgar, or obscene language, and was in no way offending against the rules of good order and decorum. The only question for consideration, therefore, is whether the rule adopted by the company reserving the right upon its own grounds to assign places to the different hackmen, and excluding from those places others not assigned thereto, is a reasonable one, and which the company had a right to enforce. The court below was in error in supposing that the rules adopted by the railroad company, and which were sought to be enforced by the defendant, were in conflict with the opinion of this court in *Kalamazoo, H. & B. Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819. That was an action of trespass against the defendant for unlawfully entering upon a piece 18 L. R. A.

of ground near the depot in question, the plaintiff claiming in that case to have leased that particular piece of ground, with the right to use it to the exclusion of all others; and it was held by this court that the railroad company had no right to give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds to the exclusion of others in a like business, and that the railroad company could not arbitrarily admit one common carrier of passengers or freight to its depot grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so. In the present case it appears that under the rules adopted by the company these stands were fixed and numbered, and the different carriers assigned to their places, for the sole purpose of accommodating the traveling public in coming to and departing from the depot, and to prevent quarrels among the hackmen as to place, and the annoyance occasioned thereby. Before these rules were adopted it appears that the hackmen came there with their vehicles at all times of the day; sometimes left their hacks to stand a half day at a time, and leaving the depot grounds so foul that in hot weather it was almost impossible for people to pass on account of the odors; and the railroad company was compelled from time to time to remove the gravel to abate the nuisance. The rules adopted were reasonable rules, and were intended by the railroad company to convenience the traveling public. They in no manner give place to one hackman to the exclusion of another, and they deprive no common carrier of necessary approach to the depot grounds to carry on his business of carrier of freight and passengers. The rules touch and affect all alike. The mere fact that the railroad company fixes and determines the place where each particular hack shall stand is not a discrimination between hackmen, but is a necessary rule to prevent quarrels for place, so often seen among hackmen around depots. There can be no doubt that the railroad company has the right and authority to make and enforce all reasonable rules to restrain hackmen from committing offenses against good order on their grounds, and to regulate their conduct while there. *Com. v. Power*, 7 Met. 596; *Markham v. Brown*, 8 N. H. 528.

It must be held that the rules adopted and heretofore set forth are reasonable, and that the court was in error in holding otherwise. Inasmuch as it appears that the defendant acted under the direction of the railroad company, and was only attempting to enforce those rules and regulations, and that he used no more force than was necessary to eject the plaintiff from the place he unlawfully attempted to occupy and hold, the court should have directed the jury to return a verdict in favor of the defendant.

The judgment of the court below must be reversed, with costs of both courts. No new trial will be ordered.

The other Justices concurred.

Rehearing denied.

INDIANA SUPREME COURT.

CITY OF WABASH, *Appt.*,

v.

EH CARVER, Admr., etc., of Joseph Carver,
Deceased.

(.....Ind.....)

1. **Attempting to cross a bridge on a public highway** which is in constant use, with a traction steam engine, water tank, and threshing machine, is not *per se* negligence as matter of law.
2. **A general averment that decedent was without fault** in an action brought to recover damages for the death of one killed by the fall of a highway bridge is not overcome by specific averments that he was attempting to cross the bridge with a traction steam engine water tank, and threshing machine, so as to render the complaint bad.
3. **A statute imposing upon the county commissioners the duty to build all highway bridges of a certain class** does not relieve the town in which one of them is located from damages for injuries resulting from the bridge being out of repair, where another statute gives cities and towns exclusive control over the bridges within their respective limits.

NOTE.—Negligence in construction and care of highway bridges.

The fact that a bridge leads up to and joins a street at the corporate line of a town does not make it a town bridge in such a sense as to relieve the county from the general duty of using reasonable care to keep it in a reasonably safe condition for passage. *Owen County v. Washington Twp.* 121 Ind. 379.

It is gross negligence on the part of a city to allow a hole to remain in a bridge on one of the principal streets for a period of from five to twenty days. *Griffin v. Johnson*, 84 Ga. 279.

Whether neglect to keep the flooring of a bridge spiked is negligence warranting recovery for damages depends upon whether bridges with unspiked floors are usually safe. *Zimmerman v. Conemaugh* (Pa.) 2 Cent. Rep. 361.

Liability for neglect to keep in safe condition.

Counties are liable for negligence in constructing bridges, where it results in injury. *Knox County v. Montgomery*, 6 West. Rep. 917, 109 Ind. 69; *Cooper v. Mills County*, 60 Iowa, 360.

Where the intention of the Legislature was to impose the duty of keeping a bridge in repair jointly upon the county and a town, both are liable for damages occasioned by a want of repairs; and the fact that the town officers have always made the necessary repairs, receiving one half of the expenses thereof from the county, does not relieve the county from its liability. *Lyman v. Hampshire County*, 1 New Eng. Rep. 227, 140 Mass. 311.

An action does not lie against a county for damages caused by neglect to repair a bridge, it not appearing that it was a toll bridge, or such a one as was built by a contractor, and that there was a failure to take the proper bond of indemnity required by such sections as were applicable to the subject. *Jackson, Ch. J.*, and *Hall, J.*, dissent. *Gwinnett County v. Dunn*, 74 Ga. 358.

A county is not liable for injury resulting from a horse becoming frightened at a plank standing upright in a bridge out of repair, with actual notice to the county, the horse not having entered the bridge, and the county not being obliged to main-

4. **A verdict for \$1,000 damages for the negligent killing of a widower seventy-three years old**, who was strong and vigorous for his age and actively engaged in business, will not be set aside as excessive although his children are all of mature years and not dependent upon him for support.

(November 17, 1891.)*

A PPEAL by defendant from a judgment of the Circuit Court for Wabash County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alvah Taylor and Harry Pettit for appellant.

Messrs. Cowgill, Shively & Cowgill for appellee.

*An opinion was handed down in this case on November 25, 1890, reversing the judgment of the court below. A rehearing was subsequently granted and the decision evidenced by the opinion given herewith was reached. [Rep.]

tain the highway in repair. *Fulton County v. Rickette*, 4 West. Rep. 492, 106 Ind. 501.

A township is liable for patent defects in a bridge which the supervisors neglected to repair; it is not liable for latent defects, unless the supervisors had knowledge of defect and time to repair. *Zimmerman v. Conemaugh* (Pa.) 2 Cent. Rep. 361.

Cities, towns and villages.

A city which constructed a bridge is liable for an injury resulting from the defective condition of one side of the bridge, although the other side is safe for travel. *Walker v. Kansas City*, 90 Mo. 647.

A public bridge within the limits, and located upon, a public highway of a city, constitutes a part of such highway so as to render the city, which has taken charge of the latter, liable to a person suffering injury or loss, without fault or negligence, in consequence of the neglect of the city to keep the bridge in repair. *Goshen v. Myers*, 119 Ind. 196.

Finding that the city has taken charge of and graded the highway is sufficient to sustain the conclusion that the city is liable for defects in the bridge. *Ibid.*

To render a town liable for a defect in or the insufficiency of a bridge, it is sufficient that the officers were in fault or guilty of a neglect of duty in not repairing the bridge, which was unsafe, and that the defect or insufficiency or want of repair was the cause of the accident or injury. *Koenig v. Arcadia*, 75 Wis. 62.

No formal acceptance by a village is required to hold it liable for the safety of a bridge within its limits. *Marseilles v. Howland*, 14 West. Rep. 564, 124 Ill. 547.

Notice of defect to fix liability.

With reference to defects in a bridge, a county should be held to know what, by the exercise of reasonable care, it might have known. *Howard County v. Legg*, 9 West. Rep. 212, 110 Ind. 479.

Counties, through their proper officers, are chargeable with knowledge of the tendency of timber to decay. *Ibid.*

Where to all appearances a stringer of a bridge, which broke, causing injury to plaintiff's horses,

McBride, J., delivered the opinion of the court:

This was a suit by the appellee, as administrator of Joseph Carver, deceased, to recover damages for his death, which was caused, it is alleged, by the actionable negligence of the appellant. The complaint charges that a certain bridge within the corporate limits of the City, "over what is known as the 'Wabash & Erie Canal,' where Miami Street in said City crosses said canal, the said street being a public highway and street of said City, and said bridge, forming a part of said street and highway, and being in almost constant and incessant use by the traveling public of said City and surrounding country in crossing said canal where the same has been erected, was suffered by said City to become and remain greatly out of repair, and in a state of decay and insufficiency for the purposes and uses for which it was erected, and dangerous for all who should pass over the same, the stringers, beams, and timbers under and supporting the floor of said bridge becoming entirely rotten, of which rotten and unsafe condition the officers of said City were informed and well knew, and by reason thereof unfit and unsafe to be traveled over; the same being allowed and suf-

fered to get into such unsafe, dangerous and rotten condition by said City and its officers by the defendant's carelessness, negligence, and the utter disregard of the safety of those who had a right to pass over the same. . . . That on said 8th day of August, 1887, the said Joseph Carver, now deceased, the personal representative of whom is this plaintiff, being then in good health, and without any knowledge of the unsafe and dangerous condition of said bridge, or that the timbers supporting the floor thereof were rotten, and without any fault, want of care, or negligence on his part whatever, and believing it was entirely safe to so do, and as he had a right to do, attempted to pass over said bridge from the north side of said canal to the south side thereof, along said street, with what is known as a 'traction steam-engine' and water-tank and threshing-machine attached thereto. And plaintiff avers that when said engine passed onto said bridge, the same being at the time conducted, guided, and managed in a prudent and careful manner, the said deceased then sitting on a seat provided and used for the purpose, and engaged in guiding and steering said engine, the timbers beneath the floor of said bridge and supporting the same, because of their neglected, decayed,

was sound upon the surface, in the absence of actual knowledge or notice to the township, the question in determining the township's liability is whether due diligence was used in discovering the defect, and as to whether the authorities neglected to do that which common prudence and caution required in order to ascertain the condition of the timber. *McKeller v. Monitor Twp.* 78 Mich. 435.

That, a short time before an accident occasioned by a defective bridge, the town authorities caused certain repairs to be made in the bridge, is evidence of sufficient notice to require them to make a thorough inspection of the structure. *Spaulding v. Sherman*, 75 Wis. 77.

Liability for injuries from fall of bridge.

An instruction in an action against a county for injuries sustained by reason of the falling of an unsound bridge, that the measure of damages is the value of the horses killed, and a sum equal to the amount of damage which the evidence shows to have immediately resulted to plaintiff's other property from the accident, and any expenses necessarily incurred by him as the natural and immediate result of the accident, correctly states the measure of damages. *Ford v. Umatilla County*, 15 Or. 313.

A town is not liable if a bridge falls because of an extraordinary rain storm, when in condition to resist an ordinary storm. *Jordan v. Hannibal*, 3 West. Rep. 795, 81 Mo. 673.

To render a municipality liable for a defect in a bridge it must have had notice or the defect must have existed so long that the municipality, by ordinary care, would have discovered the defect in time to repair it. *Ibid.*

A town is liable for negligent construction of a bridge, as well as for failure to keep it in repair. *Ibid.*

That a person drove upon a bridge at a trot, without stopping and examining it, is not evidence of contributory negligence. *Ibid.*

Not required to provide against extraordinary uses.

A township is not liable for accidents, where a bridge was built and maintained so as to protect 13 L. R. A.

against injuries likely to occur by ordinary use. It is not required to provide against extraordinary uses, as where plaintiff carried an unusually heavy load. *McCormick v. Washington Twp.* 2 Cent. Rep. 584, 112 Pa. 185; *Gregory v. Adams*, 14 Gray, 242; *Clapp v. Ellington*, 20 N. Y. S. R. 413.

Whether a traction engine used for a threshing machine with tank attached is of such unusual and extraordinary weight that no recovery can be had for injury thereto by breaking through a bridge is a question for the jury. *Clapp v. Ellington*, 20 N. Y. S. R. 413; *McCormick v. Washington*, 2 Cent. Rep. 584, 112 Pa. 185.

But by N. Y. Laws 1887, chap. 538, a town is not liable for injury in such cases to a traction engine weighing four tons or over.

A town is liable for an injury to an elephant by the breaking of a bridge while he was crossing it if the jury find that it was proper to take him across it under the circumstances. *Gregory v. Adams*, *supra*.

A county is not liable, under Ala. Code 1886, §1456, for injuries sustained by a horse which has escaped from pasture, by falling through a defective bridge, as the statute requires the bridge to be "safe for the passage of travelers and other persons." *Lee County v. Yarbrough*, 85 Ala. 590.

The owners of the bridge are not liable for injuries from breaking through it, where the load exceeds the limit established by statute. *Dexter v. Canton Tollbridge Co.* 5 New Eng. Rep. 704, 79 Me. 563.

Under a statute limiting the weight which a team may haul across a toll-bridge, the weight of the driver is included. *Ibid.*

The fact that a public bridge gives way and a traveler is injured is not of itself sufficient to charge the county, but it must appear that the authorities were guilty of actionable negligence. *Wabash County v. Pearson*, 120 Ind. 426.

On a trial for a claim for an allowance against a county for injuries sustained by falling through a defective bridge, there can be no inquiry as to the validity of the proceedings by which the board of commissioners assumed to establish the highway. *Knox County v. Montgomery*, 6 West. Rep. 917, 109 Ind. 69.

and rotten condition, broke and gave way, and precipitated said engine into said canal, catching and crushing said Joseph Carver between said engine and the water-tank attached thereto, causing and producing his instant death," etc. The complaint is in two paragraphs, which are substantially alike, except that one paragraph charges actual knowledge by the officers of the City of the defective condition of the bridge, and the other avers facts sufficient to charge them with notice, but does not charge actual notice. The circuit court overruled demurrers to each paragraph. In this the appellant insists the court erred.

The specific defect which the appellant contends makes the complaint bad is that, notwithstanding the averments that the decedent was without fault, the specific averments are sufficient to overcome this, and show that he was guilty of contributory negligence. A reference to the complaint above quoted will show that the averments of freedom from fault on the part of the decedent are much more full than are usual, and more full than required by the precedents in this State.

In the case of *Ohio & M. R. Co. v. Walker*, 113 Ind. 196-198, 12 West. Rep. 781, the court said: "It has long been the rule in this State that the general averment that the plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence." The writer of the opinion cites many authorities abundantly sustaining the rule thus stated, and, in addition, very clearly vindicates its soundness on principle. The specific averments which it is insisted control the general averments negating contributory negligence are those showing that the decedent attempted to cross the bridge with a traction steam-engine, with water-tank and threshing-machine attached. To sustain the appellee in this contention we would be obliged to hold that to attempt to cross a bridge on a public highway, which is in constant use, with a traction steam-engine, water-tank, and threshing-machine, is in itself negligence *per se*. This we cannot do. In the case of *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 9 West. Rep. 621, it is stated as a fact of which the court takes judicial notice that such engines have become familiar in every agricultural community; that they are customarily moved from place to place over the public highways; and that such use of the highways has become so common that it must be supposed that horses of ordinary gentleness have become so familiar with them as to be safe under ordinary guidance. Whether this assumption of judicial knowledge is fully justified or not need not be here considered. But it certainly cannot be true that an averment showing that the decedent was using the bridge in a manner that had become usual and common necessarily carries with it an inference of contributory negligence so strong that it overcomes all of the usual averments that he was free from fault. No other objection is made to the complaint, and we think it is clearly good. The appellant filed an answer in three paragraphs, the third paragraph of which avers that the bridge was one the construction of which cost over \$500. To this paragraph the court sustained a demurrer. This answer proceeds on the theory

that because the Statute (Elliott, Supp. § 1521; Acts 1885, p. 74) makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the State the estimated cost of which exceeds \$500, this inferentially relieves cities and towns of the duty of keeping such bridge in repair. The answer is plainly bad. Cities and towns are by statute (§§ 8161, 8867, Rev. Stat. 1881) given exclusive power and control over the streets, alleys, highways, and bridges within their respective limits. It was said by this court in the case of *Goshen v. Myers*, 119 Ind. 196, that "it was evidently the intention of the Legislature, by the passage of this Statute, to have all public bridges within the limits of the cities in the State of which they may take control, under the absolute management of the common council of such cities, and to charge them with the duty of keeping such bridges in repair." The Act of March 7, 1885, which includes section 1521, Elliott, Supp., above referred to, while it imposes the duty of construction upon the board of county commissioners in certain cases, does not purport to in any other manner interfere with the absolute control of the city over the bridges; nor does it relieve cities from the duty of keeping them in repair. In our opinion, that duty still rests upon them.

Complaint is also made that the damages assessed are excessive, and that the court erred in instructing the jury as to the measure of damages. There is some confusion in the record over the instructions given and refused, and after the appellant's original brief was filed, a writ of certiorari was awarded for the correction of the record. The corrections and changes in the record made by the return to this writ removed much that previously appeared objectionable. We deem it unnecessary to incumber the record by bringing into this opinion the instructions given and refused. A careful examination of all of them leads us to the opinion that the jury were sufficiently and correctly instructed as to the measure of damages, and that the appellant was not harmed by the refusal of the court to give any instructions asked by it. Indeed, as we understand appellant's counsel, the objection now is not so much that the court erred in giving and refusing instructions as that the jury erred in assessing damages. The decedent was about seventy-three years old, a widower, and his children were all of mature years, and none of them dependent upon him. The jury awarded \$1,000 damages. This, the appellant insists, was so excessive that the verdict should be set aside. The evidence showed that the decedent, notwithstanding his years, was strong and vigorous for his age, and actively engaged in business. In cases of this character, as said by Judge Davis in the case of *Barron v. Illinois Cent. R. Co.*, 1 Biss. 453, "there is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed." The jury are necessarily given a somewhat wide range of discretion. We cannot say that that discretion has been abused in this case, and that the damages awarded were excessive.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

Frances E. DEMAREST, by Guardian *ad Litem*, *Appt.*,

v.
Hugh J. GRANT *et al.*, *Respts.*

(.....N. Y.....)

1. **The defense of incorporation need not be pleaded in an action against defendants as individuals.**
2. **The election of nonresident directors without the passage of a by-law permitting it will not, *ipso facto*, dissolve a corporation of a State whose statutes provide that every director of its corporations must be a resident of the State unless the corporation has otherwise provided in its by-laws.**
3. **Whether or not the defense of incorporation in a foreign State, made by persons sued as individuals, is invalid, because the foreign charter was obtained by evasion of the laws either of the State of their residence or of that of their incorporation cannot be submitted to the jury as a question of fact; whether the incorporation is valid or not is a question of law.**
4. **A foreign corporation will not be held void as an evasion of the laws of the State in which all the corporators reside, and in which is the principal place of business of the company where there was no fraud or evasion of the law of the State of incorporation and the certificate of incorporation was granted by the secretary of state with knowledge of the facts.**

(October 6, 1891.)

A PPEAL by plaintiff from a judgment of the General Term of the Court of Common Pleas for the City and County of New York in favor of defendants after considering exceptions, directed to be heard by it in the first instance, to the dismissal by the trial term of the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Seaman Miller, for appellant:

The alleged West Virginia Corporation is fraudulent and void, and cannot be recognized by the courts of this State as a legally constituted corporation.

The corporation, being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence, even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 558, 10 L. ed. 298; *Wright v. Bundy*, 11 Ind. 398; *Merrick v. Van Santvoord*, 84 N. Y. 208; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 866.

Four individuals of New Jersey and one

NOTE.—On the subject of comity in respect to foreign corporations, see, in the addition to the cases discussed in the opinion, the *note* to *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 866.

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New Yorker once tried to outwit and commit a fraud upon the laws of New York and New Jersey in precisely the same way that the five persons who are the defendants in the case at bar sought to evade the laws of New York and West Virginia. It was decided that the corporation could not be recognized by any court in New Jersey as a legally constituted corporation, nor be dealt with as such.

Hill v. Beach, 12 N. J. Eq. 85.

The court erred in dismissing the complaint and in not allowing the jury to pass upon the facts.

Ridenour v. Mayo, 40 Ohio St. 13; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 866.

Messrs. W. Bourke Cockran and Wales F. Severance for respondents.

Peckham, J., delivered the opinion of the court:

The plaintiff alleged in her complaint that the defendants were a joint-stock company doing business in New York City under the name and style of "America's Winter Carnival Company." It was further alleged that they were the owners of the toboggan slides used at Fleetwood Park, in the City of New York, and that such slides were under their management and control. The plaintiff also alleged that she had, while riding on one of the toboggans upon one of the slides in the possession and management of defendants, been accidentally and seriously injured through the carelessness of defendants or their employes, and she demanded judgment for \$25,000 damages. The defendants, by answer, denied that they were a joint-stock company, and also denied the allegations that they were the owners of the toboggan slides mentioned, or that they were under their control; and they denied all allegations of negligence, either on their own part or on that of any of their employes. Upon the trial the plaintiff gave no evidence as to the defendants being a joint-stock association, but endeavored to prove a joint or partnership liability of defendants, based upon the allegation that the grounds where the accident occurred were owned by the New York Driving Club, and that in the fall of 1887 the grounds were leased by it to the defendants for the purpose of putting up these toboggan slides. The evidence tending to show even a *prima facie* liability on the part of the defendants is of the most meager character. We will assume, however, that the plaintiff proved enough to call upon the defendants for an answer to her cause of action. This answer was, in brief, that the defendants were nothing but individual members of and stockholders in an incorporated company which had hired the grounds, owned the toboggans, and operated the slides; and that whatever liability there was, if any, in favor of the plaintiff, was borne by the incorporated company, and not by the individual stockholders therein. To prove this defense the counsel for defendants offered in evidence a certificate of incorporation of the America's Winter Carnival Company, as organized under the laws of West Virginia, and at the same

time he offered the Code of West Virginia in evidence. The certificate and the Code were objected to by the plaintiff's counsel on the ground that there was no allegation in the answer of the existence of a corporation or the incorporation of the America's Winter Carnival Company, and that it was necessary to plead such fact before defendants could avail themselves of the defense. The certificate was further objected to as incompetent, immaterial, and illegal. The objections were overruled, and plaintiff's counsel duly excepted.

The first ground of objection, as to the necessity of pleading the defense founded on the incorporation, was properly overruled. It was not a defense necessary to be pleaded. It went to the root of the cause of action, and tended to show there never had been any liability on the part of defendants. It was not an affirmative defense which in substance admitted an original cause of action, but showed facts which operated as a satisfaction thereof. It was not like a defense of payment, or a release, or an accord and satisfaction. If operative, it showed there had never been any liability; and hence it was admissible under defendant's denial of any liability as set out in the complaint. The certificate, when read in evidence, showed that it was signed by the secretary of state of West Virginia, and that it was issued under the great seal of that State, and in it the secretary declared that the corporators therein named, and their successors and assigns, were from the 12th day of December, 1887, until the first day of January, 1895, a corporation by the name and for the purpose set forth in the certificate. It was subsequently proved, under objection and exception, that this company was at the time of the happening of the accident in possession of the toboggan slide in question, and was the owner thereof.

As to the second ground of objection taken by plaintiff's counsel to the introduction of the certificate,—that it was incompetent, immaterial, and illegal,—we may assume that it raises the question of the validity of the incorporation itself, and of its sufficiency as a defense. Upon this issue a few additional facts must be stated. The Code of West Virginia, which was received in evidence, shows that a corporation of the kind herein spoken of could be formed under the general laws of that State by five or more persons signing an agreement to the effect stated in the statute, and by the payment by each corporator of at least ten per cent of the par value of the stock subscribed for by him. Affidavits on the part of at least two of the corporators, stating necessary facts, were also required by the Statute. It is further therein provided that the agreement, acknowledgment, and affidavits are to be delivered to the secretary of state, and he issues to the corporators his certificate, under the great seal of the State, declaring, among other things, that they and their successors and assigns are a corporation from that date until a time therein specified. The effect of the certificate is provided for by the Statute, which says that the corporators and their successors and assigns shall, from the date of the certificate until the time designated therein, be a corporation, and the certificate shall be received as evidence of such incorporation. The Statute provides for

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the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the State, and it also provides for keeping the principal office of the corporation in any State or Territory of the United States, and it permits the corporation to adopt by-laws, and to prescribe the qualifications of directors, and, if it be not otherwise provided, every director must be a stockholder and a resident of the State of West Virginia. The certificate in question in this case embodies an agreement among five corporators, by which they agree to become a corporation by the name of "America's Winter Carnival Company," for the purpose of leasing premises for amusements,—among others, for toboggan slides; and they agree that its principal office shall be in the City of New York; and in this agreement they recite that they have subscribed a certain sum (named therein) to the capital of the company, and have paid ten per cent thereof, and that the capital so subscribed was divided into shares of \$100 each, which were held by them. The names of the corporators were signed to the agreement, and their residences were therein stated as being in the City of New York. The agreement, properly signed and acknowledged, was presented to the secretary of state of West Virginia, and a certificate of incorporation duly issued, as already stated. From the evidence it is clear, upon the question of user, that there was a person who acted as president of this company under a so-called election, although it does not appear how or when he was elected. That person was a resident of New York. There was also a person who acted as treasurer of the company, and he also resided in New York. The treasurer kept a check-book, and made disbursements for the company by check, and received what money came to it, and put it in the bank. There were no by-laws. The treasurer once had charge of the stock-book of the company, though at the time when he was sworn on the trial he did not know where it was, and he supposed the company was not then in existence. Admission to the grounds occupied and possessed by this company was charged, and the money that was paid for admission to the toboggan slides went through the treasurer's hands. No one could get in without paying toll, excepting members of the driving club. The president and vice-president were directors, as was also the treasurer and one other stockholder. This company was in possession of the toboggan slides when the accident occurred, "and no other concern or individuals or anybody else." The defendant Grant said he had stock in the company, which he paid for, and that he refused to go into the business at all unless under an incorporation. The books of the company were not produced, and it did not appear what, if any, books had been kept by it, other than the stock and check books spoken of by the treasurer.

This is substantially all that appears in regard to user by the corporation; and the counsel for plaintiff, upon this evidence, moved to strike out the certificate of incorporation, and all the testimony relating thereto, on the ground "that the directors of the concern were residents of New York, and that under the Statute of West Virginia it was necessary, in order

that the corporation be duly incorporated, that the directors of the concern should be residents of West Virginia, unless a special resolution were passed by the corporation permitting persons of any other State to be such directors." The motion was denied; and thereupon, on motion of counsel for defendants, the complaint was dismissed because no cause of action was proved against the defendants personally. There was sufficient evidence of user to make it clear that the company had accepted its charter, with all its privileges and liabilities, whatever they might be. This question of user, although not specifically taken in the above objections, has been urged upon us here by the counsel for the appellant, and we think it well enough to say what we have upon the subject. As to the other points which have been actually raised by the motion to strike out the certificate, we think a proper disposition was made of them by the court below.

By the Statute of West Virginia the incorporation precedes the election of directors. After the incorporation, and subsequent to the issuing of the certificate thereof by the secretary of state, the corporators named therein, or a majority of them, are directed by statute to appoint a time and place for holding a general meeting of the stockholders to elect directors, make by-laws, and transact other business. A failure to adopt a by-law at the first meeting, permitting the election of nonresident directors, and the election of nonresident directors at such meeting or at a subsequent one, in the absence of a by-law permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. The company would still remain a legal entity, notwithstanding its failure to adopt the proper by-law, or, in its absence, to elect resident directors. The counsel for plaintiff was therefore in error in his statement as to the law of West Virginia.

We come, then, to the question whether, upon the facts already set out, this corporation was so far valid as to be entitled to recognition as such in the courts of our State. The plaintiff says it clearly appears that the corporators thereof were citizens of New York, and the corporation was formed by them in the State of West Virginia for the sole purpose of doing business out of that State and in the State of New York, in which latter State its principal office was also to be located. These facts, he says, conclusively prove the invalidity of the West Virginia corporation, so far at least as this State and its citizens are concerned. If mistaken in that view, he still urges that such facts render it a question for the determination of the jury whether the incorporation was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York. He claims, if the jury should find the purpose was one of evasion, that in such case the incorporation would furnish no defense, and the defendants would be liable as individuals. We are quite clear the case should not be submitted to a jury to pass upon the question of evasion as matter of fact. If it were, we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation according to the view a jury might

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take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or as to none. In other words, it must be a question of law, instead of fact. The courts of any country recognize foreign corporations through what is termed "national or state comity" (*Merrick v. Van Santvoord*, 34 N. Y. 203; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Christian Union v. Yount*, 101 U. S. 852, 25 L. ed. 886); but whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our State, as in others, it is a question of domestic policy, and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it; and in its absence we must determine the question with reference to our general legislation, and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital, and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recognition by our courts foreign corporations generally. It may be safely said there can be no such domestic policy at the present day in a civilized State. The question then arises, Shall we go behind the certificate of incorporation or charter of a foreign corporation for the purpose of inquiring under what circumstances, and for what purpose outside the charter, it was incorporated? This can only be claimed on the ground that the charter was obtained in fraud or evasion of the laws of the State which granted it, or for the purpose of evading the provisions of our own laws. It is plain there was in regard to the procurement of this charter no fraud upon or evasion of the laws of West Virginia, even if we should admit that such fact would constitute good ground for our refusal to recognize such corporation, although no proceedings had been taken to annul its charter in the State which granted it. This point is by no means clear. However that may be, it is impossible not to see that the State of West Virginia has adopted a policy which favors the formation of corporations within her borders, and pursuant to her laws, while the members and officers may be nonresidents, and where the principal business of the corporation is to be performed outside of the confines of the State.

The agreement which was signed by the corporators in this case, and duly acknowledged and presented to the secretary of state of West Virginia, clearly showed that the corporators were residents of New York, and that the principal office of the corporation was to be in New York; and the inference was a fair one

that the principal business of the corporation was also to be conducted in New York. The secretary of state, to whom the papers for the organization of the corporation were presented, was compelled to pass upon and decide the question whether they conformed to the laws of West Virginia, before he received or filed them, or gave the certificate of incorporation. He did pass upon the question and did thereupon issue the certificate of incorporation under the great seal of the State, and attested by his official signature. So far as the laws of West Virginia are concerned, it is plain that the incorporators thereupon became a corporation, and in that State the certificate was, by the laws thereof, evidence of the existence of such corporation. There was no fraud or evasion of the law of West Virginia in thus becoming incorporated. The references to her laws above made show conclusively that the formation of corporations thus composed, and for the purpose of doing their principal business outside the limits of that State, was contemplated in those laws. This corporation was beyond all question legally incorporated, and entitled to recognition, in the State of West Virginia. Unless, therefore, it can be said that the acts of our citizens in procuring an incorporation under the laws of West Virginia for the purpose of doing business here were, as matter of law, a fraud and an evasion of our own laws, and hence in conflict or inconsistent with our domestic policy, such foreign corporation is entitled to recognition and protection in our own tribunals. *Merrick v. Van Santvoord, supra.*

It is urged that such acts are thus inconsistent and in conflict with our policy, because citizens of our own State are in that way enabled to evade our own laws relative to home corporations, and to avoid personal liability by incorporating under the laws of foreign States, which may be more favorable to members than are our own laws. I think, when this claim is examined in the light of our own legislation, it will be seen that there is no substantial basis for it to rest upon. An examination of our laws shows that it is, and for many years has been, the policy of this State to enlarge the facilities for the formation of corporations. General laws are on our statute-book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in this case could readily be formed. The freedom from personal liability would be as great, and could be as easily attained, under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment, and he can obtain about as easy access to its property as if it were domestic instead of foreign. There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how

the terms "evasion" and "fraud" can be properly applied to acts of our citizens whereby they obtain incorporation in another State. When they come into our State to do business, they must conform to our laws relating to foreign corporations, and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws; and, if there be any kind where none is imposed, it is conclusive evidence that up to this time the Legislature has not thought it conducive to the true interests of the State and its citizens to impose them. I do not intimate that it is necessary for a State to expressly, by statute, exclude foreign corporations from acting within its jurisdiction. The policy of the State may exclude them, and that policy may be clearly established by a reference to the general legislation of a State. I find none such in the laws of this State.

It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another State for the purpose of incorporating themselves under the laws thereof, to do business in our own State as such corporation. We think there is very little force in the argument. The public policy which we see in our own State, as evidenced by her laws upon the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital, and an exemption from personal liability to the largest extent consistent with reasonable supervision by the State. The facilities for incorporation offered by this State are not the result of any desire to promote the formation of corporations here as against their formation in other States. They are offered because of a policy on our part which urges upon the State the propriety of furnishing them as one means of controlling the business done by them, and keeping it within our borders. If, in any particular case, it is thought by those interested in the matter that the business can be done in our own State and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this State may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the Legislature to say whether any, and, if so, what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the Legislature; and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this State and do business here. The courts cannot themselves impose terms or conditions.

The case of *Montgomery v. Forbes*, 148 Mass. 249, is not necessarily in conflict with these views. In that case, the defendant, a resident of Massachusetts, went to New Hampshire, and there executed and filed certain papers, for the purpose of forming a corporation in that State, for the reason that its tax laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business was to continue to be done in Massachusetts, and these steps were taken in order to avoid the laws of that State. The court held that the defendant had not complied with the terms of the New Hampshire Act, and hence had never become incorporated. There was no tribunal in New Hampshire to which the papers in regard to a proposed corporation could be submitted, and which had power to decide whether the law had been complied with, and, upon compliance to issue a certificate of incorporation. But all persons filed their papers at their peril. If the question ever arose as to a compliance with the law, it had to be decided by comparing the papers with the Statute. The Massachusetts court did that, and decided that the defendant did not comply with the New Hampshire Statute, and that no corporation had ever been formed. In *Hill v. Beach*, 12 N. J. Eq. 31, the court of chancery of New Jersey, in a proceeding for an accounting, said that certain persons who had entered into an agreement with a view to form a company to do business in New Jersey, and who thereupon undertook to form themselves into a corporation under the General Act of this State relative to the formation of manufacturing corporations, passed in 1848, and who complied with the forms of such Act, would nevertheless not be recognized by the courts of New Jersey as a legally constituted corporation. The chancellor said they were not a foreign corporation, "for it is perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York respecting corporations was a fraud upon the laws of that State." In what respect it was a fraud does not appear unless it were one because the corporators were residents of New Jersey, and intended to do business in that State under the New York incorporation. From what has already been said, we do not think those facts make out a case for a refusal to recognize a corporation legally constituted and existing in the foreign State.

We recognize corporations formed by the citizens of a foreign State under its laws for the purpose of doing business, among other places in our own State. Where is the essential difference between such a corporation and one legally incorporated under such foreign State for the same purpose, but the members of which are citizens of our own State? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign State? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this State which would not also and equally suffer by the rec-

ognition thereof when composed of nonresidents? And yet, beyond all cavil, our policy is to recognize the latter. The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our State, and composed of citizens of the foreign State, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a State should at least deal as liberally with its own citizens as with those of foreign States. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here, and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?

The case of *Land Grant R. & T. Co. v. Coffey Co. Comrs.*, 6 Kan. 245, simply holds that the courts of that State will not recognize a corporation formed under the laws of Pennsylvania, where the corporation is not itself permitted to do business in the State which grants its charter. It was also stated in the above case that the charter, if enacted by the Kansas Legislature, would have been void as contravening two constitutional provisions. In such a case it would scarcely be expected that a foreign State would grant greater recognition and privileges than were accorded by the State under which the corporation was formed. It might readily be supposed that no rule of comity compelled the recognition of a foreign corporation formed to do acts which are prohibited by the laws of the State to its own citizens or corporations. It is upon this principle that *Empire Mills v. Gaston Grocery Co.* was decided by the Court of Appeals of Texas, and reported in 12 L. R. A. 366, and to which our attention has been called. The Legislature of Texas prohibited the operation of corporations in that State of the character of the Iowa corporation, and the court held that comity did not extend to the recognition of such a corporation by the courts of Texas.

After a careful examination of the case, we have come to the conclusion that the defendants sufficiently proved the existence of a valid corporation under the laws of West Virginia, and that there was nothing in the other facts proved which should cause us to refuse recognition of that corporation.

The result is that *the complaint was properly dismissed, and the judgment to that effect should be affirmed with costs.*

All concur, except *Finch, J.*, absent.

MISSISSIPPI SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Appt.,
v.
W. H. ROGERS.

(..... Miss.)

Mental suffering alone, unaccompanied by physical injury, will not support an award of damages against a telegraph company for mere negligent failure to promptly deliver a message.

(May 25, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Lauderdale County in favor of plaintiff in an action brought to recover damages for the alleged negligent failure of defendant to promptly deliver a telegraph message. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. W. P. & J. B. Harris*, for appellant:

Mental suffering is not readily distinguishable from physical suffering and to become an element of damages it must be based on bodily injury or the injury by which it is produced

must be attended by circumstances of malice, insult, or oppression.

Dorrah v. Illinois Cent. R. Co. 65 Miss. 14.

The fact that in Texas, Tennessee, and Kentucky a rule different from the one which prevails in this State has been applied in suits in which telegraph companies are parties misleads some lawyers into the belief that a different or special rule applies in telegraph cases. This view is not sound.

The rule in the *Dorrah Case*, *supra*, is applied in telegraph cases.

See *Logan v. Western U. Tele. Co.* 84 Ill. 468; *Western U. Tele. Co. v. Hamilton*, 50 Ind. 185; *Russell v. Western U. Tele. Co.* 3 Dak. 815; *Chase v. Western U. Tele. Co.* 44 Fed. Rep. 551; *West v. Western U. Tele. Co.* 89 Kan. 93; *Thompson v. Western U. Tele. Co.* 106 N. C. 549.

See also, on the general subject of mental anguish as element of damages—

Wyman v. Leavitt, 71 Me. 227; *Salina v. Trooper*, 27 Kan. 544; *Joch v. Dankwardt*, 85 Ill. 331; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23; *Boece v. Danville*, 53 Vt. 190, 7 Am. & Eng. Encyclop. Law, p. 42, note 2, p. 449, note 2; Grey, Communication by Telegraph, p. 147.

NOTE.—Damages for mental anguish alone not recoverable.

The authorities bearing upon this proposition have been fully collated in a note to *Western U. Tele. Co. v. Brown* (Tex.) 2 L. R. A. 766. The conclusions outlined in that case fully sustain the decision reached in the case under review. See generally on this subject Wood's Mayne, Dam. 1st Am. ed. 54, note.

The authorities fully sustain the conclusions of the principal case and hold that where no physical injury is shown, mere mental anguish is not entitled to consideration in estimating the amount of damage. *Johnson v. Wells, Fargo & Co.* 6 Nev. 224; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 238; *Stone v. Evans*, 32 Minn. 243; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Hyatt v. Adams*, 16 Mich. 180; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 598; *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443; *Salina v. Trooper*, 27 Kan. 564.

It should be borne in mind, however, that the rule of damages is not the same where the action is for a breach of contract as for a tort. In the case of wrongs, the jury are permitted to consider injury to feelings and many other matters which have no place in questions of damages for a breach of contract. *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342.

The contract to marry, in which injury to feelings may be considered, stands, according to all the authorities, upon peculiar and exceptional grounds. But, "in actions for breaches of contract, the damages must be such as are capable of being appreciated or estimated." *Pollock, C. B. in Hamlin v. Great Northern R. Co.* 1 Hurlst. & N. 408-411.

Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of the contract, but not 18 L. R. A.

damages for the disappointment of mind occasioned by the breach of the contract. *Ibid.*

The rule almost uniformly laid down by the courts of England and the United States is to the effect that only the pecuniary loss sustained can be compensated for, and that no compensation can be given for the mental anguish or suffering of the heirs or next of kin of the deceased. We cite only a few of the many authorities that might be cited on this point: 3 Suth. Dam. 231, 232, and cases; 2 Rorer Railroads, 345, 361, 382, 1167, and cases; 3 Lawson, Rights, Rem. & Pr. 1729, and cases; 3 Wood, Railway Law, 1536-1538, and cases; Whittaker's Smith, Neg. 434, and cases; Wood's Mayne, Dam. 74; Gulf, C. & S. F. R. Co. v. Levy, 50 Tex. 542, 12 Am. & Eng. R. R. Cas. 90; Baltimore & O. R. Co. v. Hauer, 60 Md. 449, 12 Am. & Eng. R. R. Cas. 154; Lett v. St. Lawrence & O. R. Co. 11 Ont. App. 1, 21 Am. & Eng. R. R. Cas. 165; Holmes v. Oregon & C. R. Co. 6 Sawy. 232; Donaldson v. Mississippi & M. R. Co. 18 Iowa, 230; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Field, Dam. § 630.

The term "pecuniary loss."

The word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children. *Tilley v. Hudson River R. Co.* 29 N. Y. 287.

It may include the loss of expected services of children who at the time of their death are too young to render any service (*Ihl v. Forty-second St. & G. St. Ferry R. Co.* 47 N. Y. 317), or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown render it probable it will be rendered. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90, 18 L. ed. 591.

When the text-writers come to treat of the subject of mental anguish or wounded feelings as an element of damages it is generally in connection with exemplary or punitive damages.

See Field, Dam. §§ 26, 73; Sedgw. Damages, p. 654, note 1; 1 Suth. Dam. pp. 156, 782, 786; Shearm. & Redf. Neg.; Grey, Communication by Telegraph, p. 147.

Mr. Lawson's statements in "Rights, Remedies, and Practice," vol. 4, § 1970, that "in the federal courts it has been held that a husband may recover for disappointment and anguish caused by his being unable to be present at his wife's death-bed owing to the failure of the company to deliver a message," is misleading in that it is based on *Beasley v. Western U. Tele. Co.*, 89 Fed. Rep. 181, which is a Texas case and of no more value than any other Texas case.

See *Chase v. Western U. Tele. Co.* 44 Fed. Rep. 554.

The rule announced in *Dorrah v. Illinois Cent. R. Co.* is the rule, so far as we have been able to ascertain, in England and in the United States, except in Texas, Kentucky, and probably in Tennessee.

The Texas cases are conflicting and it must be said that the courts of that State have as yet arrived at no satisfactory or fixed rule.

4 Lawson, Rights, Rem. & Pr. § 1969.

It may include the loss of the society of a near relative (*Beeson v. Green Mountain Min. Co.* 57 Cal. 20), and may include damages for the loss of the father by children who are of full age living away from the home of the deceased and supporting themselves. *Lockwood v. New York, L. E. & W. R. Co.* 98 N. Y. 523.

A distinction noted.

The mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury. The mental anguish, like physical pain, to be taken into consideration in such cases, is confined to such as is endured by the plaintiff in consequence of a personal injury to himself. 2 Thomp. Neg. 1258, notes 4, 5; 1 Sedgw. Dam. 7th ed. 47, note a; 2 Sedgw. Dam. 543.

Review of the dissenting opinions.

It is pertinent to note, in this connection, that in several jurisdictions a contrary rule obtains, and the doctrine of the principal case is repudiated. The supreme courts of Alabama, Indiana, Kentucky, North Carolina, Tennessee and Texas have distinctly affirmed the right to recover damages against a telegraph company for failure to transmit and deliver a message, where the only element of damage was mental anguish, and where there was an entire absence of either physical suffering or pecuniary loss. *Western U. Tele. Co. v. Henderson*, 89 Ala. 510; *Reese v. Western U. Tele. Co.* 7 L. R. A. 583, 123 Ind. 294; *Chapman v. Western U. Tele. Co.* (Ky.) 30 Am. & Eng. Corp. Cas. 626; *Thompson v. Western U. Tele. Co.* 107 N. C. 449; *Young v. Western U. Tele. Co.* 9 L. R. A. 689, 107 N. C. 370; *Thompson v. Western U. Tele. Co.* 106 N. C. 549; *Wadsworth v. Western U. Tele. Co.* 88 Tenn. 696; *Stuart v. Western U. Tele. Co.* 66 Tex. 580; *Gulf, C. & S. F. R. Co. v. Wilson*, 60 Tex. 739; *Western U. Tele. Co. v. Cooper*, 1 L. R. A. 723, 71 Tex. 507; *Western U. Tele. Co. v. Broesche*, 72 Tex. 654; *Western U. Tele. Co. v. Simpson*, 73 Tex. 423; *Western U. Tele. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 531; *Beasley v. Western U. Tele. Co.* 89 Fed. Rep. 181.

The court in Tennessee was divided and we submit that the better reason is with the dissenting judge.

See *Wadsworth v. Western U. Tele. Co.* 86 Tenn. 695.

Western U. Tele. Co. v. Henderson, 89 Ala. 510, is distinguishable.

Chapman v. Western U. Tele. Co. (Ky.) 30 Am. & Eng. Corp. Cas. 626, is a clear departure and goes even beyond the Texas rule.

Fright, the most terrible of all mental disturbances, is not a cause of action.

Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222.

Mental suffering can be neither proved nor disproved.

Stowe v. Heywood, 7 Allen, 118. See *Whittaker's Smith*, Neg. p. 432.

Sutherland, in speaking of mental suffering as legal damages, gives as an exception to the general rule the case of breach of marriage promise as the case where it is allowed in suits on contracts (vol. 1, p. 156), and for all other cases into which it is allowed to enter, he refers us to cases of willful wrong.

1 Suth. Dam. pp. 782 *et seq.*, citing *Stowe v. Heywood*, *supra*; *Phillips v. Hoyle*, 4 Gray, 568; *Callin v. Ware*, 9 Mass. 218; *Fillebrown v. Hoar*, 124 Mass. 580.

There are cases making an exception to the general rule and extending the influence of

Co. v. Adams, 6 L. R. A. 844, 75 Tex. 531; *Beasley v. Western U. Tele. Co.* 89 Fed. Rep. 181.

And in *Larson v. Chase*, not reported, it is said that where a wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for if it is the direct, proximate and natural result of the wrongful act.

Mental anguish not considered in actions for injuries causing death.

Mental suffering and loss of society are not generally elements of damages in an action for injuries causing death. *Little Rock & Ft. S. R. Co. v. Barker*, 83 Ark. 330; *Kansas Pac. R. Co. v. Miller*, 3 Colo. 442; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280; *Chicago, B. & Q. R. Co. v. Harwood*, 89 Ill. 88; *Nashville & C. R. Co. v. Stevens*, 9 Heisk. 12; *State v. Baltimore & O. R. Co.* 24 Md. 84; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 393; *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *Huntingdon & B. T. R. Co. v. Decker*, 84 Pa. 419; *Hartford County Comrs. v. Hamilton*, 60 Md. 340; *Kesler v. Smith*, 66 N. C. 164; *March v. Walker*, 48 Tex. 372; *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587; *Brady v. Chicago, 4 Biss. 448*; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Whittaker's Smith*, Neg. 434, note.

And neither the pain and suffering of the deceased nor the grief and wounded feelings of his surviving relatives can be taken into account in the estimate of damages. But as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered. 3 Suth. Dam. 232, citing *Blake v. Midland R. Co.* 18 Q. B. 98; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 398; *Telfer v. Northern R. Co.* 39 N. J. L. 188; *Taylor v. Western Pac. R. Co.* 45 Cal. 323; *Castello v. Landwehr*, 23 Wis. 522; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 393; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Chicago, B. & Q. R. Co. v. Harwood*, 89 Ill. 88; *Pym v. Great Northern R. Co.* 4 Beas. & S. 399; *Chicago v. Scholten*, 75 Ill. 486; *Johnston v. Cleveland & T. R. Co.* 7 Ohio St. 394. See notes to *Western U. Tele. Co. v. Brown* (Tex.) 2 L. R. A. 766; *Chicago v. McLean* (Ill.) 5 L. R. A. 766.

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mental suffering on the amount of damages to instances of bodily hurt not occasioned by willful wrong where the suffering springs from the hurt.

See Sedgw. Dam. p. 145, note 1.

Mr. Woods' note to Mayne on Damages, pp. 73, 74, contains a very clear and accurate statement of the condition of the law.

Dorrah v. Illinois Cent. R. Co. 65 Miss. 17; *Wyman v. Leavitt*, 71 Me. 227; *Bovee v. Danville*, 53 Vt. 190; *Canning v. Williamstown*, 1 Cush. 451; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147; *Johnson v. Wells, Fargo & Co.* 6 Nev. 324; *Russell v. Western U. Telegr. Co.* 8 Dak. 315; Grey, Communication by Telegraph, p. 147; *Owen v. Henman*, 1 Watts & S. 548.

Messrs. Witherspoon & Witherspoon for appellee.

Cooper, J., delivered the opinion of the court:

A telegram was sent from Chattanooga, Tenn., to the plaintiff, who resides at Meridian, informing him of the death of his brother, and the time and place at which he would be buried. If this dispatch had been seasonably delivered, the plaintiff could and would have attended the burial. By negligence of the agent of the defendant Company at Meridian, it was not delivered until after the last train had left Meridian for Chattanooga, by which the plaintiff could have traveled to attend the funeral services. This suit was brought to recover the damages sustained by the plaintiff by reason of the non-delivery of the message. The facts are undisputed. They are that the message was sent and its transmission paid for by the sender; that it was by the negligence of the agent not delivered; that the plaintiff sustained no pecuniary loss, his damages being merely nominal, unless he is entitled to recover for the disappointment of not being informed of the death of his brother in time to attend his burial. The court below instructed the jury that the plaintiff was entitled to recover as compensation damages for the mental suffering sustained by him by reason of being deprived of the privilege of attending the funeral of his brother, it being conceded that no such negligence was shown as would warrant the infliction of punitive damages. The jury returned a verdict for \$800, and from a judgment thereon the defendant appeals. It thus appears that the single question presented is whether, under the circumstances named, damages for mental suffering may be recovered. It is immaterial, in the determination of the question involved, whether the action be considered as one for the breach of the contract to transmit and deliver the message, or as an action on the case for the tort in failing to perform the duty devolved on the telegraph company under the contract. The substance and nature of the default and the consequent injury are the same in either view, and, in the absence of circumstances warranting the imposition of punitive damages, the measure of damages must be the same, whatever be the form of the action. We have given to the investigation of the question that consideration which its importance demands, and, though the right of the plaintiff

to recover the damages awarded in this case finds support in the decisions of several of the States, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; but it is equally true that until recent years this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort, and, though the damages recoverable by the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitive. *Harrison v. Swift*, 13 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; *Thorn v. Knapp*, 42 N. Y. 475; *Johnson v. Jenkins*, 24 N. Y. 252; *Coryell v. Colbaugh*, 1 N. J. L. 77.

So much, indeed, does the motive of the defendant enter into the question of damages that in *Johnson v. Jenkins* he was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health. Some of the text-writers upon the subject of damages, notably Sutherland, (vol. 1, p. 156,) assuming that the action for breach of contract of marriage is not of an exceptional character, accept the measure of damages therein applied as appropriate in all actions for breach of contract where the losses sustained are not, by reason of the nature of the transaction, of a pecuniary nature. The authorities cited by Sutherland other than those in actions for breach of contract of marriage are *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111; *Ward v. Smith*, 11 Price, 19; *Williams v. Vanderbilt*, 28 N. Y. 217, and *Jones v. The Cortes*, 17 Cal. 487. The first of these cases decides only that a passenger who, with his wife and two small children, were negligently disembarked by a railway at a point four miles from his destination, on a rainy night, might recover for the inconvenience of having to walk that distance, he being unable to secure a conveyance. In *Ward v. Smith* the damages recovered were for a pecuniary loss. *Jones v. The Cortes* was a case of willful wrong and fraud. In *Williams v. Vanderbilt*, which was an action of tort for breach of duty, the defendant had agreed to transport the plaintiff from New York to San Francisco via Nicaragua. The defendant's vessel, sailing from the Isthmus to San Francisco, was lost at sea, and he negligently omitted to supply transportation over that part of the journey. The result was that the plaintiff was exposed to disease peculiar to the Isthmus, which he contracted, and was eventually compelled to return to New York. It was held that the plaintiff was entitled to recover for loss of time occasioned by and expenses of his sickness; the court saying: "If one of plaintiff's limbs had been broken, through the carelessness of the agents or servants of the defendant

it is settled that he could have recovered the expenses of the sickness occasioned thereby, and for the consequent loss of time, and also compensation for the bodily pain and suffering caused by such breaking of the limb. The principle on which a recovery, in such case, is allowed for bodily pain and suffering, loss of time and expenses, sustains the recovery in this case for the plaintiff's loss of time and loss of health, and his expenses during his sickness." It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from physical injury, furnish a substantive cause of action for which recovery may be had.

The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted, and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must, from the nature of things, be purely speculative and uncertain. In 1881, in the case of *So Relle v. Western U. Teleg. Co.* 55 Tex. 808, the Supreme Court of Texas, relying upon the authority of two previous decisions in that State (*Hays v. Houston & G. N. R. Co.* 46 Tex. 279, and *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261) in one of which an assault and battery had been committed on the passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of Shearman & Redfield on Negligence, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by reason of which default he was not informed of her death and failed to attend her funeral. This decision has been since overruled, upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly reaffirmed. *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 563; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580; *McAllen v. Western U. Teleg. Co.* 70 Tex. 248; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728; *Loper v. Western U. Teleg. Co.* 70 Tex. 689; *Western U. Teleg. Co. v. Simpson*, 78 Tex. 422; *Western U. Teleg. Co. v. Adams*, 75 Tex. 587, 6 L. R. A. 844; *Western U. Teleg. Co. v. Heegles*, 75 Tex. 587; *Western U. Teleg. Co. v. Moore*, 76 Tex. 67; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 651.

The courts of Alabama, Tennessee, Indiana and Kentucky have followed the Supreme Court of Texas, relying upon the decisions above noted as authority. *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; *Wadsworth v. West-* 18 L. R. A.

ern U. Teleg. Co. 86 Tenn. 695; *Reese v. Western U. Teleg. Co.* 128 Ind. 295, 7 L. R. A. 563; *Chapman v. Western U. Teleg. Co.* (Ky.) 80 Am. & Eng. Corp. Cas. 626. These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other States nor those of England.

In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is that the jury may, and since it is impossible to draw the line between physical pain and mental suffering in such instances, must, give damages for both. Expressions used by the courts as argument or illustration in those cases, in which damages for mental suffering are recoverable because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages. Damages for mental suffering have been very generally allowed in three classes of cases: (1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party. The decisions in Texas, Tennessee, Kentucky, Indiana, and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not in our opinion sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the *Case of So Relle*, in which an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the *So Relle Case* the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident, resulting from negligence by which bodily injury was sustained, was properly considered by the jury in awarding damages. *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Cooper v. Mullins*, 30 Ga. 146; *Canning v. Williamstown*, 1 Cush. 451. But where there

is no bodily injury damages for fright should not be given. *Canning v. Williamstown, supra; Victorian R. Comrs. v. Coultas*, L. R. 18 App. Cas. 222; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 577, 598.

In *Flemming v. Smithers*, 2 Car. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings, but the claim was rejected. We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. "Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." *Lynch v. Knight*, 9 H. L. Cas. 577.

The rapid multiplication of cases of this character in the State of Texas since the *Case of So Relle* indicates, to some extent, the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In *So Relle's Case* it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 564, that case was overruled, in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, where the husband had sent the dispatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental suffering caused by the negligence of the company in failing to deliver the message, but that, suing in right of his wife (who was not a party to the contract with the company), he might recover for her mental suffering. It is held in that State that the telegraph company must be informed, either by the face of the message or by extraneous notice, of the relationship of the parties and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate

these facts, "Willie died yesterday at six o'clock; will be buried at Marshall, Sunday evening" (*Western U. Teleg. Co. v. Brown*, 71 Tex. 728), while the following one did, "Billy is very low; come at once" (*Western U. Teleg. Co. v. Moore*, 76 Tex. 66). And a distinction seems to be drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering and failing to deliver one which, if delivered, would relieve such suffering.

In *Roswell v. Western U. Teleg. Co.*, 75 Tex. 26, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently a dispatch was sent containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: "The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injury to feelings in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation." The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the *So Relle Case*. Kentucky, Tennessee, Indiana and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The "intolerable litigation" invited and appearing in Texas has not yet fairly commenced in those States. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of opinion that no recovery for mental suffering can be had under the circumstances of this case. *Dorrah v. Illinois Cent. R. Co.* 65 Miss. 14; *Salina v. Trooper*, 27 Kan. 544; *West v. Western U. Teleg. Co.* 39 Kan. 98; *Russell v. Western U. Teleg. Co.* 3 Dak. 815; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 577; *Victorian R. Comrs. v. Coultas*, L. R. 18 App. Cas. 222; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 813; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224; 2 Greenl. Ev. § 268; *Wood's Mayne*, Dam. 73.

Reversed and remanded.

ILLINOIS SUPREME COURT.

Vladimir CERVENY, *Appt.*,
v.
CHICAGO DAILY NEWS CO.

(.....Ill.....)

Falsely publishing that a person is an "anarchist" is libelous.

(October 31, 1891.)

APPPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Jones & Lusk* for appellant.

Mr. John J. Knickerbocker for appellee.

Per Curiam:

The demurrer admits all such facts alleged in the declaration as are well pleaded. Gould, Pl. chap. 9, § 4. The declaration here alleges with sufficient legal precision, that the defendant falsely and maliciously published of the plaintiff language, which is literally transcribed in the declaration, charging that the plaintiff is an "anarchist." An "anarchist" is defined by Webster to be: "An anarchy; one who excites revolt, or promotes disorder in a State," and this we assume to be a sufficiently accurate definition of the word. It is, moreover, here alleged that, at the time and place of the publication complained of, it was commonly understood and believed that "the doctrines, opinions, beliefs, teachings, and tenets of said class, party, or sect called 'Anarchists,' as aforesaid, and of the persons composing said class, party, or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force." It cannot therefore be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that

which is the best. It seems to have been assumed, in the courts below, that it is not libelous to publish, falsely and maliciously, that one entertains principles merely which if carried into practice would be violative of law and destructive of all government and of every right secured by it. It may for the present be conceded that an action would not lie for slander because of the speaking of words, orally only, which would amount to such a charge against an individual; but the rule in regard to libel is different. An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words spoken would not have been actionable. Folkard, Starkie, Slander & Libel, §§ 155, 156; Newell, Defamation, p. 78 *et seq.*; Hare & W. Lead. Cas. 181; 3 Am. & Eng. Encyclop. Law, 298, and cases cited in *notes*. And it would seem so apparent that an individual may be brought into hatred, contempt, or ridicule, within the meaning of the law, by professing vicious, degrading, or absurd principles, and especially by professing them and also confederating with others, alike professing them, to give them effect, that it can need no discussion. The following cases may, however, be referred to as illustrative of the correctness of this view of the law: *Hoare v. Silverlock*, 12 Q. B. 624; *Wakley v. Healey*, 7 C. B. 591; *Williams v. Karnes*, 4 Humph. 9; *Duncan v. Brown*, 15 B. Mon. 186; *Stow v. Converse*, 8 Conn. 325, 8 Am. Dec. 189; *Giles v. State*, 6 Ga. 276.

Since government is the only guaranty we can have for protection in the enjoyment of life, and of all that makes life desirable, it is inevitable that all good citizens must regard those who advocate its destruction either with feelings of hatred or contempt, in the same measure that they may regard them as powerful or impotent to carry out what they advocate. And admitting, therefore, as this demurrer does, that this publication was made falsely and maliciously, as set out in the declaration, we cannot escape the conclusion that it is libelous. The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court, with directions to that court to overrule the demurrer to the declaration, and allow the defendant to answer over if it shall so desire; and thereupon to proceed *de novo*.

Judgment reversed, and cause remanded.

NOTE.—For note on libelous publications, see *Morey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. 621.

13 L. R. A.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress and Development of the Law during the First Quarter of the Judicial Year Beginning with Oct. 1, 1891, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL STATUS OR CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Elections.

The growing importance of ballot reform gives interest to cases on the new Ballot Acts of the different States. A case deciding among other things several important questions as to the validity of ballots with printing "offsets," grease spots, etc., on the backs also decides that the use of red ink or an indelible pencil substantially complies with an Act requiring erasures, etc., to be made with a lead pencil or common writing ink. It also decided that merely erasing a name is of no effect without substituting another or writing the words "no vote." (Cal.) 761.

Another ballot-law decision holds that the party name on the ballot may be sufficiently shown in a vignette without making the name a separate heading. Also that both tickets made by division of a split convention are to be put on the ballots as presented by the respective committees without any decision by the election commissioners as to their regularity or any addition to the party name thereon. (Mich.) 760.

A ballot reform Act which does not prevent an elector from casting his vote fairly does not interfere with his privileges or immunities, and the requirement that he place a mark opposite the name of the candidate does not impose an educational qualification within a constitutional prohibition. (Tenn.) 183.

Adjournment of an election contest beyond the time limited by statute absolutely discontinues it, even if both parties consent to proceed. (Ind.) 40.

The twenty days limited for an election contest by Indiana Statutes begins to run as soon as the board has convened and organized, although the trial is not begun. *Id.*

Appropriations.

A provision in an Appropriation Act that the salary for a certain office shall be paid to a certain person named, and none other, and a statute providing a penalty for paying it to any other person than the one named, are absolutely void as attempts to exercise judicial powers 18 L. R. A.

by declaring who is the legal officer entitled to the salary. (Ind.) 177.

The rule that a specified appropriation is necessary in order to draw money from the state treasury is applied in respect to the payment of secretary, stenographer and officers of the Senate during the sitting of the Senate for an impeachment trial. (Kan.) 222.

The sufficiency of an appropriation is considered by an Indiana case which also decides that the sum appropriated for a soldiers' and sailors' monument must all be expended for the structural work and not for incidental expenses. (Ind.) 169.

Harbor Lines.

The power of a city under its charter to establish harbor lines extends to subsequent alterations of the lines as proper occasion may require by the establishment of new ones. (Conn.) 590.

Electric Light Company.

The validity of a license to an electric light company to use streets is upheld in an Indiana case against various objections, and it is also held that notice of proposals for a contract for such lights need not be given unless required by statute where payment is to be made from the corporation treasury. (Ind.) 647.

Municipal Debt.

The distinction sometimes recognized between debts of a county created for necessary purposes or under statutory obligation, and other debts, in respect to the constitutional limitation of indebtedness, is denied by the Supreme Court of Missouri, which holds that such limitation extends to debts of all kinds. (Mo.) 244.

Monopoly of Water Supply.

An exclusive right to supply a city with water for a term of years cannot be given to a water company by the city. (Tex.) 383.

Boards of Health.

The authority of county boards of health in Florida is exhaustively discussed by a case which denies that they have any authority to

collect fees for fumigation or disinfection of vessels which are not subject to quarantine. (Fla.) 549.

Railroad Aid Bonds.

False representations to induce persons to sign a petition for an election to issue railway bonds may be shown as a ground of enjoining the issue of the bonds. (Neb.) 811.

Interstate Commerce.

A state statute prohibiting freight trains from running on Sunday between sunrise and sunset except with live-stock or perishable freight, or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce so far as it applies to interstate freight trains. (Va.) 107.

An interesting illustration of a regulation indirectly affecting interstate commerce, but not constituting an unlawful regulation thereof, is a statute prohibiting game birds to be killed for the purpose of conveying them out of the State. (Conn.) 804.

But the Game Laws of a State can give no authority to take carcasses of animals or parts thereof while in the course of transportation away from a common carrier on the ground that the animals have been killed in violation of such laws. (Me.) 83.

It is an unconstitutional regulation of commerce for a state statute to require a carrier to remove a poor person without a settlement in the State whom the carrier has brought into the State. (Me.) 686.

Eminent Domain.

The taking of property without due compensation does not apply to the mere depreciation in value of the lot of an abutting owner who does not own the street, on account of the construction of a railroad in the street where there is no actual invasion or physical interference with his premises or access thereto. (Md.) 126.

The right to appropriate for public use land which has already been appropriated is upheld in case of a water company which has permission to take water from a pond of which the shores have already been appropriated for other public uses where the land is not indispensable to the prior appropriator but is to the water company. (Mass.) 832.

Express legislative authority is not necessary to justify county commissioners in taking a strip of land from a school-house lot for a town-way. (Mass.) 157.

Police Power.

The power of a municipality to regulate the storage of inflammable oils, etc., does not extend to absolute discretion to give and revoke permission to keep and store such oils without any rule for determining the conditions. (Ind.) 587.

The suspension of electric wires over or upon the roofs of buildings, which is shown to be extremely dangerous as liable to cause or prevent the extinguishment of fires, may be prohibited by ordinance and removed by public officers on failure of the owners after notice to remove them. (C. C. N. D. Cal.) 181.

Legislative authority to construct a telegraph line on a public way is not irrevocable and is subject to the police power. (N. Y.) 454.

The police power of a city given by charter
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may extend to a penal ordinance fixing the weight of loaves of bread. (Mich.) 286.

Municipal power to restrict wooden buildings is discussed in a case which decides, among other things, that such power is not absolute. (Ind.) 481.

Regulation of Railroads.

That a dummy railroad is a railroad within the meaning of statutes regulating the operation of railroads is also decided by the Supreme Court of Tennessee. (Tenn.) 185.

The duty of keeping a lookout upon a locomotive, imposed by the Tennessee statutes on every railroad company, requires the engine as well as the lookout to be at the head of the train. (Tenn.) 864.

Privileges of Citizens.

A statute denying dower to nonresident widows does not violate the constitutional provision as to the privileges and immunities of citizens. (Kan.) 282.

Due Process.

The constitutional requirement of due process of law is violated by a statute providing that a purchase of land at execution sale under an invalid judgment shall be valid unless the purchaser is reimbursed for his bid with interest and costs of defending the title. (N. Y.) 804.

Insolvent Law.

A state insolvent law is valid as to nonresidents so far as to defeat a contract making a prohibited preference of property within the State. (Minn.) 463.

Injunction against Ordinance.

An exception to the rule that an injunction will not lie to prevent the passage of a municipal ordinance is made by a Kentucky decision in favor of an injunction against an ordinance to authorize the illegal transfer of property which might result in irreparable injury. (Ky.) 844.

Courts; Foreign Stockholders.

The rule that a court will not enforce the liability of stockholders under the laws of another State is illustrated in a case where such liability had not been judicially established and the corporation had no place of business in the State, and the parties, though both non-residents, resided in different States and neither of them resided in the State where the corporation was organized. (Mass.) 56.

Naturalization.

The requisites of a court which can have jurisdiction in naturalization proceedings is discussed in a Maine case, which holds that where the judge must keep and authenticate the records, although it has a recorder to keep them when requested by the judge, the court does not have such jurisdiction. (Mass.) 229.

Attorneys.

Attorneys need no appointment by any bar association in order to prefer charges for the disbarment of another attorney for misconduct. (Conn.) 787.

Officers.

An infant may be appointed a deputy sheriff unless otherwise provided by statute although under the State Constitution he cannot be an officer. (N. C.) 721.

The power to make an appointment to an

office largely within the control of the Legislature may be given to an administrative officer under a constitutional provision that the appointment shall be made as "prescribed by law." (Ind.) 79.

An office is not necessarily abandoned by accepting an incompatible office. (N. H.) 870.

The rights of municipal officers who have been made trustees by authority of a statute are not vested so as to prevent the Legislature from transferring the trust to other officers. (R. I.) 217.

The omission of venue from a notary public's jurat, which by the authority of many decisions would seem to be fatal, is held not so in Michigan where the notary is a state officer and the record of his appointment is kept in the office of the secretary of state. (Mich.) 556.

The exemption of an officer from liability for public money deposited in a bank which had the confidence of the public, but which afterwards suspended, cannot extend to a case where he placed the money in the bank on a general deposit in violation of law. (Ala.) 659.

Taxes and Assessments.

By a Vermont decision it is held that a corporation of another State "is taxed by such State for all its stock" so as to relieve shareholders in Vermont from a tax on their shares when it is subject to an annual tax assessed according to the amount of its paid-up capital. (Vt.) 166.

A statutory exemption of the capital stock

of a corporation when its tangible property is assessed does not prevent taxation of the excess in value of the capital stock over the tangible property. (Ind.) 515.

A deduction of debts cannot be made from the value of national bank stock under a state statute denying the right to such deduction "to any bank, company or corporation exercising banking powers or privileges." (Neb.) 614.

Charging the expense of maintaining a harbor upon those living in its immediate vicinity does not violate a constitutional provision as to equality and uniformity of taxation. (Or.) 583.

The rule that exemption from taxation does not extend to local assessments is applied to a case of express exemption from "all taxation by state or local laws for any purpose whatever." (Ky.) 668.

The exemption of the land of Indians from taxation is upheld in Indiana by force of the Ordinance of 1787. (Ind.) 512.

Special Taxing District.

The creation of a public corporation to maintain a ship canal at the mouth of a navigable river with power to levy taxes therefor is for a municipal purpose. (Or.) 533.

Schools.

The teaching of German in any school on demand of a certain number of patrons cannot be restricted under the Indiana statute to schools of certain grades in a city. (Ind.) 147.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Statutory Obligation.

A mere statutory obligation to pay money does not create an implied promise to pay it, but the obligation depends on the statute itself. (Conn.) 210.

Public Contracts.

The constitutional provision for letting contracts to the lowest bidder requires that definite plans and specifications must accompany an advertisement for bids. (Ark.) 853.

Conflict of Laws.

A nice distinction between matters relating to the nature and validity of the contract and those relating to the remedy is found in a case holding that the right to show that an indorsement is affected by a collateral oral agreement is governed by the *lex loci*. (Mass.) 52.

A note and mortgage are governed by the laws of the State in which they are made and in which the money is paid over to the maker by an agent of a nonresident mortgagee, although they are made payable at the mortgagee's residence. (Ala.) 299.

Alteration of Instruments.

The materiality of alterations in instruments is illustrated by a decision that the interlineation of an agreement for attorneys' fees is not material where they are provided for by statute. (Mich.) 313.

Family Settlement.

A family settlement for a distribution of the proceeds of a benefit certificate before anyone 18 L. R. A.

knows to whom the certificate is payable is on a sufficient consideration. (R. I.) 601.

Surety as "Creditor."

The character of a surety on an unmatured obligation as a creditor is discussed in a case holding that he is included among "creditors, purchasers or other persons" who are entitled by statute to take property from a debtor to satisfy their claims. (Tex.) 340.

Bills and Notes.

The substantial exhaustion of the fund for paying Alabama claims makes due a note payable when "the United States pays judgments" in such cases. (Mass.) 258.

An irregular or blank indorsement under the Connecticut statutes, which gives it the effect of an ordinary indorsement, makes the indorser liable as such precisely in the order in which he stands upon the note, although he signs above and before the payee. (Conn.) 806.

Banks.

The doctrine that a bank receiving paper for collection is liable for the default of a correspondent bank to which it sends the paper is applied in a New York case to a default by the insolvency of the correspondent. (N. Y.) 241.

Lack of money in the bank to meet a check will not relieve the holder from his obligation to present it, where the drawer would have provided it or paid it if payment had been insisted on. (N. Y.) 43.

The difference between a savings bank book and an ordinary commercial bank certificate is clearly shown by a Connecticut decision holding that such book is not a negotiable instrument and cannot be made so by contract so as to give an assignee any right against the bank where the book was obtained by fraud. (Conn.) 727.

Active vigilance to detect fraud and forgery is due by a savings bank officer to a depositor on paying the deposit to one presenting the pass-book, although the by-laws provide that the bank will not be responsible for fraud in presenting the bank book and drawing the money, where they also require its presentation by the owner or his agent duly constituted by a writing signed and acknowledged as a condition of payment. (N. Y.) 786.

Carriers.

A novel case as to the right to a free pass guaranteed to a grantor and his family decides that a grandchild of the grantor who has ceased to be a member of his household is not a member of his family. (Mass.) 818.

The much disputed question whether or not a conductor must accept a passenger's word as to his right to ride on a ticket where a mistake has been made by other agents of the carrier is discussed in a Mississippi case, which decides in favor of the passenger. (Miss.) 88.

Accepting too small a fare from a passenger by mistake will not defeat the right to collect the balance of the full fare within a reasonable time after discovering the mistake or to eject the passenger for failure to pay it. (Minn.) 596.

The measure of duty in respect to stopping a train on a dummy railway without regular stopping places is that applicable to street railroads and not to ordinary railroads, and is not fulfilled by merely stopping a reasonable time. (Ala.) 95.

The usage of a carrier requiring a shipper of live-stock to unload it will not prevail as against an express contract of the carrier to perform that duty. (Mass.) 262.

The requirement of notice before removing stock injured on a railroad is held to be substantially complied with where opportunity was given to the station agent at the place of destination to examine the stock, and written notice was sent within four days after to the company's claim agent. (Kan.) 862.

Favoritism between shippers by an agreement to give rebates is pronounced illegal at common law by the supreme court of Vermont in the case of contracts made before the Interstate Commerce Act. (Vt.) 70.

Each backman may be assigned a separate stand at the depot ground of a railroad company, and may be ejected from the stand assigned to another if he refuses to leave it, if no unnecessary force is used. (Mich.) 848.

The liability of a cotton compress company, which has received cotton for compression and storage with agreement to insure it, where the cotton is destroyed by fire, and of a carrier which has made the company its agent to issue bills of lading for cotton received, with various interesting questions as to the liabilities and remedies, are discussed in a Tennessee case. (Tenn.) 518.

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Insurance.

The amount for which a creditor may lawfully insure his debtor's life is held by a Pennsylvania decision to be what is sufficient to cover the debt with interest and the cost of the insurance for the period of expectancy of the life insured. (Pa.) 438.

Sun-stroke or heat prostration is held by a very interesting and learned opinion not to be covered by a policy of insurance against injuries through external, violent and accidental means, excluding those due to any disease or bodily infirmity. (C. C. W. D. Mo.) 114.

Death by inhaling deadly gas in a well is held by a Pennsylvania case, following the leading case in 8 L. R. A. 448, to be caused by violent, external and accidental means, and also not to be within the meaning of an exemption clause as to death from "inhalation of gas." (Pa.) 661.

The exception in an insurance policy against liability for death caused by fighting is interpreted to cover death by shooting which followed the fighting and which was the result of it. (Ga.) 888.

The exemption of an accident policy from liability for injury incurred in the violation of law is held by a Vermont decision to extend to an injury by slipping on frozen ground while returning from a hunting expedition or a visit of pleasure on Sunday. (Vt.) 637.

What constitutes voluntary exposure to unnecessary danger is a question discussed in a life insurance case where the insured was killed by a train and must have fallen or been thrown on the track from a platform not intended for passengers. (Mass.) 263.

Voluntary exposure to unnecessary danger is not shown by running toward a train which does not stop to get the mail and stumbling and falling down a bank against the engine. (Ala.) 267.

A lease for five years with an agreement to purchase at the end of the time is not during the time a transfer of title or possession which will defeat a policy allowing occupancy by a tenant. (Cal.) 475.

A chattel mortgage by one partner on firm property makes a change of "interest" if not of title or possession within the meaning of an insurance policy. (Mich.) 684.

The right of the insured to rescind the policy for misrepresentations in the application made by the agent without his knowledge is not defeated by the fact that the insurer would be bound by the policy unless rescinded by him. (Mich.) 349.

Donations; Forfeiture.

The removal of a manufactory which has proved a failure financially is held not to violate the rights of those who made donations to secure its establishment in their community. (Mich.) 696.

Conveyances; Leases.

A novel case concerning a deed to the "heirs" of the grantor's son reserving to the latter a life estate after life estates to the grantor and another holds the deed to be a present grant to the children of such son. (N. Y.) 47.

A reservation in a conveyance of what the grantor has previously sold takes out of the deed all that is included in the boundaries of the

land previously sold, although the prior conveyances conveyed only the surface and the grantor still owned the minerals besides timber and a mill site. (Ky.) 289.

A deed for a money consideration on condition that it shall be void if the grantor supports the grantee for life and gives him a decent burial constitutes a mortgage. (Conn.) 452.

The requisite contracting parties do not exist in the case of a mortgage by a person to himself as administrator. (Vt.) 676.

The necessity of parting with all control of deeds in order to make a delivery is shown by a decision holding that there was no delivery where a box containing them with other property was given by the grantor, when expecting to die, to another person to be kept unopened until after the funeral. (Conn.) 64.

An agent's authority to deliver a deed of gift is terminated by the grantor's death. (Utah) 714.

But the death of the lessee does not abrogate a written lease. (Miss.) 593.

A stipulation in a written lease giving the right to cut and use trees on the premises may be waived by parol. (Miss.) 633.

Party Wall Agreement.

Although an oral agreement to pay half the value of a party-wall when it is used is held by the Texas Supreme Court not to be binding on a subsequent purchaser, the sale of the lot is held to be a use of the wall within the meaning of the contract. (Tex.) 50.

Covenant on Sale of Secret.

A covenant by one selling a business that she, her father, husband and brother-in-law will refrain from communicating a secret recipe used in the business to anyone but the buyer, and from using trade-marks connected with the business under a penalty of \$5,000 named as stipulated damages in case of a violation of the covenant within five years, does not limit her liability for such damages to her own personal violation of the covenant, but extends it to a violation by any of the persons named. (N. Y.) 652.

Sales.

A somewhat peculiar case in which the obligation to make the first annual payment on a contract is held optional is one for the purchase of patents with a cash payment and an agreement for annual payments for fourteen years,

amounting to \$250,000 or \$100,000 to be paid within two years providing that failure to make any payment shall make the contract void. (Mass.) 690.

The good-will and trade-marks of an insolvent manufacturing company are part of its property which may pass at an assignee's sale of the mills, machinery, etc. (Md.) 380.

Private representations made before a public auction may constitute a warranty. (Vt.) 678.

It may be shown that by usage the sellers of tobacco by samples undertake to guarantee the truth of statements on tags attached to the samples. (Pa.) 438.

The price fixed by a combination of manufacturers for their own purposes will not govern as to the price to be paid by a purchaser from one of them for goods ordered without mentioning the price. (Mich.) 770.

A contract for ice of a described quality and thickness is an express warranty that it shall be of that quality and thickness when delivered, and the warranty is not waived by receiving, storing and attempting to dispose of the ice. (Me.) 224.

Statute of Frauds.

The Statute of Frauds as to a contract for more than one year does not apply to a parol agreement by one having a lease of a farm for one year beginning at a future day to use the ice in an ice-house thereon without charge if he would refill it so as to leave it filled when he surrendered possession. (Conn.) 646.

The Statute of Frauds as to a promise to pay the debt of another applies to a verbal promise by the administrator of a mortgagee to pay taxes against the mortgagor if the collector will not levy on the mortgaged property, on which he has no lien. (Conn.) 643.

Although an agreement to acquire real estate converted into money and divide the proceeds is within the Statute of Frauds, a trust to pay over the proceeds will arise where the contract has been executed, except as to such payment. (Mich.) 621.

Honesty of Employé.

The breach of the implied condition that an employé will serve his employer honestly by embezzling funds during every month he was employed by a contract which was entire for each month prevents any recovery for wages. (Minn.) 72.

III. CORPORATIONS AND ASSOCIATIONS.

A very important case as to the status of foreign corporations holds that the fact that the incorporators are all residents of the State, and the principal place of business is in the State, will not make their incorporation in another State invalid where no fraud or evasion of the laws of the State of incorporation is shown. (N. Y.) 854.

False statements in a certificate filed by a foreign corporation in order to be permitted to do business will not render the consignees liable for deceit to one who suffers loss by giving credit to the corporation. (Mass.) 733.

The question whether a bank was a corporation or a partnership was held to be a question for the jury, where there was evidence of or-

ganization under an alleged charter, the holding of stock and receipt of dividends thereon. (Pa.) 870.

The powers of a committee of a corporation appointed to make a contract may be exercised by a majority of the committee in the absence of the other members. (Mass.) 559.

The estoppel of stockholders as to the corporate character of their company, has a somewhat striking illustration in a Pennsylvania case in which subscribers to companies never completely organized but merged in a new company were held estopped as against creditors of the latter to deny the legality of the merger or the corporate character of any or all of the companies. (Pa.) 779.

(DOMESTIC RELATIONS; PERSONAL CAPACITY—TORTS; NEGLIGENCE, INJURIES; NUISANCES.)

A corporation is not liable for the forgery by its president of the secretary's signature to certificates of stock taken in private and personal transactions with him, although it had allowed him to continue in office and have access to its certificate book and seal after he had violated his agreement to pledge his own shares to his associates by pledging them to another. (Mass.) 198.

The Minnesota law as to a union depot in the city of St. Paul is construed to require the railroad companies owning stock therein to surrender some if necessary in order to allow a new company whose road enters the city to become a member of the corporation. (Minn.) 415.

The reasonableness of tolls charged by a company, so long as within the limits fixed by statute, cannot be questioned, and the right to collect tolls cannot be questioned by denying the necessity of the franchise or the perfection of the improvements made by the corporation. (Pa.) 427.

Under the retaliatory feature of the Maryland statute as to foreign insurance companies, if a Maryland company is refused a license in another State on the ground of discretion, companies of that State may be excluded from Maryland on the same ground although the Maryland statutes do not in terms authorize it. (Md.) 584.

The law of a benefit society making the decision as to a death claim by its committee final, and denying any appeal to the courts, is not invalid. (Mich.) 625.

The rule that church property cannot be diverted from the purposes for which it was given applies in the case of a Baptist church, although independent in government, where a majority attempt to use it in teaching doctrines contrary to those of the Baptist denomination. (Iowa) 198.

IV. DOMESTIC RELATIONS; PERSONAL STATUS OR CAPACITY.

A divorce will not be denied to a man in case of his wife's adultery by reason of the fact that he married her while under arrest on bastardy process merely to have the child born in wedlock and on an agreement with her that they should never live together, which they have kept. (Mass.) 843.

Resumption of marital duties by a wife who had voluntarily left her husband is no consideration for the revocation of a valid antenuptial contract. (Pa.) 581.

The right of women to be admitted to the bar on equal terms with men is affirmed by a Colorado decision in the absence of statutory or constitutional provision to the contrary. (Colo.) 538.

A marriage which is void because one of the parties has no right to marry cannot legitimate a child under a statute providing for legitimation by marriage. (Mass.) 275.

The meaning of the word "relative," in the Maine statute giving to the descendants the share of a relative named as devisee, who dies

before the testator, is restricted to blood relations and does not extend to relatives by marriage. (Me.) 37.

The presumption as to care and prudence of a child is that it was such as was usual for those of his age and experience, but the presumption is not conclusive. (Pa.) 874.

The protection of infants' property is illustrated by a case in which a judicial sale to a relative, who was virtually their guardian, was set aside although the sale was in good faith and managed by a stranger appointed curator of the estate. (Ark.) 490.

The distinction between residence and domicile is made in the case of a child not formally adopted but living as a member of the family of a resident of a school district, and the child is held to be a resident of the district for school purposes. (Conn.) 161.

Unsoundness of mind requiring a guardian is something more than a liability to exercise "ordinary care and prudence" in managing and taking care of one's property. (Iowa) 757.

V. FIDUCIARIES AND REPRESENTATIVES.

The bond on granting ancillary administration may be made twice the value of the personal estate in the State, although the language of N. Y. Code Civ. Proc., § 2699, would seem to limit it to twice the amount of the claims of resident creditors. (N. Y.) 104.

The ratification of unauthorized acts extends to negligence of one who was not at the time acting in the employment of the person ratifying. (Mass.) 219.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

Breach of Public Duty.

The rule that a breach of public duty will create a liability to a person injured in consequence is applied to the case of a street railroad company which failed to use the extra degree of care required by a valid ordinance. (Mo.) 74.

The obligation of a sleeping car company to passengers occupying berths is illustrated by a decision that the passengers can recover for mistake in awakening them and causing them 18 L. R. A.

to get off at the wrong place, where they are injured by the consequent exposure. (Tex.) 215.

Malicious Prosecution.

That the malicious prosecution of a civil suit without probable cause is actionable although defendant is not arrested or his property attached is affirmed as the better doctrine by the Supreme Court of Missouri. (Mo.) 59.

Libel and Slander.

Words which merely impute a criminal in-

tention are not within the rule which makes a charge of crime actionable. (R. I.) 134.

The words "Bad Debt Collecting Agency," printed in large bold type on envelopes mailed to a debtor, especially when mailed in care of his employers, constitute a criminal libel. (Mo.) 419.

Falsely publishing that a person is an "anarchist" is libelous. (Ill.) 864.

The privilege of discussing the character and fitness of a candidate for office does not extend to false statements. (Mo.) 59.

The distinction between the privilege, in the case of libel, as to servants, and that in case of public persons, is clearly brought out in a Massachusetts decision which holds that false statements of fact as to public persons are not privileged, although free and open comment and criticism are, and that reasonable cause to believe the truth of the charge is no defense to a libel, also that damages therefor cannot be enhanced by republication of the libel by others even if it was a probable consequence. (Mass.) 91.

The rule as to privileged communications in libel cases applies to a communication by the cashier of a bank to a stockholder as to the solvency of a surety on a bond to the bank. (N. J.) 655.

Slander of Title.

A case as to slander of title decides that no action therefor can be based on statements which cause the breach by a third person of a valid contract because there is a remedy on the contract. (Cal.) 707.

Poisoning Animals.

Evidence of the market value of dogs is not necessary to sustain a judgment for damages for poisoning them, where there is proof of their usefulness and services from which the jury can infer value. (Tex.) 272.

Conversion.

The sale of stolen stock by a stock broker, who purchased it from the thief in good faith, renders him liable to the owner for conversion. (Cal.) 605.

Negligence Generally.

The liability of a railroad company for injury to a boy by its turn-table left unlocked near a highway is denied by a Massachusetts decision reviewing conflicting authorities. (Mass.) 248.

A common hand-car is not such a dangerous agency that a railroad company is liable for leaving it unlocked and unguarded near a railroad track at a distance from any habitation, where a boy, who with others had put it on the track, was run over and killed by it. (Utah) 765.

Want of care in making an excavation whereby a building on adjoining land is damaged, is presumed where no notice was given to the owner. (N. J.) 569.

The weight which may properly be driven upon a bridge is discussed in an Indiana case holding that it is not negligence as matter of law to drive upon a bridge with a traction steam

engine, water tank and threshing machine. (Ind.) 851.

Snow on the deck of a ferry-boat during a snow-storm, on which a passenger slips and falls, raises no presumption of negligence on the part of the carrier. (Pa.) 366.

The liability of a steamship company for negligence of a physician whom it is required by law to carry is denied in a case in which there were charges of negligence and assault by the physician in vaccinating passengers. (Mass.) 329.

The rule that a telegraph company cannot exempt itself by stipulation from liability for negligence is reaffirmed by a Utah decision. (Utah) 510.

The doctrine of license by acquiescence in the use of a railway crossing is held not to extend to a case of mere knowledge by the company that numerous persons are in the habit of crawling under its cars while standing on the tracks in its yard. (Ga.) 634.

Voluntary Risk.

Voluntarily risking one's life or safety to save another is held by an Ohio decision, following the humane doctrine of several other courts, not to constitute contributory negligence. (Ohio) 190.

Injuries to Servants.

The assumption of risk by continuing to work near dangerous machinery after a promise to enclose it is discussed by a Michigan case reviewing many authorities. (Mich.) 728.

A loom fixer in a cotton mill, whose duty it is to look after looms and keep them in repair, is not the fellow servant of the weavers in respect to his negligence as to the looms. (N. H.) 824.

A railroad employé's disobedience of a rule requiring him to examine and know the kind and condition of coupling apparatus before attempting to couple cars, where sufficient time to make it is given, will defeat his right to recover for injuries from defective couplings. (N. Dak.) 465.

The rule as to the assumption of negligence by an employé is applied in the case of a brakeman to charge him with the risk of hanging from the side of a car to look under it in order to learn what made stones fly therefrom, and the company is not liable for negligence in making wing fences at cattle-guards so near the track as to strike him while hanging in that position where no such accident had ever been anticipated. (Iowa) 817.

Nuisance.

The exemption of a municipal corporation from liability for injuries by work done for a public benefit does not extend to a nuisance by the encroachment and overhanging of the premises of a private owner where a retaining wall is pushed over by filling up a school yard above its natural level. (Mass.) 841.

Another case concerning nuisances holds that a slaughter-house is not necessarily a nuisance in a neighborhood, and that the noise of pigs kept in confinement for slaughter does not make it so. (Mich.) 321.

VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.

Water Rights.

The right to erect barriers against the overflow of a river in time of floods, where it will damage lands on the opposite bank by increasing their overflow or deflecting the river, is denied by a decision which exhaustively reviews the cases on the subject, both English and American. In this case the embankment was built by a railroad company. (Ga.) 394.

The right of the owner of land bordering on a stream to use it as a pasture in a reasonable way is not affected by the fact that the waters are thereby made unfit for use, although the water-works of an incorporated company have been established lower down to supply the public with water from that stream. (Md.) 117.

No riparian rights are acquired by a purchaser of lots according to a plat which shows the boundary by specified measurements and an alley on other lots between that and the water. (Wash.) 142.

The right as to floatage of logs on streams is exhaustively discussed in a New Hampshire case, which is based on the rule that dams for manufacturing purposes must not interfere with public rights to floatage. (N. H.) 826.

The doctrine that riparian rights may be severed from the ownership of the shore land is again maintained by a Minnesota decision. (Minn.) 411.

Another case involving rights in the great ponds of Massachusetts, which have been discussed in several earlier cases in this series of Reports, sustains the right of private owners to prevent drawing water therefrom. (Mass.) 255.

Room in Building.

The rights of a grantee of a single room in a building, with an easement for ingress and egress, are extinguished by a destruction of the greater part of the building, whereby the identity of the room is destroyed. (Or.) 158.

Fee in Road-bed.

The fee in the whole road-bed passes by a deed of land bounded along a road which is laid out entirely on the grantor's own land but on the margin thereof. (N. Y.) 611.

Condition.

A conveyance for the use of a county in consideration of establishing a county seat at the place is not on a condition subsequent that the county seat remain there. (Ind.) 178.

Reservation.

A reservation of a right to flood lands conveyed by a railroad company will not be implied by the fact that a faulty embankment was already constructed. (Tex.) 657.

Entireties.

That an absolute divorce changes a tenancy by entirety into a tenancy in common without survivorship is decided by the New York Court of Appeals following decisions in Illinois, Indiana and Tennessee against a contrary decision in Michigan. (N. Y.) 825.

Dower.

The doctrine that a wife's inchoate right of dower is not cut off by a sale for taxes, which 18 L. R. A.

is laid down in 5 L. R. A. 821, by the Supreme Court of South Carolina, is again declared by the Supreme Court of Missouri without reference to that decision. (Mo.) 441.

Wife's Right on Partition.

The right of a married woman to the proceeds on partition sale of her share of lands vested in her by the Delaware Married Woman's Acts, is held to be absolute. (Del.) 346.

Levy.

The right of an officer forcibly to take personal property from its owner after levy against a third person is denied in a Wisconsin case reviewing conflicting decisions on the question. (Wis.) 487.

The exemption from execution of personal property extends to the proceeds of insurance thereon. (Iowa) 719.

Homestead.

The right to a continuance of a homestead exemption after the loss of all one's family is sustained in accordance with the weight of authority by a Kentucky decision. (Ky.) 743.

Mines.

The rights of the grantee in fee of coal under the surface extend to the use of a tunnel through the coal for the removal of other coal from adjacent lands. (Pa.) 637.

Good-will and Trade-marks.

The transfer of the good-will and trade-marks not personal is accomplished by the sale of the plant of an insolvent company by an assignee for creditors, under an advertisement describing the property as "old established and valuable cotton-duck mills." (Md.) 380.

A trade union is held by a decision similar to that in 3 L. R. A. 125, not to be entitled to a trade-mark where it is neither a manufacturer, dealer nor trader. (Pa.) 377.

Equity will not protect a non-union trade-mark label, the purpose of which is to discriminate between union and non-union labor and coerce laborers into joining the union by denouncing all non-union goods as "inferior, rat-shop, cooley, prison or filthy tenement-house workmanship." (Pa.) 377.

The right to a trade-mark does not extend to the shape of a bottle or of a box in which bottles are packed, or in the use on such a bottle of a cap label previously used by others nor in the combination of such label and bottle. (Pa.) 348.

Fraud in Transfers.

A conveyance by an insolvent to his daughter in consideration of her marriage is not fraudulent as to creditors if made without intent to defraud. (Cal.) 711.

The necessity of a fraudulent intent in order to make a conveyance fraudulent as to creditors is extensively discussed by a California decision, which holds that such intent must be found. (Cal.) 576.

An innocent purchaser of personal property from one who has obtained possession of it by fraud without obtaining title acquires no title by the purchase. (Iowa) 717.

Pledge.

A pledge to secure a note and "any other note or claim" held against the maker includes claims against the firm of which he is a member. (Mass.) 315.

Liens.

A vendor on the sale of land by contract has a lien as security for a purchase-money note and can transfer it to an assignee of the note. (Cal.) 187.

Consent to the erection of buildings is shown so as to render the vendor's interest subject to a mechanics' lien, where in the contract of sale it is provided that the vendee shall erect the buildings within a specified time, although it also provides that any mechanics' liens shall be subsequent to those of the vendor. (N. Y.) 701.

Mortgages.

The rights of the mortgagee in possession are not affected by the fact that his right of action is barred. (Cal.) 487.

An assignment for creditors is held by the Ohio supreme court to cut off a mortgage on real property which is not yet deposited for record, and to do so as soon as it is delivered to the probate court, although it is not itself filed for record. This decision is based on the Ohio statute, which, although not declaring that unrecorded mortgages are void as to creditors, says they shall take effect from the time they are delivered for record. (Ohio) 235.

There is no merger of a mortgage in the equity of redemption acquired by the mortgagee where while he owns it another person has the mortgage as collateral. (N. H.) 294.

The law as to recording chattel mortgages is illustrated by a decision that a mortgage taken after a prior mortgage on a stock of goods had been recorded to secure the purchase price of goods sold to the mortgagor after the prior mortgage was made but before it was recorded is superior to the first mortgage, where the second mortgagee first takes possession of the goods under his mortgage. (Mich.) 388.

A mortgagor's removal of personal property to another State, where it is seized and sold by his creditors on attachment, cannot affect the rights of the mortgagee whose mortgage was duly recorded in the State where the parties resided. (N. C.) 740.

Dedication.

The validity of a dedication of land for a public park and of an acceptance thereof is discussed in a case which holds that one who has carefully investigated the facts cannot become a bona fide purchaser as against the dedication although he purchases after reaching a conclusion that is erroneous. (Mass.) 251.

Gift.

A gift of the use of the profits of a plantation to a certain person, but not to be bound for his debts other than decent and comfortable support, is held not to be within the reach of his creditors. (Va.) 212.

Money expended by a man while living with his married daughter on her premises without any expectation of payment, and to make improvements for his own use, cannot be charged against her estate for the benefit of his creditors after his death. (Vt.) 640.

Wills.

What the court calls a close case is one in which it decides that a will directing that testator's wife "shall have and hold the property" where he resides gives her the fee which is not cut down by a subsequent clause directing that she shall have the "sole control of the same during her lifetime." (Pa.) 359.

An obligatory trust is not created by a gift to testator's wife of all his estate requesting her to leave what she does not require for her support by her will to other persons named. (Del.) 563.

The time when legacies vest is discussed in a case deciding that it is at the death of the testator where an estate converted into money is to be given in equal shares among certain children and if either dies before payment his share is to be divided between the survivors. (Pa.) 360.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Right of Action.

A purchaser of premises after an elevated railroad has been built, which makes a continuing trespass upon easements of light, air and access, has a right of action regardless of the amount paid by him, and his recovery in lieu of an injunction must be the difference in values with and without the road. (N. Y.) 401.

An action for injury to lands without the State cannot be maintained in a state court if no part of the act which caused the injury was performed within the State. (Tex.) 542.

A difference in the statutes as to the right of action for negligence causing death is not sufficient to prevent action in a State other than that where the injury occurred where the difference is merely as to the person designated to bring the action or as to the amount of recovery. (N. Y.) 458.

A suit by a taxpayer to set aside a contract by a city must be based on injury to himself as a taxpayer. (Tex.) 383.

18 L. R. A.

Failure of a bailee to procure insurance as agreed by him will not make him liable if the bailor without relying on the agreement has himself procured sufficient insurance. (Tenn.) 518.

Remedy of Indian.

The right of an Indian to sue in a state court is affirmed in a Texas case which decides that he may lawfully own personal property and assign a claim for damages for its wrongful destruction. (Tex.) 542.

Election of Remedy.

Election of remedies is not made by attachment and bill in chancery based on fraud in procuring credit so as to defeat an action on subsequently maturing notes for purchase money as the remedies are not inconsistent. (N. Y.) 91.

An action to set aside an assignment for creditors as fraudulent is not such an election of remedies as will debar the creditors from

sharing in a distribution under the assignment pending the suit. (N. Y.) 472.

The fact that a negotiable note given for the purchase price of a chattel has gone to protest and is unpaid will not defeat an action for breach of warranty. (Neb.) 140.

The remedy on an injunction bond is not exclusive of the common-law action of covenant, where the injunction has operated as a breach of covenant. (Va.) 811.

When Barred.

A suit to restrain a continuous trespass is not barred so long as the remedy at law for injuries is not barred and the plaintiff retains the legal title. (N. Y.) 788.

The doctrine that mere laches of plaintiff, unaccompanied by circumstances amounting to an estoppel, will not bar an equitable remedy to enforce a legal right, is applied where plaintiff delayed eleven years before suing to restrain a continuous trespass. (N. Y.) 788.

Revival of a judgment without jurisdiction of the defendant after he has left the State will not affect the running of the Statute of Limitations in another State. (Neb.) 565.

Injunction.

A property owner may enjoin the rebuilding in violation of a valid ordinance of a wooden building partially destroyed by fire although it would not be a nuisance *per se* if it would work special and irreparable damage to him. (Ind.) 481.

An injunction to prevent the removal of buildings placed by a vendee on land held under a contract for which he has paid a large share of the purchase money will not be granted if the vendor's security will not be impaired by the removal. (Cal.) 680.

Jury.

The jury are final judges of the law as well as of the facts in a prosecution for criminal libel under Mo. Const., art. 2, § 14, although the judge should assist and inform them what the law is. (Mo.) 419.

The amount to be paid for the joint use of a street railway track in the hands of a receiver may be determined by the court on a petition where the statutes give the right to such use on payment of one half the cost of construction, and there is no right to a jury on the ground that it involves the exercise of the right of eminent domain. (Cal.) 754.

Process.

The residence of a family after the head of it has established himself in another State intending to make that his permanent residence is no longer "his usual place of residence" at which process may be served by leaving a copy with a member of the family. (Iowa) 786.

Service of summons on "Jack Veasey" is held sufficient to sustain a judgment by default against A. J. Veasey. (Ala.) 541.

Evidence.

An interesting construction of one of the modern statutes concerning testimony as to transactions with deceased persons is that of the Michigan Supreme Court, holding that the words "opposite party" in a statute excluding the testimony of such party to matters equally within the knowledge of a deceased person in a suit by the latter's heirs, representatives, etc.,

mean the opposite party in interest, and include an interested person who is not a party on the record, and exclude an executor who has no personal interest. (Mich.) 83.

The privilege of women under the Mississippi Code to testify by deposition is discussed in a case which denies that the deposition can be read where the other party dies before trial, even if the substituted party is also a woman and might testify by deposition. (Miss.) 682.

The question as to permitting an expert witness to state directly his opinion as to the amount of damages to property is extensively discussed by a New York case which decides it in the negative. (N. Y.) 499.

Apparently ambiguous marks on tobacco tags attached to samples may be explained by parol. (Pa.) 488.

An Illinois decision holds that parol evidence is admissible to show the liability assumed by a stranger which places his name on the back of a promissory note. (Ill.) 649.

Possession under a specific legacy is presumed to be with the assent of the executors. (C. C. S. D. Ga.) 587.

Open and notorious facts which one with honest motives would have learned may be shown on the question of malice in a prosecution. (Minn.) 463.

Damages.

The denial of any damages for breach of a covenant of warranty is made by a South Carolina decision where the consideration of the covenant was love and affection and the recovery for the breach of covenants of warranty under the statute was limited to the purchase money paid with interest. (S. C.) 728.

The amount to be paid for property taken for public uses is discussed in a case holding that the value, and not the cost of a toll-bridge taken by the county, is the amount to be paid. (Pa.) 481.

The use of a house as a place of prostitution does not affect the liability for depreciation of its value from the construction and operation of an elevated railroad in the street in front of it. (N. Y.) 102.

The doctrine of liquidated damages is well discussed and illustrated in a Kansas case holding the sum of \$500 fixed as damages for failure to perform a contract, the cost of which would not exceed \$100, to be a penalty. (Kan.) 671.

In assessing damages for personal injury jurors should not have their attention drawn to the price for which they would be willing to suffer the injury. (Pa.) 374.

Punitive damages are recoverable for willfully delivering at the wrong landing goods marked for delivery at a private landing. (Miss.) 600.

The authorities on the question of damages for mental suffering are reviewed in a Mississippi decision which denies such a recovery for negligent failure to deliver a telegram. (Miss.) 859.

Subrogation.

The right of subrogation on payment of prior liens extends to one who has been induced by fraud to take a mortgage in good faith from one without legal capacity to make it. (Ind.) 619.

Set-off.

A surety sued jointly with his principal may offset his individual claim against the creditor where both creditor and principal are insolvent. (N. Dak.) 283.

Judgments.

The validity and effect of judgments entered on warrants of attorney is discussed in a New York case holding such judgments as valid in all other States as in the State where they are entered, and also that they may be entered on a note containing such a warrant before its maturity. (N. Y.) 796.

Bribing a witness is not ground for vacating a decree. (Cal.) 836.

The right to set aside a judgment taken in the absence of defendant's attorney is upheld where the absence was due to sickness and the client was also absent on account of an announcement by the judge that the cases of that attorney would not be taken up. (Ga.) 689.

Appeal.

The right to appeal as a party "aggrieved" is held not to extend to executors where the judgment affects only the rights of claimants of the property of the decedent as between themselves. (N. Y.) 745.

Estoppel.

Representations to a commercial agency re-

specting one's business, communicated to its patrons, estop him as against the latter to deny their truth. (Minn.) 270.

An estoppel against setting up adverse possession is held not created against a defendant in ejectment by the fact that his grantor after setting up the same defense in a prior action had settled it by buying plaintiff's title and giving his notes for the purchase money, which have not been paid. (N. Y.) 206.

Ejectment.

The remedy of ejectment does not extend to the case of constructing a sewer upon land without taking possession of it. (Mich.) 664.

Replevin.

The rule that replevin will not lie for goods in custody of the law is applied in the case of goods held by a sheriff in proceedings to forfeit them, although they are in the original packages in which they were brought from another State and the plaintiff legally entitled to have them restored to him. (Iowa) 408.

Quieting Title.

The rights of an execution purchaser in respect to a prior fraudulent conveyance are discussed in a case holding that his title may be quieted against it where the statute authorized the levy notwithstanding the conveyance. (Mich.) 693.

IX. CRIMINAL LAW AND PRACTICE.

A change of procedure from indictment to information is not *ex post facto* as to offenses already committed. (Wyo.) 748.

Registering a qualified voter without his appearing in person as required by law is held not to be punishable as a felony under the Kansas statute when done without fraudulent intent. (Kan.) 607.

Being intoxicated and yelling on the public streets in such a manner as to disturb the good order and tranquillity is a breach of the peace. (Mich.) 163.

An officer has no right to make an arrest without a warrant for breach of the peace by yelling, etc., committed when he was not in sight although he heard it. *Id.*

The right of an officer to take money from a person under arrest is discussed in an Alabama case which decides that it can be taken only when there is reasonable ground to believe that the money is connected with the

crime, or may be useful on the trial. (Ala.) 120.

One convicted of intoxication can constitutionally be required to disclose when, where, how, and from whom he obtained the intoxicating liquor. (Conn.) 66.

The illegal purpose of a person from whom money is obtained by false pretenses is no defense to an indictment against the person thus obtaining it. (Colo.) 752.

The agent of a common carrier is held liable for aiding and abetting in bringing intoxicating liquors into a city to be sold illegally, where he habitually delivered them, although he had nothing to do with ordering them, or bringing them to the city. (Mass.) 195.

The time of absence from jail through an unauthorized act of the sheriff under a sentence to pay a fine or be imprisoned cannot be counted in estimating the period of imprisonment. (Cal.) 574.

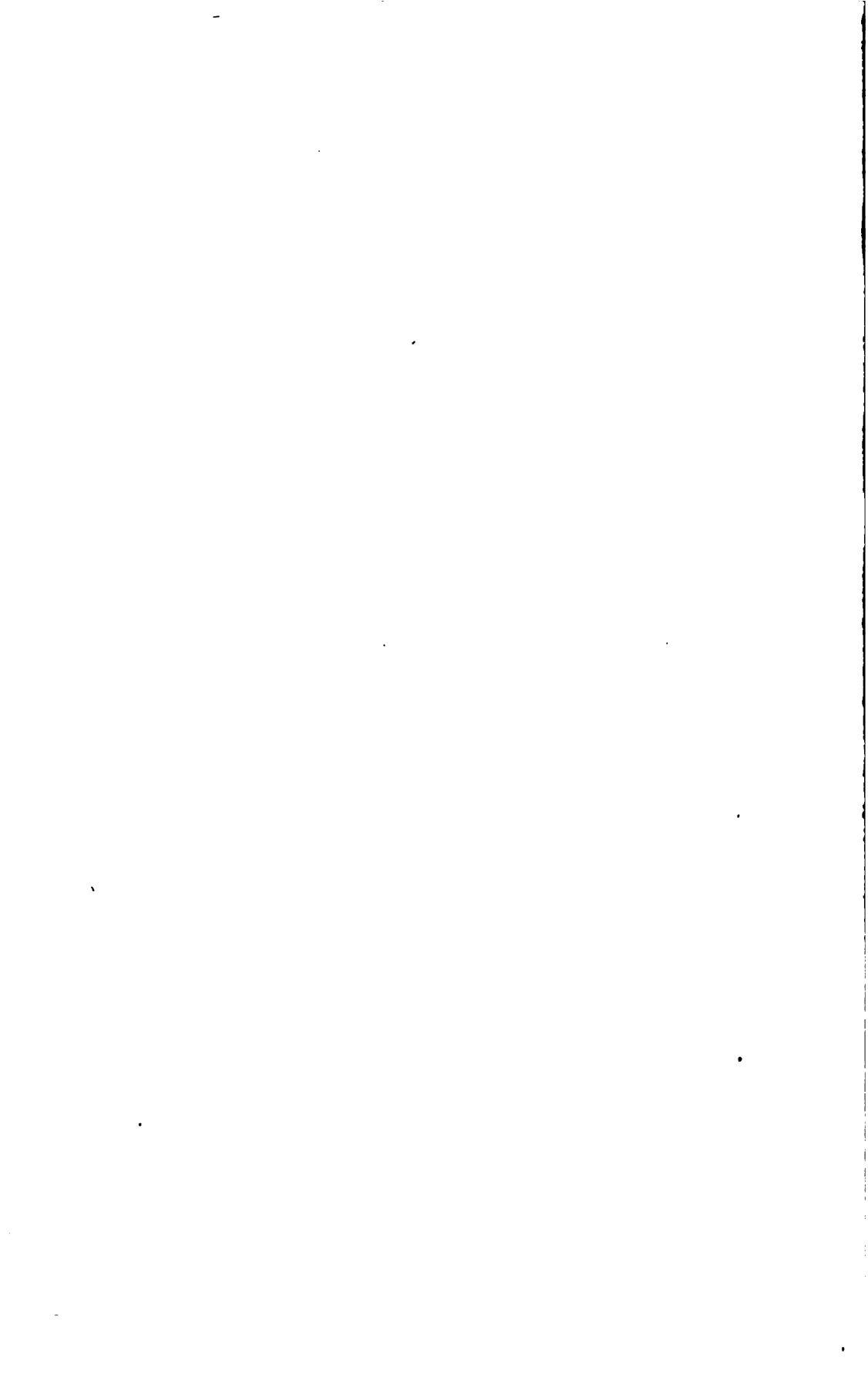
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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACCOMPLICES. See CRIMINAL LAW, NOTES AND BRIEFS.

ACCOUNT.

An attorney may properly include in one item of his account sued on his compensation for writing two letters to different persons upon the same subject-matter. *Powers v. Manning* (Mass.) 258

ACTION OR SUIT. See also COURTS, 7.

1. One in actual, peaceable, and exclusive possession of personal property may maintain an action for its destruction by the negligence of a mere wrongdoer. *Missouri P. R. Co. v. Cullers* (Tex.) 542

2. Mere possession of buildings on land, to which plaintiff has no title or right of possession, is insufficient to support an action for their wrongful destruction,—especially in the absence of evidence that they were not attached to the land, or of any right to remove them. *Id.*

3. Continuing trespasses by an elevated-railroad company on easements appurtenant to certain premises give a right of action to the purchaser of the premises, without regard to the price paid by him. *Pappenheim v. Metropolitan Elev. R. Co.* (N. Y.) 401

4. A contract by a vendor with a third person to pay a judgment gives no right of action in favor of a vendee by quitclaim who has been compelled to pay it to protect his land. *McClure v. Melton* (S. C.) 723

5. Owners of separate and distinct tenements may unite in an action to restrain the rebuilding, in violation of a city ordinance, of a structure partially destroyed by fire, the injury from which will affect all of them alike. *Mount Vernon First Nat. Bank v. Sarlls* (Ind.) 481

6. Bringing and prosecuting an action to set aside as fraudulent his debtor's assignment for the benefit of creditors is not such an election of remedies as will debar a creditor from sharing in a distribution of the assigned estate made pending such suit. *Mills v. Parkhurst* (N. Y.) 472

7. An election of remedies is not made by attachment and bill in chancery based on fraud in procuring credit on a purchase by an insolvent corporation, so as to defeat an action on subsequently maturing purchase-money notes, as the remedies are not inconsistent, be-
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ing in each instance for the recovery of the price. *Crossman v. Universal Rubber Co.* (N. Y.) 91

8. A carrier liable for the destruction of cotton in the hands of a compress company as its agent is a necessary party to an action by the owner of the cotton to recover from the company for its breach of a contract with the carrier to procure insurance on the cotton. *Deming v. Merchants Cotton-Press & S. Co.* (Tenn.) 518

9. To prevent abatement of an action on purchase-money notes it may be shown that a prior attachment and a bill in chancery for the recovery of the debt had been respectively discontinued and unproductive. *Crossman v. Universal Rubber Co.* (N. Y.) 91

10. A disability of the plaintiff to sue is waived by failure to file a plea in abatement or to take a special exception. *Missouri P. R. Co. v. Cullers* (Tex.) 542

11. Administration in one county will not prevent an administrator of a stockholder from being joined as defendant in another county, in a suit in equity to enforce the liability of stockholders. *Hamilton v. Jackson* (Pa.) 779

NOTES AND BRIEFS.

Action; law as to election of remedies; what is conclusive evidence of election. 91

Election of remedy. 472

AFFIDAVIT. See OATH, NOTES AND BRIEFS.

ALABAMA CLAIMS.

The fees of a commissioner of the Court of Commissioners of Alabama Claims are not regulated by U. S. Rev. Stat. § 847, relating to commissioners' fees. *Powers v. Manning* (Mass.) 258

ALIENS.

1. The word "citizens," as used in the Kansas Bill of Rights, § 17, prior to the amendment of 1888, prohibiting any distinction between citizens and aliens in reference to the purchase, enjoyment, or descent of property, means citizens of Kansas; and the word "aliens" means persons born out of the United States and not naturalized. *Buffington v. Grovesnor* (Kan.) 282

2. A statute which denies a widow any
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right in land conveyed by her husband, if she was not then and never had been a resident of the State, does not make any distinction "between citizens and aliens," within the meaning of the Kansas Bill of Rights, § 17, as it stood prior to 1888. *Buffington v. Grosvenor* (Kan.) 282

NOTES AND BRIEFS.

Aliens; naturalization of: jurisdiction of state courts; process; papers. 229

ALTERATION OF INSTRUMENTS.

1. The interlineation of an agreement to pay attorneys' fees, in that clause of a bond to secure an agent's possible indebtedness to his principal, in which the obligors bind themselves to pay the penalty, which has been fixed at a definite amount, is not a material alteration which will avoid the bond, under a statute providing that judgment in case of breach shall be entered for the penalty and execution issued for the damages assessed by the jury, not to exceed the penalty, as it cannot affect the judgment or amount of damages assessed. *White Sewing-Mach. Co. v. Dakin* (Mich.) 313

2. Alteration of a bond after execution, by an agent of the obligee without authority, express or implied, will not avoid it. *Id.*

ANIMALS.

Evidence of the market value of dogs is not necessary to sustain a judgment for damages for poisoning them, where there is proof of their usefulness and services from which the jury can infer value. *Heiligmann v. Rose* (Tex.) 272

APPEAL AND ERROR. See also HEALTH, 2.

1. The right to appeal as a party "aggrieved" does not extend to executors who have obtained a judgment construing a will as to which of two parties is entitled to a certain bequest, where the alleged claimants acquiesce in the decision. *Bryant v. Thompson* (N. Y.) 745

2. A plaintiff whose time to redeem from a mortgage as allowed by the court has expired pending an appeal by defendant which prevented the redemption will be allowed by the appellate court the same time after entry of final judgment upon the trial. *Schlawig v. De Peyster* (Iowa) 785

3. A finding by the trial court upon a distinct issue of fact whether or not the assignee of a savings bank pass-book is a bona fide holder is conclusive. *McCaskill v. Connecticut Sav. Bank* (Conn.) 787

4. On an appeal involving the right of a commissioner appointed to take testimony by the Commissioners of Alabama Claims to make a special contract as to fees, instructions issued by the Court of Commissioners cannot be entitled when not put in evidence on the trial. *Powers v. Manning* (Mass.) 258

5. Absence of evidence to support a justice's judgment cannot be presumed where no attempt to return the evidence was made, but the return states that the judgment was rendered after listening to the testimony, and after due deliberation. *Sullivan v. Hall* (Mich.) 556

6. On appeal by defendant, plaintiff cannot ask that the decree be changed or altered in the appellate court. *Schlawig v. De Peyster* (Iowa) 785

7. A conviction for resisting an officer in arresting the defendant for breach of the peace without a warrant cannot be sustained on appeal by the claim that defendant was liable to arrest for being intoxicated in a public street. *People v. Johnson* (Mich.) 163

8. The admission of incompetent evidence will not be held to be nonprejudicial to defendant in an action to enjoin an elevated-railroad company from operating its road until it pays the damage done to an abutting-property owner, because the company is not bound to pay the ascertained damages to acquire the easement, but may submit to the injunction and proceed to acquire the right by eminent domain. *Roberts v. New York Elev. R. Co.* (N. Y.) 499

9. The admission of incompetent declarations of an employé of a railroad company, in an action against it for damages for injuries to stock transported by it, is immaterial error where the facts stated by such employé are not in controversy. *Atchison, T. & S. F. R. Co. v. Temple* (Kan.) 363

10. An instruction which fails to present separately the elements of actual and exemplary damages, but limits the amount of recovery, is not prejudicial if the verdict is for less than the jury could properly find. *Heiligmann v. Rose* (Tex.) 272

11. Error in charging on the rule of contributory negligence is not prejudicial to defendant where there is no evidence of plaintiff's negligence. *Pullman Palace Car Co. v. Smith* (Tex.) 215

12. A judgment will not be reversed for the error of the court in directing a verdict for plaintiff when the case should have been submitted to the jury because the right of recovery depended on oral testimony, where no interest of defendant would be subserved by reversal, if the assignments of error do not contain the language of the court in *totidem verbis*, and the question is not argued for appellant. *Genesee Fork Imp. Co. v. Ives* (Pa.) 427

NOTES AND BRIEFS.

Appeal; right of administrator, executor, or trustee to appeal as party aggrieved. 745

APPROPRIATIONS.

1. A provision in an appropriation Act, that the salary for a certain office shall be paid to a certain person named, and none other, and a statute providing a penalty for paying it to any other person than the one named, are absolutely void as attempts to exercise judicial powers by declaring who is the legal officer entitled to the salary. *State, Worrell, v. Carr* (Ind.) 177

2. An appropriation of a certain sum for a state soldiers' and sailors' monument, by an Act requiring bonds from commissioners that the cost shall not exceed that sum including

donations and contributions, can be used only for the structural work of the monument, and not to pay the compensation and expenses of commissioners, secretary, and architect, or expenses of advertising for and procuring the design, or for other incidental expenses authorized by the Act. *Henderson v. State Soldiers & S. Monument Comrs.* (Ind.) 169

8. A sufficient appropriation is made by an Act expressly authorizing expenses to be incurred, and directing that they shall be paid, when it is taken in connection with the general statute authorizing the auditor of the State to "draw warrants on the treasurer for all moneys directed by law to be paid," etc. *Id.*

4. Money appropriated for the pay of members of the Legislature, its officers and clerks, cannot be used to pay the expense of an impeachment trial. *Henderson v. Hovey* (Kan.) 222

5. Under a statute appropriating for the expenses of an impeachment trial specific sums for the pay of members of the Senate, and for the compensation of the secretary, stenographers, and other officers, the Senate has no power to transfer a portion of the sum appropriated for the pay of its members for the purpose of paying such officers. *Id.*

6. The state auditor must, under Kan. Gen. Stat. 1889, §§ 6583, 6597, 6676, take notice of the amount appropriated for a specific purpose, and, when that amount has been exhausted for that purpose, has no authority to allow or audit other claims against such appropriation, and issue warrants therefor. *Id.*

7. The state treasurer may properly refuse to recognize or pay a warrant drawn by the state auditor after the appropriation against which it was drawn is exhausted. *Id.*

NOTES AND BRIEFS.

Appropriation; how made. 169

Necessity of, for use of public moneys. 222

ARREST.

1. An officer has no authority to make an arrest without a warrant, for a breach of the peace committed when he was out of sight on another street 150 feet away, although the disturbance was heard by him. *People v. Johnson* (Mich.) 163

2. Money can be taken from a prisoner under arrest, only when there is probable ground for believing that it is connected with the offense charged or may be used as evidence on his trial. *Ex parte Hurn* (Ala.) 120

ASSAULT AND BATTERY.

Vaccination of an immigrant passenger on a steamship coming from a foreign country is not an unlawful act, where her whole conduct indicated that she desired it to be performed so that she might receive a certificate which would save her from detention at quarantine. *O'Brien v. Cunard Steamship Co.* (Mass.) 329

NOTES AND BRIEFS.

Assault; in retaking property. 487

Effect of consent to. 330

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ASSIGNMENT. See also VENDOR AND PURCHASER, NOTES AND BRIEFS.

An assignment by an Indian of a right of action for the destruction of his personal property is not invalid. *Missouri P. R. Co. v. Outlers* (Tex.) 542

ASSOCIATIONS.

NOTES AND BRIEFS.

Effect of decision of their tribunals. 625

ATTACHMENT.

The assignee of a note given on the purchase of land by contract is entitled to the benefit of the vendors' lien, and cannot attach the land as a creditor without security. *Gessner v. Palmater* (Cal.) 187

ATTORNEYS. See also ACCOUNT; EVIDENCE, 12.

1. Women will be admitted to the bar on equal terms with men, in the absence of a statutory or constitutional provision to the contrary. *Re Thomas* (Colo.) 538

2. The use of the masculine pronoun exclusively in the statutes relating to applicants for admission to the bar and to licensed attorneys is not sufficient to show a legislative intent to exclude women from the bar. *Id.*

3. Attorneys at law are not civil officers within Colo. Const. art. 7, § 6, requiring the incumbent of a civil office to be a qualified elector. *Id.*

4. The absolute disbarment of an attorney is justified where, upon receiving an unenforceable claim against his own client, he caused a complaint to be served in the name of another attorney, and then advised his client to settle, falsely telling him, with full knowledge of the facts, that the claim was good and could be collected out of his property. *Fairfield County Bar, Fessenden, v. Taylor* (Conn.) 767

5. Attorneys preferring charges against another attorney of unprofessional conduct, for the purpose of having him disbarred, need not show that they constitute a committee appointed by the bar association of the county for that purpose, either to establish their right to institute the proceeding or to give the court jurisdiction. *Id.*

6. The appearance as attorney in proceedings to enforce a loggers' lien on behalf of the claimant, of the notary public who administered the oath in support of the lien, is not unlawful. *Sullivan v. Hall* (Mich.) 556

7. An attorney who has withdrawn from a case in which the client has other counsel, because of misconduct of the client sufficient to justify him, may recover for services previously rendered. *Powers v. Manning* (Mass.) 258

NOTES AND BRIEFS.

Attorneys; right of women to be admitted as. 538

Disbarment of. 767

BAILMENT. See also **CONTRACTS**, 14.

1. A person sued individually for bonds received from another may show that he received them from the latter as the property of her husband's estate, of which he was executor, as against a claim by her administrator that they belonged to her by gift from the testator. *Penny v. Croul* (Mich.) 83

2. An innocent purchaser of a diamond entrusted by the owner to another for the purpose of exhibition to a pretended purchaser, but immediately pledged by him to the keeper of a gambling-house, and sold by the two, acquires no title as against the owner. *Bachr v. Clark* (Iowa) 717

BALLOT. See **VOTERS AND ELECTIONS**, 3, 4, 7, 8, **NOTES AND BRIEFS**.**BANKS.** See also **EVIDENCE**, 2; **OFFICERS**, 7; **TRIAL**, 4.

1. The addition to the name of the depositor in an account with a bank, of the words "judge of probate, license money," is not alone sufficient to make deposits on such account special. *Alston v. State* (Ala.) 659

2. A bank which has received for collection a check which it forwards to its correspondent for that purpose cannot fulfill its obligation to the owner by delivering to him the correspondent's draft on a third person, drawn and used for transmitting the proceeds of the check, not to the owner, but to itself, and which has become worthless because of the insolvency of both drawer and drawee. *St. Nicholas Bank v. State Nat. Bank* (N. Y.) 241

3. The sending of a check by a New York bank to a Tennessee bank for collection in Texas does not constitute the contract for collection a Tennessee contract. *Id.*

4. Active vigilance to detect fraud and forgery is due by savings bank officers to a depositor on paying the deposit to one presenting the pass-book, although the by-laws provide that the bank will not be responsible for fraud in presenting the bank-book and drawing the money, where they also require its presentation by the owner, or his agent duly constituted by a writing signed and acknowledged, as a condition of payment. *Kummel v. Germania Sav. Bank* (N. Y.) 786

5. A savings bank pass-book is not a negotiable instrument, either by itself or in connection with an order signed by the depositor directing payment to a third person or bearer; nor can it be made so by contract. The account may be transferred, but the assignee takes it subject to the equities and defenses between the original parties, in the absence of facts creating an estoppel. *McCaskill v. Connecticut Sav. Bank* (Conn.) 737

6. The entry by a savings bank of a credit in a pass-book will not estop it from denying that a deposit was made, as against an assignee of the account, where the entry was procured by fraud, and the bank made it without knowledge of the material facts or any intention that the representation should be acted on,—especially where the assignee is not a bona fide holder. *Id.*

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Banks; liability of collecting bank. 242
Relation between officials and depositors. 370
Possession of pass-book as evidence of right to draw deposit; transfer of deposit. 737

BASTARDY. See **DESCENT AND DISTRIBUTION**, 3; **PARENT AND CHILD**, **NOTES AND BRIEFS**.**BENEFIT SOCIETIES.** See **ASSOCIATIONS**, **NOTES AND BRIEFS**.**BIDS.** See **BRIDGES**, 1; **CONTRACTS**, 11.**BILLS AND NOTES.**

1. A promissory note payable when the United States pays judgments in "Class Two" of the Alabama claims was due when judgments of the first class were fully paid, and the residue of the fund was practically exhausted in the *pro rata* payment of the second class. *Powers v. Manning* (Mass.) 253

2. A blank indorsement under Conn. Gen. Stat. § 1860, which makes it "import the contract of an ordinary indorsement," renders the indorser liable as such precisely in the order in which he stands upon the note, although he signs before and above the payee. *Spencer v. Allerton* (Conn.) 906

NOTES AND BRIEFS.See also **CHECKS**.

Bills and notes; taking effect from delivery. 52

BONDS. See also **EMINENT DOMAIN**, 3; **PRINCIPAL AND SURETY**.

In Nebraska at least fifty freeholders resident in the township, etc., must sign a petition to the county commissioners, to give the latter jurisdiction to call an election for the purpose of voting aid for a railroad. *Wullenwaber v. Dunigan* (Neb.) 811

NOTES AND BRIEFS.

Bonds; false representations to induce vote for railroad-aid bonds. 811

BONUS. See **SUBSCRIPTION**.**BOUNDARIES.**

A conveyance of land bounded "along" a certain road which was laid out entirely on the grantor's land, but on the margin thereof, carries the fee in the whole roadbed. *Haberman v. Baker* (N. Y.) 611

NOTES AND BRIEFS.See also **DEED**.

Boundary; by highway. 611

BREACH OF THE PEACE.

Being intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquility is a breach of the peace. *People v. Johnson* (Mich.) 163

NOTES AND BRIEFS.

Breach of the peace; defined; examples of. 163

BREAD.

An ordinance establishing the weight of the loaves of bread that shall be offered for sale within the city, and fixing a penalty for offering for sale short-weight loaves, cannot be successfully attacked as not being within the police power, or as taking property without compensation, or abridging or unlawfully interfering with the right to carry on business. *People v. Wagner* (Mich.) 286

BRIBERY. See JUDGMENT, 7.

BRIDGES. See also COUNTIES, 1; INJUNCTION, 6.

1. Definite plans and specifications must accompany an advertisement for bids for building a public bridge, under a constitutional provision requiring bridge contracts to be given to the lowest bidder; and a statute permitting the commissioners to advertise at the same time for plans, specifications, and bids, and to adopt one of the offered plans with its specifications, and accept the accompanying bid, is unconstitutional. *Fones Bros. Hardware Co. v. Erb* (Ark.) 853

2. The Arkansas Act of March 18, 1879 (Mansf. Dig. § 1451), forbidding contracts in behalf of a county for which there is no unexpended appropriation, applies to contracts for bridges. *Id.*

3. The Arkansas Act of March 18, 1879 (Mansf. Dig. § 1451), forbidding contracts in behalf of a county in the absence of an appropriation, is not unconstitutional in its application to bridges as interfering with the exclusive jurisdiction vested by the Constitution in the county court over bridges. *Id.*

4. A statute imposing upon the county commissioners the duty to build all high way bridges of a certain class does not relieve the town in which one of them is located from damages for injuries resulting from the bridge being out of repair, where another statute gives cities and towns exclusive control over the bridges within their respective limits. *Wabash v. Carver* (Ind.) 851

5. Attempting to cross a bridge on a public highway which is in constant use, with a traction steam-engine, water-tank, and threshing machine, is not *per se* negligence as matter of law. *Id.*

NOTES AND BRIEFS.

Bridges; negligence in respect to; liability for injuries caused by defects of; extraordinary use. 851

BROKER. See TROVER.

BUILDINGS. See also INJUNCTION, 7.

1. A municipality cannot, without express authority, absolutely and without regard to circumstances, prohibit the making, upon any wooden building within designated limits, of 18 L. R. A.

repairs to the amount of \$800 or over. *Mount Vernon First Nat. Bank v. Sarlis* (Ind.) 481

2. Grants of rooms or apartments in a building, like leases of the same, must be construed according to the intention of the parties and with reference to the subject-matter upon which they operate. *Hahn v. Baker Lodge No. 47 A. F. & A. M.* (Or.) 158

3. A conveyance of the middle room of the upper story of a building, with an easement of ingress and egress, does not grant any part of the building, or any interest which will continue after a fire has destroyed the greater part of the building, and the identity of the room and its existence as such have been extinguished. *Id.*

NOTES AND BRIEFS.

Buildings; municipal control over erection of wooden buildings. 481

CARRIERS. See also ASSAULT AND BATTERY; GAME LAWS, 2; HACKS.

1. The owner of a vessel carrying emigrants, who has provided a competent surgeon under Act of Congress of Aug. 2, 1882 (22 U. S. Stat. at L. 188), is not liable for the want of care of such surgeon in performing an operation. *O'Brien v. Cunard Steamship Co.* (Mass.) 829

2. The mere existence, during the storm which caused it, of snow on the deck of a ferry boat, raises no presumption of negligence on the part of the ferry company which will establish its liability to respond in damages to a passenger who receives injuries by falling on the slippery deck. *Fearn v. West Jersey Ferry Co.* (Pa.) 366

3. Stopping a train drawn by a dummy engine, with no regular stopping place, for a reasonable time on request to stop, is not the full measure of the conductor's duty, but before starting he must see that no passenger is in the act of alighting or in a position that will be perilous if the train starts. *Highland Ave. & B. R. Co. v. Burt* (Ala.) 95

4. A railway conductor who collects from a passenger boarding the train without a ticket, a less sum than the full train fare to his destination, may within a reasonable time, on discovering the mistake, require him to pay the deficiency, and eject him at the next station on his refusal to pay it, upon first refunding the sum paid less the fare for the distance actually traveled. *Wardwell v. Chicago, M. & St. P. R. Co.* (Minn.) 596

5. For refusing to accept the remaining part of a return ticket on the return trip, where the return part has been taken through mistake by the conductor on the first trip, and ejecting the passenger for refusing to furnish any other ticket or fare, the carrier may be compelled to pay damages. *Kansas City, M. & B. R. Co. v. Riley* (Miss.) 88

6. A shipper's knowledge of directions to the carrier's agent not to receive certain articles for transportation will not relieve the carrier from liability if their transportation is actually undertaken. *Bennett v. American Exp. Co.* (Me.) 83

7. The ordinary carrier bill of lading exempting the carrier for loss by fire on cotton does not exempt the carrier from loss by fire while the cotton is in the possession of a compress company to which it has been delivered as the agent of the carrier, instead of at the carrier's own depot. *Deming v. Merchants Cotton-Press & S. Co. (Tenn.)* 518

8. A railroad company is liable for cotton burned in its car while entrusted to it for shipment, where the cotton would not have been destroyed but for the breaking of a drawbar in attempting to draw the train out of danger, although its bill of lading contains a valid clause exempting it from liability for loss by fire. *Id.*

9. Seizure of property in the course of transportation, by an officer without any warrant or other legal process, does not excuse the carrier for nondelivery. *Bennett v. American Exp. Co. (Me.)* 38

10. A common carrier by water who receipts for goods marked for delivery at a private landing cannot, without excuse or justification, deliver them at another landing without liability for the damages so occasioned. *Stricker v. Leathers (Miss.)* 600

11. A railroad company is not absolved from liability for injuries to stock transported by it, occasioned by the negligence of its employees, by a clause in the shipping contract providing that it shall not be liable unless written notice is given before removal of the property from the car, where it had a good, fair, and reasonable opportunity to inspect the stock before removal. *Atchison, T. & S. F. R. Co. v. Temple (Kan.)* 363

12. A contract by a railroad company for the transportation of horses and their delivery at its depot, providing for their storage unless called for, and containing stipulations in relation to unloading which imply that the company will unload them, requires the company to unload the horses at the place of destination, notwithstanding a usage of its agent there, known to the shipper, of requiring owners of animals to unload them. *Benson v. Gray (Mass.)* 263

13. A railroad company may, by special contract, limit its liability to the owner of stock or goods, so long as the limitation does not relate to its liability for negligence or misconduct. *Atchison, T. & S. F. R. Co. v. Temple (Kan.)* 362

14. A carrier contracting for the shipment of merchandise over lines other than its own, whether it has or has not an initial line of its own, may make a special contract exempting it from liability for loss by fire. *Deming v. Merchants Cotton-Press & S. Co. (Tenn.)* 518

15. A sleeping-car company is liable for the mistake of its servants in awakening passengers in its car, and causing them to get off at a water-tank half a mile from the depot, in the dark and rain, where they were left by the train, when the consequent exposure resulted in serious damage to them. *Pullman Palace Car Co. v. Smith (Tex.)* 215

16. The obligation to awaken and notify a passenger in time for him to prepare safely and comfortably to leave the train at his destination. *L. R. A.*

tion is directly involved in his contract for the use of a sleeping berth. *Id.*

17. An agreement by a common carrier to give one shipper a favor and advantage over others by a rebate is illegal at common law. *Fitzgerald v. Grand Trunk R. Co. (Vt.)* 70

NOTES AND BRIEFS.

Carriers; duty of conductors in stopping and starting trains; length of stop; signals; starting of train. 95

Expulsion of passenger for failure to pay fare. 506

Discrimination as to hackmen and other solicitors of patronage at depots, wharves, etc. 843

Liability for goods in transit; inquiry as to value; extent of liability; effect of seizure by judicial process. 33

Agreement to restrict liability. 518

Contracts for reasonable exemptions. 302

Right to contract for rebates. 70

CASE. See ACTION OR SUIT, 1, 2.

CHARITABLE USES. See TAXES, 3.

CHattel MORTGAGE. See MORTGAGE, 9.

CHECKS. See also BANKS, 2; PAYMENT.

1. The holder of a check is under obligation to an indorser thereon to present it for payment not later than the next day after its date. *Carroll v. Sweet (N. Y.)* 43

2. Delay in presenting a check at the drawer's request, whereby its collection becomes impossible because of his insolvency, operates as payment up to the amount of the check in favor of an indorser who has transferred it to the holder on account of an antecedent debt. *Id.*

3. Lack of money of the drawer in a bank to meet a check, where he would have provided for it or paid it if payment had been insisted upon, does not relieve the holder, who has taken it from an indorser on an antecedent debt, from his obligation to present it, or prevent his failure to do so until collection becomes impossible from operating as payment to the amount of the check. *Id.*

NOTES AND BRIEFS.

Check; time for presentation; ordinary mode; when stale or overdue; reasonable time on. 43

CIGAR MAKER'S UNION. See TRADE-MARK, 5.

CITIZENS. See ALIENS.

CLERKS. See DEPUTIES, NOTES AND BRIEFS.

CLOUD ON TITLE.

1. The legal owners in the actual possession of land can maintain a suit to quiet title against adverse claims which becloud the title and injure the market value of the land. *Kincaid v. McGowan (Ky.)* 269

2. An execution purchaser of land included in an assignment for creditors which is void on its face may have his title quieted against such assignment, where the statute at the time of the purchase authorized a levy on lands fraudulently conveyed. It is not necessary for the judgment creditor to seek aid in equity before the sale. *Wolf v. O'Connor* (Mich.) 693

COAL. See MINES.

COMMERCE.

1. A state statute prohibiting freight trains running on Sunday between sunrise and sunset, except with livestock or perishable freight, or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce, so far as it applies to interstate freight trains. *Norfolk & W. R. Co. v. Com.* (Va.) 107

2. A state statute requiring a carrier who brings into the State a person not having a settlement therein, to remove him from the State, upon request of the proper officers, if he falls into distress within a year, or to be liable for his support,—is an unconstitutional regulation of commerce. *Bangor v. Smith* (Me.) 686

3. A state statute prohibiting game birds to be killed for the purpose of conveying them out of the State is not an unlawful interference with interstate commerce. *State v. Geer* (Conn.) 804

NOTES AND BRIEFS.

Commerce; interstate; regulation of. 107

Interstate; game laws as affecting. 804

State taxes or penalties as affecting; what includes; right of carriers to land passengers. 686

COMMISSIONERS. See ALABAMA CLAIMS.

COMMITTEE. See CORPORATIONS, 2, 3.

COMPROMISE AND SETTLEMENT.

Abandonment of legal proceedings which are without merit is no consideration for the revocation of a valid and binding contract. *Lukens's Appeal* (Pa.) 581

NOTES AND BRIEFS.

Compromise; favored by courts. 601

CONDITION. See DEED, 10.

CONFLICT OF LAWS.

1. The courts of New York will construe the common law as applicable to a contract made and to be performed in another State, according to their own precedents, although they will follow the courts of such other State in the construction of its statute law. *St. Nicholas Bank v. State Nat. Bank* (N. Y.) 241

2. A loan is an Alabama contract, when the application is made, the money paid over to the borrower, and the notes and mortgage executed, in that State, although the debt is made payable in New York and the money was sent from that State to the mortgagee's agent in Alabama, to be paid over on the execution of

the papers. *American Freehold Land Mortg. Co. v. Sewell* (Ala.) 299

3. The right to show that the obligation growing out of an indorsement of a promissory note is not absolute, but depends upon a collateral oral agreement, relates to the nature and validity of the contract, and not to the remedy, and is governed by the *lex loci contractus*. *Baxter Nat. Bank v. Talbot* (Mass.) 52

4. The mere fact of a difference as to the one designated to bring the action, in the provisions of the statutes of two States providing for the recovery of damages for the benefit of those injured by the negligent killing of a person, is not sufficient to prevent the maintenance of the action in the State where the accident did not occur, if the statutes are otherwise substantially the same. *Wooden v. Western New York & P. R. Co.* (N. Y.) 458

5. The plaintiff in an action to recover damages for the benefit of those injured by the negligent killing of a person, which is brought outside of the State where the accident occurred, in the courts of a State which enforce the liability because of the similarity of its statutes to those of the former State, must be the person designated by the statutes of the State where the injury occurred. *Id.*

6. The fact that the amount of recovery for the negligent killing of a person is limited in the *lex fori* and unlimited in the *lex loci* does not make the statutes of the two States so dissimilar that the remedy will not be enforced in the former State; but the amount that can be recovered will be governed by the *lex fori*,—at least where the killing was done by one of its corporations. *Id.*

7. A mortgagor's removal of personal property to another State, where it is seized and sold by his creditors on attachment, cannot affect the rights of the mortgagee, whose mortgage was duly recorded in the State where the parties resided. *Hornthall v. Burwell* (N. C.) 740

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CONSTITUTIONAL LAW. See also STATUTES, 3.

1. A statute changing the mode of procedure in criminal cases from indictment to information is not *ex post facto* as applied to offenses committed before its passage, and takes away no substantial right of an accused. *Re Wright* (Wyo.) 748

2. The power to appoint a state supervisor of oil inspection may be conferred upon state geologists by the Legislature, under Ind. Const. art. 15, § 1, authorizing appointments to offices not otherwise provided for in that Constitution to be made as "prescribed by law." *State, Yancey, v. Hyde* (Ind.) 79

3. An Act to provide for the purity of elections, which does not prevent an elector from casting his vote fairly, does not interfere with the privileges and immunities of the citizens so as to conflict with U. S. Const. amend. 14. *Cook v. State* (Tenn.) 183

4. There is no unconstitutional discrimination against a nonresident widow, under U. S. Const. amend. 14, by making a conveyance by her husband of his property sufficient to cut off her interest if she was not then and never had been a resident of the State. *Buffington v. Grostenor* (Kan.) 293

5. Property rights are created by the rendition of a judgment, which the Legislature has no power to reach and destroy. *Gilman v. Tucker* (N. Y.) 804

6. Commitment for contempt in refusing to make a disclosure as required by law is not a deprivation of liberty without due process of law. *Re Clayton* (Conn.) 66

7. A statute denying effect to a judgment against the validity of a title purchased at execution sale, unless plaintiff reimburses the purchaser, on failure of which the latter's title shall be valid, is unconstitutional as depriving the debtor of his property without due process of law. *Gilman v. Tucker* (N. Y.) 804

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CONTEMPT. - See also CONSTITUTIONAL LAW, 6.

The utility of a disclosure required by statute from one convicted of intoxication, as to when, where, how, and from whom, he obtained the intoxicating liquor, which disclosure is to be turned over to the State's attorney, cannot be questioned by the convict or the court, as an excuse for a refusal to make the disclosure. *Re Clayton* (Conn.) 66

CONTRACTS. See also CARRIERS, 17; COMPROMISE AND SETTLEMENT.

1. A mere statutory obligation to pay money does not raise an implied contract to pay it. The liability depends on the statute itself. *Davis v. Seymour* (Conn.) 210

2. An agreement between all the next of kin of one who died a member of a benefit society, before anyone knew in whose favor the certificate was made payable, that the fund should be collected by the administrator and divided equally among them, is sufficiently supported by consideration in the mutual surrender by each of the chance to receive a larger share, and will be binding on the one who proves to be the beneficiary named. *Royal Society of Good Fellows v. Campbell* (R. I.) 601

3. A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties will be bound by the agreement. *Wullenwaber v. Dunigan* (Neb.) 811

4. A mortgage by an administrator individually to himself as administrator, to secure an

indebtedness which he owes to the estate, is invalid for want of contracting parties. *Burditt v. Colburn* (Vt.) 676

5. Where the current price of a manufactured article is that arbitrarily fixed by a combination of manufacturers, its fair market value will govern in an action for its price upon a sale in which no price was mentioned. *Lovejoy v. Michels* (Mich.) 770

6. A parol agreement made in March, permitting one who was to take possession of a farm as tenant April 1 next, under a lease for one year, to use the ice in an ice-house thereon without charge, if he would refill it so as to leave it filled when he surrendered possession, is not void as not to be performed within a year from the making of it. *Brown v. Throop* (Conn.) 646

7. A verbal promise by the administrator of an estate holding a mortgage against a third person, to pay taxes assessed against the mortgagor if the collector will not levy on the mortgaged property, upon which he has no lien, is within the Statute of Frauds and not enforceable. *Dillaby v. Wilcox* (Conn.) 643

8. A stipulation in a written lease, giving the tenant the right to cut and use trees growing on the leased premises, may be waived by parol. *Lee v. Hawks* (Miss.) 633

9. Although a parol agreement to acquire the interests of all the tenants in common of real estate, convert the same into money, and pay over to each his *pro rata* share of the proceeds, is not enforceable under the Statute of Frauds, yet if the agreement is carried out so far that the title is acquired and the property converted into money, a trust will arise to pay over the proceeds. The trust, however, is not enforceable at law, unless the trustee has affirmatively recognized his duty to make the payment. *Collar v. Collar* (Mich.) 621

10. The first annual payment is optional with the obligor on a contract to purchase certain patents and inventions, which does not mention a cash payment which was made, but calls for annual payments for fourteen years amounting to \$250,000, or, in lieu thereof, the sum of \$100,000 at any time within two years, and provides that on failure to make any payment when due, within sixty days after demand, the "sale shall be null and void and of no effect," and the patents revert discharged of any obligations under the contract, with a further provision giving the obligor the right to assign the contract and thus free himself from personal liability. *Williamson v. Hill* (Mass.) 690

11. The rights of persons submitting bids for the erection of a building cannot be determined by the printed "notice to bidders," where it appears that the terms of the contract were orally fixed at a conference between the bidders and the persons requesting the bids, that the terms so fixed were not incorporated into the printed notice, and that both parties rested upon what was said and done at the conference. *McNeil v. Boston Chamber of Commerce* (Mass.) 559

12. A five years' restriction on the use of a secret process and trade-marks sold with the business is not an illegal restraint of trade,

though it applies not only to the seller, but to those employed by or associated with her in the business. *Tode v. Gross* (N. Y.) 652

18. A contract by a compress company to procure insurance for the benefit of carriers, upon cotton delivered to it for such carriers, renders it liable to them for failure to procure insurance sufficient to cover any loss that occurs. *Deming v. Merchants Cotton-Press & S. Co.* (Tenn.) 518

14. An owner of property in the possession of a bailee who has contracted to insure it cannot recover for the latter's failure to procure full insurance, when he has himself procured it and received payment thereon. *Id.*

15. A grandchild of one granting land to a railroad company, who has ceased to be a member of the latter's household, has no rights under a clause in the deed entitling the grantor and his family to free passage over the road as long as the granted land shall continue to be used for railroad purposes under the charter of the grantee. *Dodge v. Boston & P. R. Co.* (Mass.) 818

16. The breach of the implied condition that an employé will serve his employer honestly, by embezzling funds during every month he was employed by a contract which was entire for each month, prevents any recovery of wages. *Peterson v. Mayer* (Minn.) 72

17. Contracts concerning interstate transportation must be regarded as made upon the basis and with the understanding that changes in the law applicable to them may be made by Congress; and there is no vested right in the law as it existed at the time they were made. *Fitzgerald v. Grand Trunk R. Co.* (Vt.) 70

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See also LOSS; MASTER AND SERVANT.

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CORPORATIONS. See also FRAUD AND FRAUDULENT CONVEYANCES; NAVIGATION, 1.

1. The mere fact of the insertion, in certain corporate charters, of a prohibition to interfere with the navigation of streams, is no ground for construing a charter which does not contain such prohibition as authorizing such interference where it would be advantageous to the corporation. *Connecticut River Lumber Co. v. Olcott Falls Co.* (N. H.) 826

2. A majority of a committee appointed by a corporation to contract for the erection of a building may, in the absence of the other members, lawfully act in letting the contract. *McNeil v. Boston Chamber of Commerce* (Mass.) 559

3. Silent acquiescence by directors of a corporation in acts of its building committee in procuring bids and letting the contract for the building, with full knowledge of such acts, 18 L. R. A.

will make the contract binding on the corporation, although the committee had in fact no authority to make it. *Id.*

4. Four of the six directors who own in equal shares all the stock of a corporation formed for establishing a summer resort upon its land may make a binding dedication of portions of such land to the public for parks. *Attorney-General v. Abbott* (Mass.) 251

5. Subscribers to the stock of corporations which never become fully organized because all the stock is not taken, but which are merged, with their consent, in a new corporation, cannot set up illegality of the merger or the lack of corporate character of any or all of the companies to defeat their liability, as against creditors of the new company, after they have permitted it to incur liabilities. *Hamilton v. Jackson* (Pa.) 779

6. One holding a bond for half the share in the proceeds of sales to which a stockholder in a corporation formed for establishing a summer resort will be entitled has no such interest as to give him a voice in determining the policy of the company, or to make his assent to or dissent from its proposed plans material. *Attorney-General v. Abbott* (Mass.) 251

7. A corporation is not negligent in permitting its president to continue in office and have access to its certificate book and seal, so as to make it liable for his act in issuing forged certificates of stock, by reason of his former misconduct in pledging his own shares to another person in violation of an agreement to pledge them to an associate. *Hill v. C. F. Jewett Pub. Co.* (Mass.) 198

8. The forgery of the necessary signature of the secretary to certificates of stock, by the president of a corporation, whose only authority as to the issue of certificates is to sign them, does not make the corporation liable therefor to holders who took them in private and personal transactions with the president. *Id.*

9. A Maryland statute providing that whenever the laws of any other State impose upon Maryland insurance companies seeking to do business within its borders greater obligations or prohibitions than are prescribed for foreign companies seeking to do business in Maryland, the same obligations and prohibitions shall be imposed on companies of such State which shall seek Maryland business,—makes such foreign law the rule which Maryland will apply to companies of the foreign State asking permission to do business within its territory; and if a Maryland company is refused a license in the foreign State merely on the ground of discretion, the latter's companies may be refused license in Maryland on the same ground, although the Maryland statutes do not in terms authorize it. *Talbott v. Fidelity & C. Co.* (Md.) 584

10. A foreign corporation will not be held void as an evasion of the laws of the State in which all the corporators reside and in which is the principal place of business of the company, where there was no fraud or evasion of the law of the State of incorporation, and the certificate of incorporation was granted by the secretary of state with knowledge of the facts. *Demarest v. Grant* (N. Y.) 854

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 Liability for misfeasance of officers. 198
 Evasion of law by incorporation in another State. 854
 Foreign; amenable to local law; law of comity. 584

COUNTIES. See also **BRIDGES**, 8.

1. A contract by a county to build a bridge is not authorized by an appropriation for preliminary work, estimates, etc., towards securing such bridge. *Fones Bros. Hardware Co. v. Erb* (Ark.) 558
 2. A constitutional limitation on the amount of county indebtedness applies to a debt for necessary books and stationery which it is made by statute the duty of the county clerk to purchase for his office, as well as to any other obligation. *George D. Barnard & Co. v. Knox County* (Mo.) 244

COURTS.

1. An action to enforce the liability of a stockholder under the laws of another State in which the corporation was organized and judgment has been rendered against it, but no proceedings taken against him, cannot be maintained in a State in which the corporation has no place of business, notwithstanding that the parties, although both nonresidents, do not reside in the same State, and neither of them resides in the State where the corporation was organized. *Bank of North America v. Rindge* (Mass.) 56
 2. The determination of the Legislature in abolishing an office and creating a new one, that the change of duties or burdens is sufficient to make the latter a different office, cannot be reviewed by courts, provided the Act is otherwise valid. *State, Yancey, v. Hyde* (Ind.) 79
 3. A court in which the judge thereof is charged with the duty of keeping its records, which must be authenticated by him, though having a recorder charged with the duty of keeping such records when requested by the judge, is not a court having a clerk, within the federal statute regulating naturalization, and has no power to receive a declaration of intention to become a citizen. *Re Dean* (Me.) 229
 4. A court, to have jurisdiction of applications for naturalization or to receive declarations of intention under the federal statute, must, in addition to possessing a seal, have a clerk distinct from the judge, charged with the duty of keeping a true record of its doings and afterwards of authenticating them. *Id.*
 5. While a court, to have cognizance of applications for naturalization or to receive declarations of intention under the federal statute, must possess common-law jurisdiction, it is not necessary that it have all the common-law 13 L. R. A.

jurisdiction that pertains to all classes of actions, but merely that it exercise its powers according to the course of the common law. *Id.*

6. An action may be maintained in Texas for the destruction of personal property in the territory of the Choctaw Nation. *Missouri P. R. Co. v. Cullers* (Tex.) 542

7. An action for injury done to lands without the State by an act no part of which was performed within the State is purely local, and cannot be maintained in the Texas courts. *Id.*

8. The assignee of a right of action from an Indian for the destruction of the latter's personal property may maintain an action thereon in the Texas courts. *Id.*

9. Claims in different counts against a town for injuries to sheep, under Conn. Gen. Stat. § 3752, not being based on contract, cannot be united to make up the amount necessary to give jurisdiction to the Connecticut court of common pleas. *Davis v. Seymour* (Conn.) 210

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COVENANT.

1. Damages to a tenant, resulting from an injunction obtained without sufficient cause by the lessor, which prevented him from cultivating the land, may be recovered in an action on the covenants in the lease, although there may be a remedy on the injunction bond. *Hubble v. Cole* (Va.) 311
 2. A covenant by one selling a business, that she, her father, husband, and brother-in-law will refrain from communicating a secret recipe used in the business to anyone but the buyer, and from using trade-marks connected with the business, under a penalty of \$5,000 named as stipulated damages in case of a violation of the covenant within five years, does not limit her liability for such damages to her own personal violation of the covenant, but extends it to a violation by any of the persons named. *Tode v. Gross* (N. Y.) 653
 3. No damages can be recovered for breach of a covenant of warranty in a deed given in consideration of love and affection, under a statute limiting the recovery in case of breach of covenants of warranty to the amount of purchase money paid, with interest thereon. *McClure v. Melton* (S. C.) 723

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Covenants; voluntary, how far enforceable. 723

CRIMINAL LAW. See also **VOTERS AND ELECTIONS**, 1.

1. Duplicity in an information, which amounts only to surplusage, is not ground for motion in arrest. *State v. Armstrong* (Mo.) 419

2. The time of absence from jail of one who, having been committed under an alternative judgment that he pay a fine or be imprisoned a certain number of days, secures his release through the unauthorized act of the sheriff,

cannot be considered as having been spent in jail in satisfaction of the judgment. *Ex parte Vance* (Cal.) 574

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CUSTOM. See also CARRIERS, 12.

A verdict against a tobacco sampler for the amount of loss resulting to a buyer because the tobacco in the cases was not as represented by the sample tags is supported by evidence that by usage of trade he undertook to make good such loss, and that he had promised to make it good after having been notified of it, and had paid other losses resulting from the same cause, although there was no privity of contract between him and the person injured. *Conestoga Cigar Co. v. Fynke* (Pa.) 488

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Custom and usage; as law; conflict with rules of law; reasonableness of; knowledge of; to affect express contract. 488

DAMAGES. See also EVIDENCE, 14, 28, 29.

1. Mental suffering sustained by one deprived of attending the funeral of his brother is not an element of damages for failure to deliver a telegram. *Western U. Teleg. Co. v. Rogers* (Miss.) 859

2. Damages for wrongful confinement in an insane asylum are not confined to the expense of procuring a release and the time lost, but extend to the mental suffering, humiliation, shame, disgrace, and injury to reputation suffered thereby. *Heulett v. George* (Miss.) 682

3. A verdict for \$1,000 damages for the negligent killing of a widower seventy-three years old, who was strong and vigorous for his age and actively engaged in business, will not be set aside as excessive, although his children are all of mature years and not dependent upon him for support. *Wabash v. Carver* (Ind.) 851

4. Nominal damages only can be recovered for breach of a covenant of warranty by reason of an incumbence consisting of a right of dower, so long as it remains inchoate. *Blevins v. Smith* (Mo.) 441

5. If delivery of goods by a carrier at the wrong landing is made with a willful purpose to harass and injure the owner, punitive damages may be recovered. *Stricker v. Leathers* (Mich.) 600

6. Punitive damages cannot be awarded against the estate of a deceased person for a tort committed by him in his lifetime. *Heulett v. George* (Miss.) 682

7. The sum of \$500 stipulated "as liquidated and ascertained damages for the breach" of a contract to build a wall, or, at the contractor's option, to remove a house 8 feet and put it in as good condition as before, the cost of which would not exceed \$100, must be held to be a 18 L. R. A.

penalty, and not liquidated damages. *Condon v. Kemper* (Kan.) 671

8. "The penalty of \$5,000 which is hereby named as stipulated damages" for violation of a covenant, made on the sale of a business, not to reveal a secret process or use trade-marks belonging to the business, is to be regarded as stipulated damages, notwithstanding the use of the word "penalty." *Tode v. Gross* (N. Y.) 652

9. The damages for continuing trespasses by an elevated railroad on easements of light, air, and access, which must be paid to prevent an injunction in favor of a purchaser of the premises after the trespasses began, is the difference between the value of the property with and without the railroad; and the price paid by the purchaser is immaterial. *Pappenheim v. Metropolitan Elev. R. Co.* (N. Y.) 401

10. The use of a house as a place of prostitution does not affect the liability for depreciation of its value from the construction and operation of an elevated railroad in the street in front of it. *Lawrance v. Metropolitan Elev. R. Co.* (N. Y.) 102

11. The cost of repairs upon a toll bridge which has been taken by a county cannot be considered in determining the compensation which must be paid to the owners because of such taking. *Miffin Bridge Co. v. Juniata County* (Pa.) 481

12. Damages from publication of a libel cannot be enhanced by the republication thereof by other persons, even if there was a general probability of its republication. *Burt v. Advertiser Newspaper Co.* (Mass.) 97

13. Only damage which is the natural and direct result of slander of title is recoverable therefor. *Burkett v. Griffith* (Cal.) 707

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DEATH. See CONFLICT OF LAWS, 4-6; LANDLORD AND TENANT, 1.

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Death; right of action for; who must bring action. 458

DEDICATION. See also CORPORATIONS, 4.

1. Use by the public is a sufficient acceptance of parks to complete a dedication, although the town takes no action in regard thereto. *Attorney-General v. Abbott* (Mass.) 251

2. A land company which by a quorum of its directors lays out open spaces or parks, and designates them as such, though with some changes of boundaries, on all its plans upon which its sales of lots were made, and assures purchasers that they shall always be kept open, dedicates them as parks to the public, although not much is done to adorn them and all that was done was done by the corporation. *Attorney General v. Abbott* (Mass.) 251

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Dedication; of land for public parks. 251

DEED.

1. The delivery by a grantor to his own agent of a deed of gift intended for one who has no knowledge that it was to be made is not a valid delivery to the latter. *Peck v. Rees* (Utah) 714

2. No delivery of a deed, either absolute or conditional, can be made without parting at the time with the possession of it, and with all power and control over it by the grantor, for the benefit of the grantee. *Porter v. Woodhouse* (Conn.) 64

3. Warranty deeds made by way of gift, which are in a box with money and bank books, are not delivered by the grantor when expecting to die, by giving the box to another person, saying that "the names of the persons who are going to have the houses are on the deeds, and if I live I will talk further about the contents of the box; but don't you open it until after my funeral." *Id.*

4. The mere fact that a map bearing a prior date and showing a road not mentioned in a deed is annexed to a subsequent deed is not sufficient to show that the earlier conveyance was made with reference to the road. *Haberman v. Baker* (N. Y.) 611

5. A grantor of the fee of the surface of land may reserve an estate in fee in the minerals, and each estate will be subject to the law of descent, devise, and conveyance. *Kincaid v. McGowan* (Ky.) 289

6. The right to minerals, timber, and a mill-site, reserved to the grantor in a conveyance of certain parcels of land within a larger tract will not pass by his subsequent conveyance of the whole tract, expressly deducting therefrom the parcels of land previously conveyed. *Id.*

7. No reservation of a right to flood lands conveyed by a railroad company, with water of a river backed up by the faulty construction of the embankment on which its tracks are laid, will be implied from the mere fact that the conveyance was made after the embankment was finished. *Sellers v. Texas C. R. Co.* (Tex.) 657

8. A deed to certain persons, "commissioners of W. County, and their successors in office, for the use of said county," accepted by an entry upon the county records as a deed "to and for the use of" said county, gives the legal title to the county, and not to the commissioners, where there was no statute designating their corporate name and style. *Sumner v. Darnell* (Ind.) 178

9. Removal of a county seat fifty-six years 18 L. R. A.

after its location on land conveyed for such use does not make a total failure of consideration which will cause a reversion to the grantor. *Id.*

10. A conveyance "for the use of" a county, "in consideration of the seat of justice having been permanently established" at that place, is not on a condition subsequent that the county seat remain there; and no reversion is worked by removal of the county seat. *Id.*

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Reservation in; what are; distinguished from exceptions; what may be reserved. 289

Construction of consideration clause; rules for construction. 318

DEFINITIONS. See also ALIENS, 1; DESCENT AND DISTRIBUTION, 2.

1. Discontinuance and dismissal are synonymous terms. *English v. Dickey* (Ind.) 40

2. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in open market, in the usual and ordinary course of lawful trade and competition. *Lovejoy v. Michels* (Mich.) 770

3. Proximate cause of an injury is that act or omission which immediately causes or fails to prevent the injury, and without which the injury would not have happened, notwithstanding other acts or omissions concurrent therewith. *Deming v. Merchants Cotton-Press & S. Co.* (Tenn.) 518

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See also DEPOSITIONS.

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DELIVERY. See DEED, 2, 3; MORTGAGE, 8.

DEPOSITIONS. See also EVIDENCE, 17; WITNESSES, 1.

1. Requiring a person convicted of intoxication to make a disclosure under oath, as to when, where, how, and from whom, he procured the intoxicating liquor, does not violate the constitutional provisions as to due process of law, equal protection, or right of trial by jury; nor is it against public policy. *Re Clayton* (Conn.) 66

2. The competency of a deposition offered against the estate of a deceased person does not depend upon the facts at the time the deposi-

tion was taken, but upon those existing at the time of the trial. *Hewlett v. George* (Miss.) 682

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Infants as deputy sheriffs; women as deputy clerks. 721

DESCENT AND DISTRIBUTION.

See also HEIRS, NOTES AND BRIEFS.

1. Upon the death, before converting the land into money, of one who has received a conveyance of the shares of tenants in common of real estate under a parol agreement to sell the same and divide the proceeds among his grantors, the land descends to his heirs unincumbered, by any trust; and a purchaser from them will owe no duty to the original grantors arising out of the parol agreement made with them. *Collar v. Collar* (Mich.) 621

2. A "relative" is a blood relation, and not a relation by marriage only, within the meaning of Me. Rev. Stat. chap. 74, § 10, giving the lineal descendants the share of a relative of the testator who is a devisee, if he dies before the testator. *Elliot v. Fessenden* (Me.) 87

3. Statutes providing that children of a marriage annulled because of a former husband or wife living, or of a marriage null in law, shall be legitimate, do not legitimate a child born before such marriage. *Adams v. Adams* (Mass.) 275

4. Marriage, in California, of the parents of an illegitimate child, after a void divorce obtained by one of them in that State, does not, under the California statute legitimizing children born out of wedlock by the subsequent marriage of their parents, legitimate such child so as to entitle him to set up a claim in competition with the legitimate children of such parent under a Massachusetts will. *Id.*

DISCLOSURE. See DEPOSITIONS, 1.

DISORDERLY PERSONS. See BREACH OF THE PEACE.

DOMICIL. See SCHOOLS, 2; WRIT AND PROCESS.

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DONATION. See FORFEITURE, NOTES AND BRIEFS.

DOWER. See also ALIENS, 2; CONSTITUTIONAL LAW, 4.

An inchoate right of dower is not cut off by a sale of the husband's land for taxes, since the tax proceeding is not strictly *in rem*, al- 13 L. R. A.

though the statutes do not permit any personal judgment for the tax, where they also provide that the wife's interest shall not be affected by any act or laches of the husband or by any judgment against him. *Blevins v. Smith* (Mo.) 441

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DUE PROCESS. See CONSTITUTIONAL LAW, 7.

DUMMY RAILROAD. See also CARRIERS, 8.

A train pushed by a small engine called a "dummy," although exclusively engaged in carrying passengers, whether run within or without the limits of a municipality, is a "railroad" train within the meaning of a statute prescribing regulations to be observed by railroads. *Katzenberger v. Lawo* (Tenn.) 185

EASEMENTS. See also DEED, 7.

An easement ends when the particular purpose for which it was granted ceases. *Hahn v. Baker Lodge No. 47 A. F. & A. M.* (Or.) 158

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EJECTMENT.

Ejectment is not the proper remedy to procure the discontinuance of a sewer which was constructed by a city over land of the United States government, which was afterwards conveyed to plaintiff, where the only facts that appear are that the sewer was constructed and was thereafter continuously applied to its proper use, without being fenced in or anything done to prevent plaintiff from taking possession of the land. *Harrington v. Port Huron* (Mich.) 684

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ELECTRICAL USES AND APPLIANCES.

1. An ordinance prohibiting the suspension of electric wires over or upon the roofs of buildings is within the legitimate police powers of a city, where such suspension of these wires is extremely dangerous, both as being liable to originate fires and as obstructing the extinguishment of fires otherwise originated. *Electric Imp. Co. v. San Francisco City & County* (C. N. D. Cal.) 181

2. Public officers may be authorized by ordinance to remove dangerous electric wires

suspended over or upon the roof of buildings, where the owners fail to do so after notice to remove them. *Electric Imp. Co. v. San Francisco City & County* (C. C. N. D. Cal.) 181

ELEVATED RAILROADS. See EVIDENCE, 18.

EMINENT DOMAIN.

1. Permission to a water company to take water from a pond the shores of which have already been appropriated to public use, and also to take and hold all land necessary for raising, holding, and purifying it, impliedly authorizes the taking of previously appropriated land on the shore of the pond for a pumping station and filtering gallery, together with a right of way thereto, where such land is not indispensable to the prior appropriator, while the water company could only with difficulty, if at all, do business without it. *Old Colony R. Co. v. Framingham Water Co.* (Mass.) 883

2. A provision that a water company may be required to give security to the selectmen of the town for the payment of all damages awarded for lands taken by it, which may, upon becoming insufficient, be required to be increased, sufficiently provides for compensation to justify the taking of the land. *Id.*

3. A second bond is not required from a corporation organized under the Pennsylvania Act of 1888 for the improvement of the navigation of a stream, which has failed to agree with abutting-property owners as to payment of damages, before it can exercise its franchises, if it has given the one prescribed by § 5 of that Act, although § 4 provides that in case of failure to agree as to damages they shall be assessed under Pa. Act 1874, § 41, which requires the tender of a bond to the person claiming damages. *Genesee Fork Imp. Co. v. Ives* (Pa.) 427

4. Although the presumption is that the establishment of harbor lines is for a public use in the interest of navigation, yet if the record shows that their purpose was to prevent a new bridge from being marred by the erection of structures on either side of and connected with it, the proceedings to take property therefor will be held void. *Farist Steel Co. v. Bridgeport* (Conn.) 590

5. Compensation must be paid to a riparian owner by a city which in establishing harbor lines appropriates a portion of the land laying between high and low water mark adjacent to his property, under a charter which gives power to establish such lines, but preserves to landowners the same rights that they have under the section of the charter providing for opening highways, where the latter section makes full provision for compensation for whatever damage a landowner may suffer. *Id.*

6. The mere depreciation in the value of the lot of an abutting owner who does not own the fee of the street, by the construction of a railroad in the street, and his deprivation of the full use of the street, but without any invasion of or physical interference with his lot or any obstruction of his access thereto, is not a taking of his property, within the meaning of the constitutional provision as to compensation for property taken.

O'Brien v. Baltimore Belt R. Co. (Md.) 126

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Eminent domain; rights of abutting owners where a railroad is laid in street. 127

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Right of compensation to owner; what property may be taken; measure of damages for toll bridge taken. 481

ENTIRETIES. See HUSBAND AND WIFE, 1, NOTES AND BRIEFS.

EQUITY.

Equity has jurisdiction of a bill to determine as between the public and riparian millowners the proper form, dimensions, and place in a milldam of a sluice for running logs on the stream; and the suit is not barred by the fact that the dam is already erected. *Connecticut River Lumber Co. v. Olcott Falls Co.* (N. H.) 826

ESTOPPEL. See also BANKS, 6; CORPORATIONS, 5.

1. An actual fraudulent intention is not necessary to constitute an estoppel *in pais* by representations made by one who knows or ought to know the truth, and may reasonably anticipate that they will be relied and acted on as true. *Stevens v. Ludlum* (Minn.) 270

2. Representations to a commercial agency respecting one's business, communicated to its patrons, estop him as against the latter to deny their truth. *Id.*

3. No estoppel against an injunction to restrain continuing trespasses by the operation of an elevated railroad in a street in front of plaintiff's premises arises out of his mere delay to bring suit for eleven years after the original trespass, and his occasional riding on the road as a passenger, though his only protest against the construction of the road was by subscription to pay counsel to prevent it. *Galway v. Metropolitan Elev. R. Co.* (N. Y.) 788

4. A defendant in ejectment is not estopped to set up adverse possession by the fact that his grantor, after setting up the same defense in a prior action, had settled it by buying the plaintiff's title and giving his notes for the purchase price, and that the same plaintiff has brought a second action after a default in payment of the notes. *Greene v. Couse* (N. Y.) 206

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EVIDENCE.

I. PRESUMPTIONS; BURDEN OF PROOF.

II. PAROL TO VARY WRITINGS.

III. DOCUMENTARY; EXPERT.

IV. DECLARATIONS; RES GESTÆ.

V. RELEVANCY AND MATERIALITY.

VI. WEIGHT AND SUFFICIENCY.

NOTES AND BRIEFS.

See also DEED, 8.

I. PRESUMPTIONS; BURDEN OF PROOF.

1. The burden of proving voluntary exposure to unnecessary danger as a defense to an action for life insurance is on the insurer. *Badenfeld v. Massachusetts Mut. Acci. Assn.* (Mass.) 263

2. To hold the owners of an insolvent bank individually liable as partners for its debts, plaintiff must show that it was a partnership enterprise of which defendants were members; and until a prima facie case of partnership is made out the burden cannot be placed on defendants of showing that it was incorporated or was a limited partnership, to relieve themselves from liability. *Hallstead v. Curtis* (Pa.) 370

3. Where the cause of the accident by which a passenger was injured is known as well to the passenger as to the carrier, the presumption of negligence which arises from the mere fact of injury to a passenger while on the carrier's vehicle has no application; but the passenger must affirmatively show negligence. *Fearn v. West Jersey Ferry Co.* (Pa.) 366

4. The degree of care and prudence which must be exercised by a child to avoid the charge of negligence is measured by his capacity to see and appreciate danger, whether he is under or over fourteen years of age; and in the absence of evidence to the contrary, such capacity will be held to be that which is usual to children of his age and experience. Fourteen years is simply the age after which capacity is presumed, and the burden of showing lack of it placed on the child. *Kehler v. Schwenk* (Pa.) 874

5. There is no presumption of such want of capacity in a child as to render it irresponsible for its contributory negligence, in a case submitted to the jury, although in deciding a demurrer there may be such a prima facie presumption. *Central R. & Bkg. Co. v. Ryles* (Ga.) 684

6. If the absence of the books and papers of an insolvent bank affords a presumption as to its character, against either party to a suit to hold members of the concern individually liable as partners for its debts, it must be against plaintiff, where the documents are in possession of his witness in another State, beyond the reach of process, while defendants are simply small stockholders without means of reaching them or compelling their production. *Hallstead v. Curtis* (Pa.) 370

7. To sustain a tax upon land which is shown to have been legally exempt from taxation for a long period prior to the year for which the tax was assessed, the burden is on the tax officers to show that something had occurred before such year to remove the exemption. *Allen County v. Simons* (Ind.) 512

8. The assent of executors to a specific legacy is presumed where the legatees are in possession under it. *Schley v. Collis* (C. C. S. D. Ga.) 567

II. PAROL TO VARY WRITINGS.

9. Parol evidence is not admissible to vary the effect of a blank indorsement, where the 18 L. R. A.

statute provides that it shall have the effect of an ordinary indorsement. *Spencer v. Allerton* (Conn.) 806

10. The liability intended to be assumed by a stranger to a promissory note, who places his name on the back of it, may be shown by parol. *Kingsland v. Koepp* (Ill.) 649

11. When a writing is shown to have been executed for the purpose of conveying an estate held in common to a trustee for sale and distribution of the proceeds, it is the best evidence of the terms of the trust; and unless it has been lost, parol evidence respecting the terms should be excluded. *Collar v. Collar* (Mich.) 321

III. DOCUMENTARY; EXPERT.

12. The record in an action against an attorney to recover money out of which he was charged with defrauding plaintiff, which resulted in a judgment against him, is admissible in a proceeding by members of the bar, based on the transaction out of which such action arose, to procure his disbarment for unprofessional conduct,—especially where the complaint averred the existence of such record, which the answer denied. *Fairfield County Bar, Fessenden, v. Taylor* (Conn.) 767

13. A deed excepting from the warranty "any right of way the public may have acquired" over the premises is inadmissible to prove the existence of such right, or notice thereof to the purchaser. *Central R. & Bkg. Co. v. Ryles* (Ga.) 634

14. Returns of the value of its capital stock, made by a toll-bridge company to the state auditor as required by law, is competent evidence upon the question of such value, in a proceeding to determine the compensation to be made to the company for the taking of the bridge by the county. *Mifflin Bridge Co. v. Juniata County* (Pa.) 481

15. A letter written by the debtor, protesting against libelous duns from a collecting agency, and claiming that the debt has been paid, on which the creditor writes a reply, is admissible against the latter on a trial for criminal libel. *State v. Armstrong* (Mo.) 419

16. A portion of an envelope containing a libel is not inadmissible in evidence on a trial for criminal libel because it has been unnecessarily pasted in the information. *Id.*

17. A deposition taken in an action by deponent's wife, to which he was made a formal party, brought to recover damages for personal injuries to her, alleged to have resulted from a carrier's negligence, is not admissible in an action against the same defendant, prosecuted by the wife as administratrix of deponent to recover damages for injuries to him, alleged to have been received at the same time and place and through the same cause as those sued for in the first action. *Fearn v. West Jersey Ferry Co.* (Pa.) 366

18. In an action by a landowner to compel a company operating an elevated railroad in the street in front of his property to pay the damage done him by cutting off the easements of light, air, and access connected with such property, an expert witness cannot be permit-

ted to state what, in his opinion, the amount of such damage is, nor what would have been the present value of the land if the road had not been built. *Roberts v. New York Elev. R. Co.* (N. Y.) 499

IV. DECLARATIONS; RES GESTÆ.

19. Representations, promises, and inducements, in the course of the canvassing and electioneering to induce freeholders to sign a petition for an election for the issuance of bonds to be donated to a railroad company, although made previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestæ*. *Wullenwober v. Dunigan* (Neb.) 811

20. Where two agents of a railroad company were engaged in the common purpose of soliciting freeholders to sign a petition for an election to vote bonds, and one made pledges and promises and held out certain inducements to said freeholders, who shortly afterwards signed a petition presented by the other, such pledges, promises, and inducements were a part of the *res gestæ*. *Id.*

21. A physician's statement as to what a person told him about her exposure, as the basis of his opinion as to the cause of her sickness, is not inadmissible on the part of the plaintiff in an action for damages sustained from the exposure. *Pullman Palace-Car Co. v. Smith* (Tex.) 215

22. In an action for personal injuries the plaintiff's wife may testify to exclamations of pain made by plaintiff on waking up during the night. *Bennett v. Northern P. R. Co.* (N. D.) 465

V. RELEVANCY AND MATERIALITY.

23. Evidence that a conveyance of his interest by a tenant in common to a trustee, to facilitate a sale of the property and distribution of the proceeds, was in fraud of his creditors, is immaterial in an action by him to recover his share of the proceeds of the sale, to which they are not parties. *Collar v. Collar* (Mich.) 621

24. Where one charged with fraud in the New York custom-house admits that sugar was valued there lower than in Boston, and claims that the Boston polariscope gives too high a valuation, evidence that it does not is admissible. *Burt v. Advertiser Newspaper Co.* (Mass.) 97

25. Evidence in a libel case that the libel has been published before is not admissible in mitigation of damages, except where defendant's libel refers to and professes on its face to be based on the former one. *Id.*

26. Evidence of the amount of plaintiff's salary and the number of weeks that he lost is admissible in an action for damages expressly claiming loss of time as an element of the damage. *Pullman Palace-Car Co. v. Smith* (Tex.) 215

27. In an action to enforce the alleged liability of a tobacco sampler to make good the loss resulting to a buyer because the tobacco in the cases was not as represented by the tags attached to the samples, evidence is admissible

to show what meaning apparently ambiguous words and figures on the tags conveyed to the trade, and that by usage the sampler undertook to make good losses resulting from untrue statements on the tags. *Onestoga Cigar Co. v. Hinkle* (Pa.) 483

28. In a proceeding to determine the compensation to be made to the owners of a toll bridge which has been taken by the county, witnesses should be questioned as to the value, and not the cost, of the bridge. *Miffin Bridge Co. v. Juniata County* (Pa.) 481

29. For what sum the county could have erected a new bridge is immaterial in a proceeding to determine what compensation it must make to the owners of a toll bridge which it has taken for the use of the public. *Id.*

30. Evidence of specific indebtedness of the prosecutrix to other persons is not admissible in behalf of a defendant in an action for criminal libel. *State v. Armstrong* (Mo.) 419

31. A variance is created by proof of a policy which specifies no time for its continuance, under a complaint which describes it as running for one year from a certain date. *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 267

32. A witness's testimony that she knows of nothing else which could have caused her illness except the exposure on which her husband's action for damages is based is admissible in connection with the details of her exposure and sickness. *Pullman Palace-Car Co. v. Smith* (Tex.) 215

33. Upon the trial of an action for malicious prosecution the plaintiff, when attempting to establish a want of probable cause, is not confined to proof of such facts as he can affirmatively show were actually known to defendant, but may also prove the existence of such open and notorious facts as would or should have been ascertained by the latter had he, before instituting the proceedings, made such inquiry and investigation as anyone with honest motives, and not actuated by malice, would have made. *Tabert v. Cooley* (Minn.) 463

VI. WEIGHT AND SUFFICIENCY.

34. Voluntary exposure to unnecessary danger which will prevent recovery of life insurance is not shown by the fact that the insured, while waiting for a train, was thrown or fell upon the track from a platform not intended for use in getting upon his train, or in fact for use by passengers at all, though they sometimes used it, but for train hands, and which was only about 24 feet wide in places where girders extended out from the wall. *Badenfeld v. Massachusetts Mut. Acci. Asso.* (Mass.) 263

35. The testimony of two witnesses or their equivalent is necessary to modify an antenuptial agreement, even on the ground of fraud. *Lukens's Appeal* (Pa.) 581

36. The voluntary dismissal of a civil suit is not, as a matter of law, prima facie evidence of malice. *Smith v. Burrus* (Mo.) 59

37. The doctrine of reasonable doubt as to guilt has no application in an action for malicious prosecution of a suit for slanderous words

charging a crime. A preponderance of evidence is sufficient to make out a case for either party. *Id.*

38. Criminal acts need not be proved, in a civil action, by any greater or more certain degree of proof than is required in civil actions generally. *Heiligmann v. Rose* (Tex.) 272

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Evidence; burden of proof as to negligence and liability of carrier. 33

Burden of proof as to negligence in case of injury to servant. 374

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Parol as to blank indorsement of note. 807

Parol to vary term of written instrument. 621

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Of custom and usage. 488

Right of witnesses to give evidence as to amount of damages. 499

EXCAVATION. See LATERAL SUPPORT, NOTES AND BRIEFS.

EXECUTION. See CONSTITUTIONAL LAW, 7.

EXECUTORS AND ADMINISTRATORS. See also CONTRACTS, 4; LEVY AND SEIZURE, 1.

1. A bond for double the value of the personal estate in the State, as in the case of principal administration, may be required under N. Y. Code Civ. Proc. § 2699, on granting ancillary administration, where the security already given in the place of principal administration is insufficient, although that section provides that the bond may, in the discretion of the surrogate, be in such a sum, "not exceeding twice the amount which appears to be due from the decedent to residents of the State," as will secure resident creditors. The section is intended to allow, but not to require, a smaller bond than in ordinary cases. *Re Prout's Estate* (N. Y.) 104

2. Moneys advanced by an intestate to his daughter and her husband, and treated by the parties as paid by his board, will not be held a debt due the estate on an accounting between the daughter and her husband and the administrator. *Kelsey v. Kelley* (Vt.) 640

3. Money advanced in his lifetime by an intestate residing with his daughter and her husband, for repairs upon the daughter's house, without expectation of repayment and for his own convenience, without substantial benefit to the property, cannot be recovered by the administrator in an accounting with the daughter. *Id.*

4. Lands purchased on a mortgage sale by the mortgagee's administrator *cum testamento* 13 L. R. A.

annezo in his own name, although held by him in trust, take on in his hands the character of the mortgage indebtedness, and are as personality of which he can convey a good title that cannot be disputed by the mortgagee's heirs. *Haberman v. Baker* (N. Y.) 611

5. An agreement between the next of kin of a decedent, that all his property, including money due on life insurance policies payable to some of them, shall be collected by the administrator, and a certain portion of the proceeds used in the ornamentation and care of decedent's burial lot, and the remainder divided equally among the next of kin,—will be supported as a family settlement; and the beneficiaries in the insurance policies cannot claim their proceeds. *Royal Society of Good Fellows v. Campbell* (R. I.) 601

NOTES AND BRIEFS.

Executors and administrators; New York Code provision concerning bond of; origin of law requiring bonds; statutory regulations of the various States. 104

EX POST FACTO. See CONSTITUTIONAL LAW, 1.

FALSE PRETENSES.

The illegal purpose of a person from whom money is obtained by false pretenses is no defense to an indictment against the person thus obtaining it. *Re Cummins* (Colo.) 752

NOTES AND BRIEFS.

False pretenses; illegal purpose of person defrauded as a defense. 758

FAMILY. See CONTRACTS, 15.

FAMILY SETTLEMENT. See EXECUTORS AND ADMINISTRATORS, 5; HUSBAND AND WIFE, 4.

FERRY. See CARRIERS, 2.

FICTIONS. See WATERS, 15.

FIRES. See RAILROADS, 2, 3.

FOOD. See BREAD.

FORFEITURE.

NOTES AND BRIEFS.

Of gifts made to secure location of public buildings, etc. 698

FRAUD AND FRAUDULENT CONVEYANCES.

1. False statements in a certificate required by Mass. Stat. 1884, chap. 380, § 3, to be filed with the commissioner of corporations to enable a foreign corporation to do business in Massachusetts, will not render the persons signing it liable for deceit to one who, relying upon them, takes the corporation's notes and thereby suffers loss. *Hunnewell v. Duxbury* (Mass.) 733

2. A conveyance by a father to his daughter in consideration of her marriage, made without intent on the part of either to defraud, is not fraudulent as to creditors, although the father is insolvent at the time. *Cohen v. Knox* (Cal.) 711

3. A disposition by an insolvent of all his property in consideration of future support, though fraudulent as to creditors, cannot be set aside at the suit of the latter after the death of the insolvent and after support to an amount greater than that of the property received has been furnished. *Kelsey v. Kelley* (Vt.) 640

4. The fact of fraudulent intent must be found to support a judgment setting aside a voluntary conveyance as in fraud of creditors,—at least unless the facts found absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor,—under statutes making every transfer of property with intent to defraud or delay a creditor void, and providing that the question of fraudulent intent is one of fact, and not of law, and that no transfer shall be adjudged to be fraudulent solely on the ground that it was not made for a valuable consideration. Findings that the transfer was voluntary, that the grantor was insolvent, and that the transfer actually defrauded creditors, are not sufficient. *Bull v. Bray* (Cal.) 578

5. The liability of a surety on an unmatured obligation is a lawful debt, claim, or demand which will make a transfer of goods to him by the debtor, on his assuming the obligation, valid as to other creditors, under a statute giving "creditors, purchasers, or other persons" the right to take sufficient property from their debtor to satisfy bona fide claims. *Frees v. Baker* (Tex.) 840

GAME LAWS. See also **COMMERCE**, 3.

1. The game laws of a State can give no authority to take carcasses of animals or parts thereof, while in the course of interstate transportation, away from a common carrier, on the ground that the animals have been killed in violation of such laws. *Bennett v. American Exp. Co.* (Me.) 88

2. Common carriers are not included in the provision of Me. Rev. Stat. chap. 80, § 12, imposing a penalty on "whoever . . . has in possession" between October 1 and January 1 more than the number therein specified of the carcasses of certain wild animals. *Id.*

3. Woodcock, ruffed grouse, or quail need not have been killed for the purpose of conveying them out of the State in order to make it an offense, under Conn. Gen. Stat. § 2546, to have such birds in possession with intent to procure their transportation out of the State. *State v. Geer* (Conn.) 804

NOTES AND BRIEFS.

Game laws; as affecting interstate commerce. 804

GARNISHMENT.

An officer may be garnished for money which he has taken from a debtor under arrest, 13 L. R. A.

where a statute makes property in his hands subject to legal process, if the arrest was made in good faith and there is probable ground for believing the money to be connected with the offense or useful as evidence on the trial of the prisoner. *Ex parte Hurn* (Ala.) 120

GIFT.

1. A deed of gift is not invalid because made to evade a statute rendering a devise void in case of the death of the testator within thirty days after the execution of the will, where the gift is absolute. *Peck v. Rees* (Utah) 714

2. A deed of gift does not become operative by delivery to an agent of the grantor to be delivered to the grantee, when it is not delivered to the latter until after the grantor's death. *Id.*

NOTES AND BRIEFS.

See also **FORFEITURE**.

Gifts; requisites of. 714

GOODWILL.

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HACKS.

Each hackman may be assigned a separate stand at the depot ground of a railroad company, and may be ejected from the stand assigned to another for refusing to leave it, if no unnecessary force is used. *Cole v. Rowen* (Mich.) 848

NOTES AND BRIEFS.

Hacks; rights of hackmen at depots, wharves, etc. 848

HALLWAYS.

NOTES AND BRIEFS.

Implied reservation of use of. 657

HARBOR. See also **EMINENT DOMAIN**, 4, 5.

1. The establishment of harbor lines by a city under power conferred by its charter will not preclude it from altering them by the subsequent establishment of new ones, as proper occasion may require, without further legislative authority; and the legal discontinuance of the old lines will be accomplished by the legal establishment of new ones, without any specific declaration of discontinuance. *Farist Steel Co. v. Bridgeport* (Conn.) 590

2. Under a charter provision that harbor lines established by a city may be laid out and designated by a committee appointed by the city council for that purpose, no legal layout can be made by the adoption by the council of a mere recommendation by the committee of the acceptance of a resolution previously passed by the council, to the effect that the lines be laid out. *Id.*

NOTES AND BRIEFS.

Harbor line; powers of State and municipality as to. 590

HEALTH. See also **QUARANTINE.**

1. Under the Florida Act of 1879 (chap. 8162) as amended by the Florida Act of 1883 (chap. 3443), county boards of health have no authority to demand and collect from vessels coming into the jurisdiction of said boards fees for fumigation or disinfection, unless said vessels are subject to and have been put in quarantine. *Forbes v. Escambia County Bd. of Health* (Fla.) 549

2. County boards of health are corporate bodies invested by statute with functions of a public nature to be exercised for the public benefit, and, in the absence of such remedy conferred by statute, are not liable in an action for tort for damages in the performance of an official duty. *Id.*

HEIRS.**NOTES AND BRIEFS.**

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HIGHWAYS. See also **BRIDGES, 5.**

1. County commissioners may take a strip of land necessary for a highway from a school-house lot, where such taking will not prevent the use of the lot for school purposes, although it will considerably injure it. *Easthampton v. Hampshire County Comrs.* (Mass.) 157

2. A mere licensee of the right to use streets does not obtain a monopoly or an exemption from subsequent reasonable police regulations. *Crowder v. Sullivan* (Ind.) 647

3. Authority to construct a railroad or any part thereof in a tunnel in a city street, on the terms and conditions and in the mode fixed by ordinance, includes authority to construct portions of it in an open cut, where the ordinance so directs; and even without special authority, the right to construct a tunnel would include the right to make properly graded approaches. *O'Brien v. Baltimore Belt R. Co.* (Md.) 126

HOMESTEAD.

Subsequent loss of his family will not terminate a legally acquired homestead exemption of one who continues to occupy the premises as a housekeeper. *Stutts v. Sale* (Ky.) 743

NOTES AND BRIEFS.

Homestead; how far defeated by loss of family. 743

HUSBAND AND WIFE. See also **DESCENT AND DISTRIBUTION, 4; INSURANCE, 14.**

1. A tenancy by entirety is changed by an absolute divorce into a tenancy in common without survivorship. *Stolz v. Schreck* (N. Y.) 325

2. The separate estate of a married woman cannot be charged, in a suit by her father's administrator, with moneys paid by her father as surety for her husband. *Kelsey v. Kelley* (Vt.) 640

3. A woman's share as tenant in common in the proceeds of lands the right to the possession of which vested in her after the passage of 18 L. R. A.

sage of the Delaware married woman's Acts, and which have been sold under direction of court for partition, will not, at the request of her husband, be invested for his benefit, but it will be paid to her absolutely. *Moore v. Darby* (Del. Ch.) 846

4. An agreement by a man, on behalf of his wife, to a family settlement of an estate in which she is interested, by which certain insurance policies payable to her are made part of the general fund, is ratified by her subsequently joining in an application for the appointment of an administrator, and the execution of a power of attorney to enable him to collect the money in accordance with the agreement; and it will be binding on her although the husband had no authority to make it. *Royal Society of Good Fellows v. Campbell* (R. I.) 601

5. The resumption of her marital duties by a wife who has voluntarily estranged herself from her husband because of her dissatisfaction with a valid and binding antenuptial contract is no consideration for a revocation of such contract. *Lukens's Appeal* (Pa.) 581

6. A divorce will not be denied to a man in case of his wife's adultery, by reason of the fact that he married her while under arrest on bastardy process, merely to have the child born in wedlock and on an agreement with her that they should never live together, which they have kept. *Franklin v. Franklin* (Mass.) 843

NOTES AND BRIEFS.

Husband and wife; rule as to estates by entireties; effect of divorce. 825

Antenuptial settlement. 711

Agreement to live separate as a bar to divorce. 848

ICE. See **SALE, 1-3.****IDEM SONANS.** See **NAME, NOTES AND BRIEFS.****ILLEGALITY.****NOTES AND BRIEFS.**

See also **DAMAGES.**

Illegality; of use as affecting damage to property. 102

ILLEGITIMATE CHILDREN. See **DESCENT AND DISTRIBUTION, 3, 4.****IMPRISONMENT.** See **CRIMINAL LAW, NOTES AND BRIEFS.****INDIANS.** See also **ASSIGNMENT; COURTS, 6, 8.**

1. U. S. Ord. July 18, 1787, art. 3, providing that lands and property of Indians shall never be taken from them without their consent, is in force in Indiana. *Allen County v. Simons* (Ind.) 512

2. The land of an Indian who has retained his tribal relations cannot be taxed by a State in which U. S. Ord. July 13, 1787, art. 3, is in force, although it has been patented to him in fee simple without restraint on alienation. *Id.*

NOTES AND BRIEFS.

See also TAXES.

Indians; right to remedies in court. 542

INDICTMENT, INFORMATION, AND COMPLAINT.

1. An information need not all be written by the prosecuting attorney himself. *State v. Armstrong* (Mo.) 419

2. An oath on the "best knowledge and belief" of the prosecutrix is a sufficient verification of an information for criminal libel. *Id.*

3. A criminal information setting forth that the city clerk of a city of the second class registered as a voter the name of a person who did not appear in person, and was not present, and did not give his name, age, occupation, or place of residence,—is sufficient without expressly alleging any criminal intent. *State v. Bush* (Kan.) 607

INFANTS. See also DEPUTIES, NOTES AND BRIEFS; PARENT AND CHILD; SHERIFF.

1. The record must show that the minor resided within the county in which the court was held which attempted to remove his disability, under the authority conferred by the Arkansas Act of Feb. 18, 1869, to render the order of removal valid. *Hindman v. O'Conner* (Ark.) 490

2. A judicial sale of minors' property to their step-grandmother, will, at their request, be set aside when, after the death of their mother and at her request, the step-grandmother took charge of them and was virtually constituted their guardian by the probate court, and had, before the sale, at their request taken charge of the property and taken up her residence thereon, although the management of the sale was by law imposed on a stranger,—the curator of the estate,—and the purchaser acted fairly and in good faith. *Id.*

INJUNCTION. See also ACTION OR SUIT, 5; COVENANT, 1; DAMAGES, 9; MINES.

1. Persons who, upon the representation of the agent of a railway company that a depot will be located at a particular place, sign a petition calling an election in their township for the purpose of voting aid to the company, may enjoin the issuance of the bonds if the company subsequently places its depot at a place other than that agreed upon. *Wullenwaber v. Dunigan* (Neb.) 811

2. An injunction will not lie at the suit of a vendor who, though not obliged so to do, has placed the purchaser in possession, retaining title to the land in himself as security, to restrain removal from the land of buildings erected thereon under direction of the latter, in the absence of any showing that the former's security will be impaired, or that the purchaser is unable or unwilling to comply with the terms of his purchase. *Miller v. Waddingham* (Cal.) 680

3. A corporation composed of representatives of the several mills owning water-power on a river, which has built and maintains a dam at the outlet of the reservoir, and controls the whole water-power in the interest of the owners 18 L. R. A.

ers for their benefit, may sue to enjoin third persons from drawing water from the reservoir. *Watuppa Reservoir Co. v. Fall River* (Mass.) 255

4. An injunction against the passage of a municipal ordinance may be granted at the suit of taxpayers who by reason of their business have a special or peculiar interest in the use of a wharf owned by the city in trust for the public, where the ordinance, which has been favorably reported by a committee, authorizes the illegal transfer of the wharf to an insolvent board of commissioners, which it might not be possible to prevent if the ordinance were passed, and which would result, if passed, in irreparable injury to the plaintiffs. *Roberts v. Louisville* (Ky.) 844

5. Withdrawal of an illegal ordinance after commencement of the suit will not defeat the right to an injunction against its passage. *Id.*

6. An injunction will lie at the suit of a taxpayer, to restrain the making of an unauthorized contract in behalf of a county for the construction of a bridge. *Fones Bros. Hardware Co. v. Erb* (Ark.) 353

7. A property-owner may maintain a suit to enjoin the rebuilding, in violation of a valid city ordinance, of a wooden building which has been partially destroyed by fire, although it would not be a nuisance *per se*, if it will work special and irreparable injury to him and to his property,—as, by diminishing the value of the property and increasing the rates of insurance thereon. *Mount Vernon First Nat. Bank v. Sarlis* (Ind.) 481

8. The collection of a tax, part of which is illegal, upon property subject to taxation, cannot be enjoined without paying or tendering the amount for which the property is legally liable. *Hyland v. Central Iron & S. Co.* (Ind.) 515

9. A decree which attempts to enjoin a nuisance caused by the manner of carrying on a business should specifically point out the things which are to be done and to be refrained from in order to abate the nuisance. *Ballentine v. Webb* (Mich.) 321

NOTES AND BRIEFS.

Injunction; caution as to granting; requirement as to bond. 311

To restrain nuisance. 321

To prevent passage of municipal ordinance. 844

INSANE PERSONS.

An aged person is not of unsound mind so as to require a guardian of his estate, merely because he has not sufficient strength of mind and ability to transact his business affairs with "ordinary care and prudence," if he is capable of transacting the ordinary business involved in taking care of his property, and understands the nature and effect of what he does, and can exercise his will concerning it with discretion, notwithstanding the influence of others. *Emerick v. Emerick* (Iowa) 757

NOTES AND BRIEFS.

Insane persons; what incapacity will justify appointment of guardian. 757

INSOLVENCY. See also ACTION OR SUIT, 6.

1. A mortgage of real property, which has not been deposited for record with the recorder of the proper county before an assignment of the property by the mortgagor for the benefit of his creditors takes effect, is not a valid lien upon the property, as against the assignee or the creditors; nor does it become so by being subsequently recorded. *Betz v. Snyder* (Ohio) 285

2. An assignment for creditors takes effect, as to all persons, from the time of its delivery to the probate court of the county in which the assignor resides at the time of its execution. It is not necessary that it be also filed for record with the recorder of deeds. *Id.*

3. An assignment preferring some creditors whom it fails to specify either in the instrument itself or in an indexed schedule is void upon its face. *Wolf v. O'Connor* (Mich.) 688

4. A conveyance of property situate in Minnesota by an insolvent debtor to a creditor, which amounts to a preference unlawful under the State insolvent laws, may be avoided, although the creditor so preferred resides without the State. *Macdonald v. Corunna First Nat. Bank* (Minn.) 462

NOTES AND BRIEFS.

Insolvency; recitals of assignment. 698

INSURANCE. See also CORPORATIONS, 9; EVIDENCE, 1, 34.

1. A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest thereon, and the cost of the insurance, with interest thereon during the period of the expectancy of life of the insured, according to the Carlisle Tables, and may retain the full proceeds of the policy, regardless of the time of the debtor's death. *Ulrich v. Reinoehl* (Pa.) 438

2. A policy of insurance may be rescinded by the insured on discovery of misrepresentations in the application, made without his knowledge by the agent of the insurer, although the latter would be bound by the policy if it were not rescinded. *Michigan Mut. L. Ins. Co. v. Reed* (Mich.) 849

3. Death resulting from a fight voluntarily engaged in, even if caused by a shot fired by one party just after the fight had ceased and the other had gone a few feet away, is within the exception of an accident insurance policy as to death caused by fighting. It makes no difference in such a case whether the slayer was sane or insane. *Gresham v. Equitable L. & Acci. Ins. Co.* (Ga.) 838

4. "Inhalation of gas" causing death, within the meaning of a clause exempting an insurer from liability, does not include the involuntary inhaling of deadly gas in a well where its presence is unsuspected. *Pickett v. Pacific Mut. L. Ins. Co.* (Pa.) 661

5. Death from asphyxia occasioned by deadly gas in a shallow well into which one descends to fix a pump is caused by external, violent, and accidental means. *Id.*

6. An injury received by slipping on the

frozen ground while returning from a hunting expedition or a visit of pleasure to one in an adjoining town, on Sunday, is within the provisions of an accident insurance policy exempting the insurer from liability where the violation of law is either the proximate or remote cause or condition of the injury, under statutes prohibiting hunting and traveling, except from necessity or charity, on Sunday. *Duran v. Standard L. & Acci. Ins. Co.* (Vi.) 687

7. A man is not guilty of voluntary exposure to unnecessary danger within the meaning of a policy, because he runs toward an approaching train which does not stop there, to get the mail, and stumbles and falls down a bank against the engine. *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 287

8. Leaving a car while in motion is not necessarily "a voluntary exposure to unnecessary danger" which will defeat a recovery on a policy which by its terms is avoided by such exposure. *Badenfeld v. Massachusetts Mut. Acci. Asso.* (Mass.) 268

9. Sunstroke or heat prostration is not a bodily injury "sustained through external, violent, and accidental means," within the meaning of an insurance policy covering such injuries, but expressly excluding liability for "any disease or bodily infirmity." *Dozier v. Fidelity & C. Co.* (C. C. W. D. Mo.) 114

10. The date of the policy, and not that of the attaching of the risk, must govern the question whether other insurance is prior or not, under a clause in a policy of marine insurance providing that other assurance prior in day of date shall be first applied in payment of a loss. *Deming v. Merchants Cotton-Press & S. Co.* (Tenn.) 518

11. Where cotton burned in the possession of a compress company was insured by marine policies as to some of the owners, and by fire policies procured by the company upon a portion of its value for the benefit of carriers and owners, in part performance of contracts to procure insurance, the marine insurers are not entitled to contribution from the fire insurers until the carrier liability and that of the uninsured owners is fully discharged. *Id.*

12. A chattel mortgage given by one partner on firm property for his individual benefit makes a change of "interest," if not of title or possession, within the meaning of an insurance policy providing against incumbrances by chattel mortgage and changes in interest, title, or possession. *Olney v. German Ins. Co.* (Mich.) 684

13. A policy of insurance issued upon an unfinished building, with knowledge that it is to be occupied by a tenant not named, and conditioned to be void if the property is sold or transferred, or if the title or possession shall be changed from any cause whatever, is not avoided by a letting to a tenant for a term of five years, with the privilege to him to purchase at any time, and his absolute agreement to purchase at the end of the term, although the insurance company had no notice of the agreement to purchase. *Smith v. Phoenix Ins. Co.* (Cal.) 475

14. A married woman may sell and convey her right to recover upon policies of life in-

insurance made payable to her without the intervention of a trustee, under R. I. Pub. Stat. chap. 166, § 8, authorizing her to sell and convey any of her personal property other than that described in § 5, with the same effect as though she was unmarried. *Royal Society of Good Fellows v. Campbell* (R. I.) 601

15. Agreement by the beneficiary in certain life insurance certificates, to the family settlement of the estate of the insured, which provides that they shall go into the general fund and be collected by the administrator for equal distribution among the next of kin; signing a power of attorney to enable the administrator to collect the money due on them; and leaving them with him,—amounts to an equitable assignment of the life insurance fund. *Id.*

16. An insurer of property, upon paying the loss, is entitled to subrogation to the right of the owner to recover from a carrier or bailee primarily liable for such loss. *Deming v. Merchants Cotton-Press & S. Co.* (Tenn.) 518

17. Where the owner of cotton delivered to a compress company as agent for a carrier, under an agreement that the compress company shall procure insurance thereon, has himself procured insurance, an advancement or loan by the insurer of the amount of its policy is a payment of the insurance which will prevent a recovery by either the insurer or the owner for the failure of the compress company to procure insurance, though made on the express condition that it shall be repaid upon such recovery, and though the insurance contract required such loan to be made. *Id.*

18. Arbitration is not a condition precedent to an action on a policy promising to pay a sum certain in case of death, although it provides that no suit shall be brought thereon unless the matter "has been first referred" to arbitration. *Badenfeld v. Massachusetts Mut. Acci. Asso.* (Mass.) 263

19. A provision of the laws of a mutual benefit society formed by the voluntary association of its members, that the determination of the tribunals of the society upon an endowment certificate payable on the death of a member shall be conclusive, and that no suit at law or in equity shall be commenced by any member or beneficiary, is not invalid as against public policy, in ousting the courts of jurisdiction. *Canfield v. Great Camp K. of M.* (Mich.) 625

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INTOXICATING LIQUORS.

The agent of a common carrier is chargeable with aiding and abetting in bringing intoxicating liquors into a city to be sold illegally, where, knowing or having reasonable cause to believe that the purchaser intended to sell them illegally, he habitually delivered them to him, either personally or by his subordinates, although he did not know that the liquors were ordered until they came, and never had or could have anything to do with the transportation until they were brought to the city. *Com. v. Brown* (Mass.) 195

JOINT CREDITORS AND DEBTORS. See JUDGMENT, 3.

JUDGMENT.

1. The entry of judgment on a note containing a warrant of attorney to confess judgment may be made before maturity of the note. *Teel v. Yost* (N. Y.) 796

2. Jurisdiction to render a judgment on a note containing a warrant of attorney to confess judgment may be acquired by the appearance of the party's authorized agent. *Id.*

3. In an action on a joint contract, judgment cannot be rendered against one defendant by default and in favor of the others. *Kingsland v. Koeppe* (Ill.) 649

4. A judgment by default in an action against A. J. Veasey is supported by a return of service of summons on "Jack Veasey, the defendant." *Veasey v. Brigman* (Ala.) 541

5. A joint verdict and judgment against several defendants, some of whom were never served and had not appeared, will be set aside on motion made at the same term. *Haralson v. McArthur* (Ga.) 639

6. A judgment by default will be set aside on application made at the same term, accompanied by an affidavit of merits, where defendant's attorney was absent on account of sickness, with leave of the court, and defendant was also absent because of a public announcement by the judge in open court that none of such counsel's cases would be taken up, and plaintiff's counsel knew that such counsel was in the case, although his name was not marked on the docket. *Id.*

7. Perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a decree, although there is a reasonable certainty that the result of a new trial would be different. *Pico v. Cohn* (Cal.) 336

8. A judgment duly entered in one State on a warrant of attorney is as conclusive in all other States as in the State where it is entered. *Teel v. Yost* (N. Y.) 796

9. A judgment on attachment against a debtor who has brought mortgaged personality into the State is not binding on the mortgagee, who is not a party and whose mortgage is duly recorded in another State where the parties reside. *Hornthall v. Burwell* (N. C.) 740

10. The validity of a decree of divorce granted in another State may be contradicted in a suit involving the legitimacy of a child of a subsequent marriage, on the ground of want

of the period of residence required by the statute of such State. *Adams v. Adams* (Mass.) 275

NOTES AND BRIEFS.

Judgment; confessed on warrants of attorney; conclusiveness; in what cases authorized; form and validity of warrants; strict construction; blanks and omissions; who authorized to make the confession and where; insanity or death of party; entry by executors or administrators; against whom may be entered; in whose favor; when entry may be made; contingencies; unadjusted equities or claims; for what amount; variance; misdescription; proof necessary; consolidation; setting aside; correcting. 796

JUDICIAL SALE. See INFANTS, 2.

NOTES AND BRIEFS.

Judicial sale; doctrine of *caveat emptor* as to. 804

LANDLORD AND TENANT. See also CONTRACTS, 8; COVENANT, 1.

1. A lease for five years of a valuable plantation is not terminated by the death of the lessee, as a contract relating to a business which cannot be carried on without his personal presence. *Alsop v. Banks* (Miss.) 598

2. Abandonment of premises by the lessee, with notice from the landlord that he should hold him for the rents and would let the premises for his account, and the subsequent letting by the landlord for a less price, but the best obtainable,—is not a surrender of the lease which will absolve the tenant from liability for the deficiency. *Id.*

LATERAL SUPPORT.

Excavation by an owner on his own land adjoining another's building, causing damage, without his knowledge or previous notice to him, is evidence of want of care in doing the work. *Schultz v. Byers* (N. J. Ct. Err. & App.) 569

NOTES AND BRIEFS.

Lateral support; duty of owner in making excavations. 569

LEASE. See LANDLORD AND TENANT.

NOTES AND BRIEFS.

Lease; effect of death of lessee. 598

LEVY AND SEIZURE.

1. An execution under a judgment against executors as such cannot be levied on land of which a life tenant under the will had taken possession, with the executors' assent, before the judgment was rendered. *Schley v. Collins* (C. C. S. D. Ga.) 567

2. The proceeds of a policy of insurance on the books and instruments of a physician, which are by statute exempt from sale under execution for his debts, are also exempt. *Reynolds v. Hanes* (Iowa) 719

3. An officer cannot forcibly take personal 18 L. R. A.

property from its owner, who has acquired peaceable possession of it after the officer has levied on it as the property of a third person. *Brownell v. Durkee* (Wis.) 487

NOTES AND BRIEFS.

Levy; liberal construction of exemption laws. 719

LIBEL AND SLANDER. See also TRIAL, 2.

1. Falsely publishing that a person is an "anarchist" is libelous. *Cervený v. Chicago Daily News Co.* (Ill.) 864

2. A person is not liable for statements in disparagement of the title to another's property because a third person has been thereby deterred from purchasing it, unless he made the statements to the latter, or directed or authorized their communication to him. *Burkett v. Griffith* (Cal.) 707

3. A creditor may be guilty of criminal libel in permitting libelous communication to be sent to his debtor by his agents or associates in a collecting agency. *State v. Armstrong* (Mo.) 419

4. The words "Bad Debt Collecting Agency," printed in large bold type on envelopes mailed to a debtor,—especially when mailed in care of his employers,—constitute a criminal libel under Mo. Rev. Stat. 1879, § 1591, as tending to "expose him to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence," etc. *Id.*

5. Words which merely impute a criminal intention to another—such as, "He is going to start a house of ill-fame, so sign a protest against him,"—are not actionable *per se*. *Fanning v. Chace* (R. I.) 184

6. Free and open comment and criticism upon the acts of a person which are matters of public concern are privileged. *Burt v. Advertiser Newspaper Co.* (Mass.) 97

7. The privilege of discussion as to the acts of public persons does not extend to the making of false statements of fact. *Id.*

8. Reasonable cause to believe a libelous charge is no defense for its publication. *Id.*

9. A communication made by the cashier of a bank to a stockholder with reference to the solvency of the plaintiff, who was surety upon an official bond to the bank, is privileged; and it is not necessary, to justify the communication, that it be in response to an inquiry made by the stockholder. *Rothholz v. Dunkle* (N. J. Ct. Err. & App.) 655

10. False statements concerning a candidate for office are not included within the privilege of discussing his character and fitness. *Smith v. Burrus* (Mo.) 59

11. An action for slander of title cannot be maintained for statements causing the breach by a third person of a valid contract to purchase plaintiff's property. *Burkett v. Griffith* (Cal.) 707

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Libel and slander; right to fair criticism of public men. 97

Definition of libel; incidents of. 419

LICENSE. See HIGHWAYS, 2; RAILROADS, NOTES AND BRIEFS.

LIENS.

The insertion, in a contract for the sale of real estate, of a clause binding the vendee to erect certain described buildings on it within a specified time, shows the vendor's consent to such erection so as to render his interest in the property liable for liens for labor and material furnished for them; and its effect is not diminished by the insertion in the contract of a stipulation that mechanics' liens shall be subsequent to those of the vendor. *Miller v. Mead* (N. Y.) 701

NOTES AND BRIEFS.

Liens; New York Law of 1885; judicial construction of; nature and scope of remedy; governed by contract; to what attaches; who are within the Act; sub-contractor or materialman; term "owner" defined; consent of owner; assignment of lien; filing and proof of notice; performance as condition precedent; priority of liens; discharging lien; amount recoverable; costs. 701

LIFE TENANT. See LEVY AND SEIZURE, 1.

LIMITATION OF ACTIONS. See also ESTOPPEL, 8.

1. An equitable remedy to restrain continuous trespasses upon real estate is not barred by the lapse of ten years from the time of the original trespass, under N. Y. Code Civ. Proc. § 388, fixing that limit for actions the time for which is not otherwise specially prescribed. It will not be barred so long as the legal title is in the plaintiff and his right of action at law for injuries is not barred. *Galway v. Metropolitan Elev. R. Co.* (N. Y.) 788

2. An action cannot be maintained upon a simple contract to relieve property from the lien of a judgment, after the expiration of six years, although one entitled to benefit by the obligation is not damaged by its breach in having to pay the judgment himself until after the expiration of that time. *McClure v. Melton* (S. C.) 728

3. The five years' Statute of Limitations applies to an action to set aside the confirmation of a judicial sale of minors' lands at which their guardian had become the purchaser, notwithstanding the ground upon which the claim to relief is based is fraud. *Hindman v. O'Conner* (Ark.) 490

4. An action on a judgment recovered in 1879 in Illinois upon personal service of the defendant, and revived in 1888 according to the statute of that State, without jurisdiction of the person of the judgment debtor, is barred by the Nebraska statute providing that an action on a foreign judgment must be brought within five years from its rendition. *Hepler v. Davis* (Neb.) 565

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Limitation of actions; effect of revival of judgment. 565

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By fire; who must bear. 475

MALICIOUS PROSECUTION.

The malicious prosecution of a civil suit without probable cause is actionable, although defendant is not arrested or his property attached. *Smith v. Burrus* (Mo.) 59

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Malicious prosecution; what must be shown; malice. 463

General rules relating to. 59

MANDAMUS.

Mandamus cannot be issued to compel a court to hear and determine a motion, where the court has already overruled the motion. *Ex parte Hurn* (Ala.) 120

NOTES AND BRIEFS.

Mandamus; defined; discretion as to issuance; when will not lie. 120

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MARSHALING.

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In favor of voluntary covenantee. 723

MASTER AND SERVANT. See also CONTRACTS, 16.

1. The discretion of the master is absolute in selecting which of several styles of apparatus in common use he will use in his business; and he cannot be made to respond in damages to an employé injured while using the apparatus selected, on the ground that some other style might, under the circumstances, have been safer. *Kehler v. Schwenk* (Pa.) 374

2. All ordinary care and supervision must be used by a railroad company to keep its roadway safe for its employes. *McKee v. Chicago, R. I. & P. R. Co.* (Iowa) 817

3. A rule that no lumber, wood, stone, materials, or tools shall be placed within 5 feet of the rail, does not apply to a wing fence at a railroad cattle-guard. *Id.*

4. Placing wing fences at a cattle-guard 3 feet 10 inches from the rails at the bottom, and inclining slightly outward at the top, is not negligence which will render a railroad company liable for the death of a brakeman while hanging low on the side of a freight car looking under it to discover what was causing stones to fly therefrom, where no such accident had ever happened before on the road, or been anticipated, and no complaint had been made of the fences. *Id.*

5. A brakeman must be presumed to know the distance from the rails of wing fences at cattle-guards, so as to charge him with the risk of hanging low on a ladder at the side of a car in order to look under it. *Id.*

6. The mere fact that a servant comes in contact with exposed machinery, the danger of which is well known to him, but the risk from which he has not assumed, is not sufficient to show contributory negligence as matter of law, if his work was in its immediate vicinity and required close attention, rapidity of action, and considerable moving about; but the question is for the jury. *Rouz v. Blodgett & D. Lumber Co. (Mich.)* 728

7. A servant does not, by continuing his work at the command of the superintendent of the mill, assume the risk of injury from dangerous machinery which had, prior to the previous day, been enclosed, and which upon his complaint the superintendent promised to but did not re-enclose the previous night, although he promised in response to the servant's further complaint to fix it at noon, so as to prevent recovery for injuries received by coming in contact with the machinery during the forenoon. *Id.*

8. A railway employé injured in attempting to couple cars while standing between them on the short side of a curve is guilty of contributory negligence, where he had ample opportunity to observe that both drawheads were shorter than usual, and a rule of the company known to him required employés to take time to examine all drawheads before making couplings. *Bennett v. Northern P. R. Co. (N. D.)* 465

9. A loom-fixer in a cotton-mill, whose duty is to look after the looms and keep them in proper repair, is not the fellow servant of weavers employed at the looms, within the rule that the master is not liable for injuries received through the negligence of a fellow servant. *Jacques v. Great Falls Mfg. Co. (N. H.)* 824

10. A coal-dealer who presents a bill and demands payment for coal ordered from him, but delivered by a third person without authority, so ratifies the act of the latter as to make him his servant and become liable for the value of a plate-glass window broken by him in delivering the coal. *Dempsey v. Chambers (Mass.)* 219

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Master and servant; right to wages for part performance of contract; dishonesty as affecting right to wages. 72

Liability for acts of servant. 830

Duty to furnish reasonably safe implements; assumption of risk. 874

Liability for injuries to servant. 817, 825

MAXIMS.

1. Communis error facit jus. *Adams v. Adams (Mass.)* 275

2. Delegatus non potest delegare. *Jamesville & W. R. Co. v. Fisher (N. C.)* 721

3. Nemo est hæres viventis. *Heath v. Hewitt (N. Y.)* 46

4. Qui facit per alium, facit per se. *Nalle v. Paggi (Tex.)* 50; *State v. Armstrong (Mo.)* 419

MERGER. See MORTGAGE, 5, 6.

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MINES. See also DEED, 5.

A grantor in fee of coal underlying his land, with the right to mine and remove the same, cannot—at least before the vein has been exhausted—enjoin the grantee from using tunnels cut through the body of the coal for the removal of other coal from beneath lands adjoining those of the grantor. *Lillisbridge v. Lackawanna Coal Co. (Pa.)* 627

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Mines; conveyance of; rights of owner of surface and of mineral. 627

MONOPOLY. See CONTRACTS; MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

MORTGAGE. See also CONFLICT OF LAWS, 7; CONTRACTS, 4; INSOLVENCY, 1.

1. A deed granting land for a certain money consideration, with a condition that, if the grantor shall support the grantee during her natural life and give her decent burial, the deed shall be void, otherwise it shall remain of full force and effect,—constitutes a mortgage which may be foreclosed on failure to fulfill the condition. *Cook v. Bartholomew (Conn.)* 452

2. An assignment to secure future advances, of a mortgage made to secure an existing debt is not within N. H. Gen. Laws, chap. 136, § 3, providing that no estate conveyed in mortgage shall be held by the mortgagee for any obligation or liability arising after the execution and delivery of the mortgage. *Lime Rock Nat. Bank v. Mourey (N. H.)* 294

3. A mortgagor's placing the mortgage, which he has executed individually to himself as administrator, without recording it, in a receptacle used for keeping papers belonging to himself and the estate, where it is found after his death, is not a delivery; and its subsequent recordation, by his successor, is ineffectual. *Burditt v. Colburn (Vt.)* 676

4. A mortgagee in possession does not lose his rights as such by the fact that his right of action for his debt had become barred by the Statute of Limitations; and he can still resist any action to deprive him of his security. *Spect v. Spect (Cal.)* 187

5. A mortgage on property given to secure payment of its purchase price cannot be kept alive against the mortgagor's estate in favor of one to whom the property was afterwards transferred, and who for his own protection had to make a payment contemplated by the mortgage, where it was never a lien on any other property of the mortgagor. *McClure v. Melton (S. C.)* 728

6. A mortgage does not merge by the acquirement by the mortgagee of the interest of the mortgagor after he has assigned the mortgage, although such assignment was to secure his debt, where he does not regain title to the mortgage. *Lime Rock Nat. Bank v. Mourey (N. H.)* 294

7. No entry for breach of the condition is necessary to enable a mortgagee to maintain an action to foreclose the mortgagor's right of redemption, although the mortgage is in form

a deed absolute with a condition annexed. *Cook v. Bartholomew* (Conn.) 452

8. A mortgagor who has conveyed the lands to a third person cannot exercise any election as to redemption from foreclosure sale. *American Freehold Land Mortg. Co. v. Sewell* (Ala.) 299

9. Under How. (Mich.) Stat. § 6193, a chattel mortgage which was withheld from record for fourteen months is void as against intervening creditors who take possession of the mortgaged goods under a mortgage given after the filing of the first mortgage, to secure a debt incurred before such filing. *Dempsey v. Pforzheimer* (Mich.) 388

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Mortgage; effect of assignment; assignment as collateral; transfer of debt or of bonds or notes secured by mortgage; rights of assignee; priority among assignees. 294

Of chattels; effect of removal of property to another State. 740

Of chattels; registration and filing as equivalent to delivery; validity under Recording Acts; effect of actual notice; renewal; priority of liens; novation; mortgage of stock of goods. 888

MUNICIPAL CORPORATIONS. See also BREAD; BUILDINGS, 1; ELECTRICAL USES AND APPLIANCES; INFUNCTION, 4.

1. A municipal corporation was created by Or. Laws 1891, p. 791, incorporating certain cities named therein as the "Port of Portland," for the purpose of improving the navigation of the Willamette and Columbia rivers between those cities and the sea, so as to maintain therein a ship channel, and conferring on it power to borrow money and levy taxes in the furtherance of that purpose, within the meaning of Or. Const. art. 11, § 2, permitting the creation of municipal corporations by special law. *Cook v. Port of Portland* (Or.) 533

2. The intention to deprive a municipal corporation of its common-law powers will not be inferred simply because certain of such powers are enumerated and conferred upon it by its charter, while no mention is made of the rest of them. *Mount Vernon First Nat. Bank v. Sarile* (Ind.) 481

3. A contract by a city granting for twenty-five years the exclusive right to supply it with water is unauthorized and illegal as attempting to create a monopoly and surrendering the legislative power of the city. *Altgelt v. San Antonio* (Tex.) 383

4. A taxpayer cannot maintain a suit to vacate an illegal contract by a city granting an exclusive right for a term of years to supply it with water, in the absence of averments showing injury to him as a taxpayer,—as, that he is prevented from getting water on better terms, or that he is compelled under the contract to get water from the grantee. *Id.*

5. Notice inviting proposals for a contract to furnish electric lights need not be given by a municipal corporation, unless required by statute, where payment is all to be made from 18 L. R. A.

the corporation treasury. *Crowder v. Sullivan* (Ind.) 647

6. A debt is not incurred by a city at the beginning for the aggregate amount to become due on a contract for electric lights to be furnished for a series of years at a certain sum per year. The debt for each year is incurred only when it has been earned. *Id.*

7. A municipal corporation cannot escape responsibility for the nuisance on the ground that the structure is solely for public use, where, by filling a schoolyard several feet above its natural level, it has pushed over the retaining wall so as to encroach upon and overhang the premises of an adjoining owner. *Miles v. Worcester* (Mass.) 841

8. A city ordinance forbidding the keeping of inflammable or explosive oils within the city without license from the common council, and reserving to the latter the right to grant or refuse the license, dependent upon whether it deems the location and buildings suitable and the person a proper person, and that the license may be revoked at any time at the option of the council,—is invalid as permitting the exercise of an arbitrary discrimination. *Richmond v. Dudley* (Ind.) 587

9. The power to fix the grade of a street cannot be delegated by a city council to a contractor. *Zabel v. Louisville Bapt. Orphans Home* (Ky.) 668

10. A special license may be given for the use of streets by an electric-light company, although a general ordinance is necessary to make regulations as to the mode of using streets. *Crowder v. Sullivan* (Ind.) 647

11. An ordinance requiring the conductor and driver of a street car to keep a vigilant watch for all vehicles and persons on foot, especially children, and stop the car in the shortest time and space possible on the first appearance of danger to them, is valid under a charter which gives power to make ordinances not inconsistent with the general law, and to license and regulate the construction and operation of street railroads. *Fath v. Tower Grove & L. R. Co.* (Mo.) 74

12. An ordinance prohibiting railroad steam whistles to be blown in a city is a nullity so far as it conflicts with the general law of the State requiring whistles to be blown as signals to persons on the track. *Katzenberger v. Lavo* (Tenn.) 185

NOTES AND BRIEFS.

See also BUILDINGS; NUISANCES; STREET RAILWAYS; WEIGHTS AND MEASURES.

Municipal corporations; conflict of ordinance with state law. 185

As trustee of charity. 217

Statutory requirements as to letting contracts. 353

Cannot create a monopoly. 383

Constitutionality of ordinance. 587

NAME. See JUDGMENT, 4.

NOTES AND BRIEFS.

Names; doctrine of *idem sonans*. 541

NATURALIZATION. See COURTS, 8-5.

NAVIGATION. See also EMINENT DOMAIN, 3.

1. The right to exercise a corporate franchise and collect tolls under a charter acquired under the Pennsylvania Act of 1883, for improving the navigation of a stream, cannot be defeated by denying the necessity of the franchise, or questioning the degree of perfection in the improvements made by the company. *Genesee Fork Imp. Co. v. Ives* (Pa.) 437

2. The reasonableness of the tolls charged by a company organized under the Pennsylvania Act of 1883 for improving the navigation of a stream cannot be questioned so long as they are within the limit fixed by the statute. *Id.*

NOTES AND BRIEFS.

Navigation; power of corporation to take tolls for privilege of. 429

NEGLIGENCE. See also CARRIERS, 2; EVIDENCE, 4, 5.

1. It is not negligence *per se* for one voluntarily to risk his own safety or life in attempting to rescue another from impending danger. *Pennsylvania Co. v. Langendorf* (Ohio) 190

2. A person may be warranted in exposing his limbs or life to a very high degree of danger in attempting to rescue another who is in great and imminent danger, and should not be charged in such cases with the consequences of mere errors of judgment resulting from the excitement and confusion of the moment. *Id.*

3. Injury to one who does not rashly and unnecessarily expose himself to danger in rescuing another should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance. *Id.*

4. A railroad company is not liable for injuries to a child trespassing upon its property and injured while playing upon an unfastened and unguarded turntable at a distance of 500 feet from a highway, but having upright standards which could be seen at a distance. *Daniels v. New York & N. E. R. Co.* (Mass.) 245

NOTES AND BRIEFS.

See also TRIAL.

Negligence; in risking danger to save life. 190

Limit of liability for, to direct consequences. 193

Relation to trespass and unwarrantable interference; imminently dangerous acts. 765

NEGOTIABLE PAPERS. See CHECKS, NOTES AND BRIEFS.

NOTARY. See ATTORNEYS, 6; OATH.

NUISANCES. See also ELECTRICAL USES AND APPLIANCES, 2; INJUNCTION, 9; MUNICIPAL CORPORATIONS, 7.

1. The business of slaughtering animals for food is not a nuisance, as a matter of law, in 13 L. R. A.

dependently of the manner in which it is conducted, if the slaughter-house is situated in a new and sparsely settled portion of a city, in the neighborhood of stockyards and other slaughter-houses. *Ballentine v. Webb* (Mich.) 321

2. The noise made by hogs kept in confinement for the purpose of slaughter is not such a nuisance as to justify the destruction of a slaughter-house business for the sole purpose of ridding a neighborhood of such noise. *Id.*

3. That the existence of a slaughter-house depreciates the value of neighboring property is not sufficient ground to justify a decree interfering with the business carried on therein. *Id.*

4. A slaughter-house business will be destroyed by a court of chancery at the instance of persons who move into its neighborhood after it is established, only when it is injurious to health, where it is located at the outskirts of a city, in a locality where similar kinds of business are already established. *Id.*

NOTES AND BRIEFS.

Nuisances; slaughter-house as. 321
Liability of municipal corporation for. 341

OATH.

The omission of venue from a notary public's jurat does not render it invalid, where he is a state officer the record of whose appointment is required to be kept in the office of the secretary of state. *Sullivan v. Hall* (Mich.) 556

NOTES AND BRIEFS.

Oaths; necessity of venue and jurat in affidavit. 556

OFFICERS. See also CONSTITUTIONAL LAW, 2; COURTS, 2.

1. The power of the Legislature to abolish an office and create another with similar duties, in order to provide a place for a certain person, is not limited by a constitutional provision that officers may be impeached or removed in such manner as may be prescribed by law. *State, Yancey, v. Hyde* (Ind.) 79

2. A tax collector is such while he retains his warrants and lists upon which are uncollected taxes, even after the expiration of his term, within the meaning of a statute prohibiting collectors of taxes from being members of the board of selectmen. *Attorney General v. Marston* (N. H.) 670

3. One acquires no title to an office by being elected to it when he was disqualified by statute to hold it by reason of his holding an incompatible office. *Id.*

4. One cannot divest himself of the office of tax collector by resignation, unless his resignation is accepted by competent authority. *Id.*

5. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, in the absence of a special statutory or constitutional provision giving it that effect. *Id.*

6. The commissioners and registrars of election which Tenn. Act March 11, 1890, provides shall be appointed by the governor and the commissioners respectively, are not county officers within Tenn. Const. art. 11, § 17, providing that no county office shall be filled otherwise than by the people of the county court. *Cook v. State* (Tenn.) 183

7. A judge of probate cannot relieve himself from the duty imposed upon him by law of turning over to the State all money received by him as license fees, by showing that it had been lost by the failure of a bank in which he had deposited it in good faith at a time when it enjoyed the confidence of the business world, where the deposits made were general ones, since he had no right to make such deposit, under the Code provision that he could not use the money himself or permit anyone else to use it. *Alston v. State* (Ala.) 659

8. Payment of salary to one who had previously been acting as a *de facto* officer is no defense to a claim for the salary by the officer *de jure*,—especially where he is also the officer *de facto*. *State, Worrell, v. Carr* (Ind.) 177

NOTES AND BRIEFS.

Officers; nature of office; *de facto* and *de jure* distinguished; right to salary. 177

Liability for loss of public funds by failure of bank. 659

Incompatibility of office. 670

OILS. See MUNICIPAL CORPORATIONS, 8.

ORDINANCE OF 1787. See INDIANS, 1.

PARENT AND CHILD.

A minor child who, though married, has separated from her husband and resumed her relations with her mother, cannot maintain an action against the latter for personal injuries suffered by the latter's tort. *Hewlett v. George* (Miss.) 682

NOTES AND BRIEFS.

Parent and child; legitimation by marriage. 275

PARKS. See CORPORATIONS, 4; DEDICATION, NOTES AND BRIEFS.

PARTNERSHIP. See EVIDENCE, 6.

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Partnership; for what business; how proved. 370

Effect of chattel mortgage given by one partner. 685

PARTY-WALL.

The sale of a lot on which half of a party-wall is standing is a use of the wall by the owner, within the meaning of his contract to pay half its value when he used the wall. *Nalle v. Paggi* (Tex.) 50

PAYMENT. See also CHECK, 2, 8; INSURANCE, 17.

A check taken for an antecedent debt is conditional payment only, in the absence of an 18 L. R. A.

agreement to the contrary. *Carroll v. Sweet* (N. Y.) 43

PLEADING. See also ACTION OR SUIT, 10.

1. Inconsistency or repugnancy of allegations is waived by failure to demur. *American Freehold Land Mortg. Co. v. Sewell* (Ala.) 299

2. A general denial which puts in issue the execution of an insurance policy should be verified under the Alabama Code. *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 267

3. To plead a private statute, under Ky. Civ. Code, § 119, subs. 2, a party must at least state its title and the day on which it became a law. *Zabel v. Louisville Bapt. Orphans Home* (Ky.) 668

4. A general averment that decedent was without fault, in an action brought to recover damages for the death of one killed by the fall of a highway bridge, is not overcome by specific averments that he was attempting to cross the bridge with a traction steam-engine, water-tank, and threshing-machine, so as to render the complaint bad. *Wabash v. Carver* (Ind.) 851

5. The complaint in an action to recover damages for slander of title by charging that plaintiff had broken the covenants of certain leases and forfeited all rights thereunder must aver facts sufficient to show that plaintiff had rights under the leases and that there were covenants to be broken; and the want of such averments is not cured by the fact that the leases themselves, from an inspection of which all such facts would appear, were attached as exhibits to the complaint,—at least where they were attached merely to identify the leased land. *Burkett v. Griffith* (Cal.) 707

6. A petition by a taxpayer to restrain the collection of taxes made excessive by an illegal exemption must show the amount in which such taxes have so been made excessive, or allege other facts or amounts from which such excess may be arrived at by mathematical computation. *Altgelt v. San Antonio* (Tex.) 388

7. The defense of incorporation need not be pleaded in an action against defendants as individuals. *Demarest v. Grant* (N. Y.) 854

8. Failure of a complaint to state a cause of action is cured by the filing of a cross-complaint in which the omitted facts are stated, even though a demurrer was interposed. *Cohen v. Knor* (Cal.) 711

9. A cross-bill for cancellation of a contract sued upon, on the ground of usury, must be dismissed if it fails to offer to do equity by paying principal and legal interest. *American Freehold Land Mortg. Co. v. Sewell* (Ala.) 299

10. A plea which states only legal conclusions, instead of facts, is demurrable. *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 267

NOTES AND BRIEFS.

Pleading; scope, nature, and effect of verification. 267

PLEDGE AND COLLATERAL SECURITY.

1. A pledge of stock as security for a note of the pledgor, any surplus or excess of collaterals to be applicable to any other note or claim against him by the bank with which it is pledged, becomes collateral to notes or acceptances of a firm of which the pledgor is a member. *Hallowell v. Blackstone Nat. Bank* (Mass.) 315

2. An agreement by a pledgee to give notice before resorting to the security does not waive a previous default in payment. *Id.*

NOTES AND BRIEFS.

Pledge; of securities; extent of right of pledgee. 815

POLICE POWER. See TELEGRAPHS, 1.

PONDS. See WATERS, 11-15.

POOR. See COMMERCE, 2.

POSSESSION. See ACTION OR SUIT, 1, 2.

POWERS.

A power of attorney to enable an administrator to collect the amount due on life insurance certificates which have been equitably assigned to him is coupled with an interest, so as to be irrevocable. *Royal Society of Good Fellows v. Campbell* (R. I.) 601

PRICE. See CONTRACTS, 5.

PRINCIPAL AND AGENT.

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General rules as to ratification. 219

PRINCIPAL AND SURETY. See also FRAUD AND FRAUDULENT CONVEYANCES, 5.

The surety upon a bond given by a contractor to secure the owner of a building against liens which might be filed against it for materials or labor used by the principal is discharged by the payment to the latter by the owner of a portion of the contract price, which under the contract he was entitled to retain as an additional security against liens. *Kiesig v. Allspaugh* (Cal.) 418

NOTES AND BRIEFS.

Principal and surety; indemnity of surety. 340

Strict rule as to construction of liability of surety. 418

PRIVITY. See ACTION OR SUIT, 4; CUSTOM; VENDOR AND PURCHASER, 2.

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As ground for new trial. 536
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PROPERTY IN SECRETS. See SECRETS, NOTES AND BRIEFS.

PROXIMATE CAUSE. See CARRIERS, 8; DEFINITIONS, 3.

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Proximate cause of damage. 738

PUBLIC IMPROVEMENTS. See also MUNICIPAL CORPORATIONS, 9.

1. An exemption of a charitable institution from "all taxation by State or local laws, for any purpose whatever," does not extend to assessments for street improvements. *Zabel v. Louisville Bapt. Orphans Home* (Ky.) 668

2. A petition to enforce a lien for a street assessment is fatally defective if it fails to show that the city council, and not the contractor, fixed the grade of the street. *Id.*

QUARANTINE.

Under the Florida Act of 1885 (chap. 3608) and the Acts *in pari materia* prior thereto, county boards of health have no authority, without an examination or inspection, to require vessels, upon entering ports within the jurisdiction of said boards, to deviate from their course 6 miles and go to a quarantine station for inspection and examination. *Forbes v. Escambia County Bd. of Health* (Fla.) 549

RACE.

NOTES AND BRIEFS.

Implied reservation of use of. 657

RAILROADS. See also DUMMY RAILROADS; HIGHWAYS, 8; MUNICIPAL CORPORATIONS, 12; NEGLIGENCE, 4.

1. A railroad company is liable for damages caused by an embankment for its track along the margin of a river the accumulated waters of which, in times of flood, had previously escaped on that side, but which because of the embankment overflowed the opposite side more than it had done before, and injured land there situated. *O'Connell v. East Tennessee, V. & G. R. Co.* (Ga.) 394

2. A railroad company is liable for injury to property by fire set by its engines through its negligent act, although not done on the same day or at the same place as the setting of the fire. *Missouri P. R. Co. v. Cullers* (Tex.) 542

3. A railroad company is not liable for damages from fire set by its engines, when it has used due care and has provided its engines with the best improved spark-arresters. *Id.*

4. Mere knowledge by a railroad company that many persons, including children, frequently pass through its yard in a populous part of a city and crawl under its cars stored upon its tracks, does not render it liable for injuries to a child under such cars by a sudden movement thereof by the negligence of its servants in running other cars against the end of the line hundreds of yards away. *Central R. & Bkg. Co. v. Rylee* (Ga.) 634

5. A common hand-car standing on the

ground beside a railroad track is not a thing dangerous in and of itself, which a railroad company is required to guard or lock. *Robinson v. Oregon Short Line & U. N. R. Co.* (Utah) 785

6. It is not negligence to leave a common hand-car weighing from 600 to 700 pounds, 6 feet from a railroad track and 4 or 5 feet below it, a mile from the thickly settled part of a city and a quarter of a mile from the nearest house, and let it remain there over Sunday unlocked and unguarded, so as to render its owners liable in damages for the death of a boy eleven years old, who, while riding on it with other boys who had replaced it on the track, fell off and was run over and killed. *Id.*

7. The duty to keep a "person upon the locomotive always upon a lookout ahead," imposed upon every railroad company by Tenn. (Mill. & V.) Code, § 1298, in default of which it is, by § 1299, made responsible for all damages from accident or collision, is not performed by keeping a lookout at the head of the train if the engine is at the rear. Both must be in front in order to comply with the statute. *Little Rock & M. R. Co. v. Wilson* (Tenn.) 864

NOTES AND BRIEFS.

See also CARRIERS.

Railroads; statutory provisions to prevent accidents. 185

Duty to avoid injury to trespassers. 248

Negligence in passing between or under cars; implied license to go upon railroad track. 684

RATIFICATION. See CORPORATIONS, 8; HUSBAND AND WIFE, 4; MASTER AND SERVANT, 10; PRINCIPAL AND AGENT, NOTES AND BRIEFS.

REAL PROPERTY. See also DEED, 5, 10.

A conveyance to the "heirs" of the grantor's son, who has children then living, reserving to him a life estate after life estates in the grantor and another, is a present grant of the fee to the children. *Heath v. Hewitt* (N. Y.) 46

NOTES AND BRIEFS.

Real property; legislative control over; Recording Acts; object of such Acts; registry of mortgage as notice; statutory forms of registration; effect of failure to record. 285

RECEIVERS.

The amount to be paid for the joint use of a street-railway track in the hands of a receiver may be determined by the court on a petition, where the statutes give the right to such use on payment of half the cost of construction; and there is no right to a jury on the ground that it involves the exercise of the right of eminent domain. *Pacific R. Co. v. Wade* (Cal.) 754

RECORDING ACT. See REAL PROPERTY, NOTES AND BRIEFS.

RELATIONS. See DEFINITIONS, NOTES AND BRIEFS.

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RELIGIOUS SOCIETIES.

1. The majority of the members of a Baptist church, although it is independent in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants, and, on attempt to do so, may be enjoined from interfering with the proper use and control of the property by the minority. *Mt. Zion Baptist Church v. Whitmore* (Iowa) 198

2. The decision of a Baptist council on the joint call of both factions of a Baptist church, which agree to accept it as final, that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive and may be adopted by a court as the basis of its action in giving the control of the church property to the other faction. *Id.*

NOTES AND BRIEFS.

Religious societies; by what law governed; title of church property; distinction between church and corporation; jurisdiction of courts. 198

REPLEVIN.

1. Replevin will not lie for goods in the hands of a sheriff by virtue of a search warrant in proceedings to declare a forfeiture, even if they are in the original packages in which they were brought into the State and the plaintiff is therefore entitled to have them restored to his possession. *Lemp v. Fullerton* (Iowa) 408

2. Jurisdiction to grant a continuance in proceedings for the forfeiture of goods cannot be inquired into in replevin for the goods against the sheriff. *Id.*

NOTES AND BRIEFS.

Replevin; for property in legal custody. 408

RESERVATION. See DEED, EASEMENTS, NOTES AND BRIEFS.

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RIGHT OF WAY. See EASEMENTS, NOTES AND BRIEFS.

RIPARIAN RIGHTS.

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As to alluvion, reliction, erosion, etc. 411

SALE.

1. A contract to deliver ice of a certain described quality and thickness is an express warranty that the ice when delivered shall be of such quality and thickness. *Morse v. Moore* (Me.) 224

2. Acceptance of merchandise under an executory contract of sale warranting it to be of a certain quality does not necessarily terminate the obligation of the vendor; but it is evidence of complete performance or of waiver, the conclusiveness of which is to be determined from all the circumstances of the case. *Id.*

3. The vendee in a contract to sell and de-

liver at a certain place for shipment ice of a specified quality and thickness, who does not see the ice until it reaches its destination, and who then immediately notifies the vendor that it is not according to contract, may set up its inferiority in defense of an action for its price, although he receives, stores, and attempts to dispose of it. *Id.*

4. Representations privately made in regard to property which has been advertised for sale at public auction may become the foundation of an action for breach of warranty in favor of one who, in reliance on them, bids in the property. *Crossman v. Johnson* (Vt.) 678

NOTES AND BRIEFS.

See also **Loss.**

Sale; warranty before or after. 678

When purchaser acquires no title. 717

SCHOOLS. See also **HIGHWAYS**, 1.

1. The teaching of the German language in "any school of a township, town, or city," which is required by Ind. Rev. Stat. 1881, § 4497, on demand of the parents or guardians of twenty-five or more children, cannot be restricted by the board of school commissioners of a city to schools of certain grades, but may be compelled in any place in the city where a public school is taught, with its complement of teachers and scholars. *Indianapolis School Comrs. v. State, Sander* (Ind.) 147

2. A child living with a domiciled resident and taxpayer of a school district as a member of his family, with the expectation, on the part of all parties interested, that this relation will continue permanently, although she has never been formally adopted and may not have a domicile, in the technical sense of that term, in the district, has a "residence" in that district for school purposes, and cannot be compelled to pay tuition as a nonresident. *Yale v. West Middle School Dist.* (Conn.) 161

NOTES AND BRIEFS.

Schools; regulation of privileges by statute. 161

SEARCH. See **ARREST**, 2.

SECRETS. See **CONTRACTS**, 12; **COVENANT**, 2.

NOTES AND BRIEFS.

Secrets; property in. 653

SET-OFF AND COUNTERCLAIM.

A surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent. *Clark v. Sullivan* (Minn.) 233

NOTES AND BRIEFS.

Set-off; by surety of joint indebtedness. 233

SETTLEMENT. See **EXECUTORS AND ADMINISTRATORS**, 5.

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SHERIFFS. See also **DEPUTIES**, **NOTES AND BRIEFS.**

An infant may be appointed a deputy sheriff unless otherwise provided by statute, although under the State Constitution he cannot be an "officer." *Jamesville & W. R. Co. v. Fisher* (N. C.) 721

SHIPPING. See **CARRIERS**, 1; **HEALTH**, 1.

SLANDER OF TITLE.

NOTES AND BRIEFS.

Action for, to personal property; slander of quality of goods or property; charging infringement; denying right to sing copyrighted song; malice; good faith; special damages; proofs; joinder of parties. 707

SLAUGHTER-HOUSE. See **NUISANCES**.

SLEEPING-CAR COMPANY. See **CARRIERS**, 15.

STAIRWAY.

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Implied reservation of use of. 657

STATUTE OF FRAUDS. See **CONTRACTS**, 6-9.

STATUTES. See also **APPROPRIATIONS**, 1.

1. The title of an Act which states that it is to abolish one office and create another is not defective on the ground that the new office is the same as the old one. *State, Yancey, v. Hyde* (Ind.) 79

2. That portion of Kan. Laws 1879, chap. 80, § 15, relating to the registration of voters, which prescribes a criminal punishment for improperly registering the names of voters, is not unconstitutional or void on the ground that the title to the Act is not broad enough to authorize that provision. *State v. Bush* (Kan.) 607

8. Tenn. Act March 11, 1890, to provide for purity of elections, is not in conflict with Tenn. Const. art. 11, § 8, as class legislation, because it applies only to counties of 70,000 and cities of 9,000 population. *Cook v. State* (Tenn.) 133

STOCK CERTIFICATES. See **STOLEN PROPERTY**, **NOTES AND BRIEFS.**

STOLEN PROPERTY. See **TROVER**.

NOTES AND BRIEFS.

Rights of owner of stolen stock certificates. 605

STREET RAILWAYS. See also **MUNICIPAL CORPORATIONS**, 11; **RECEIVERS**.

Failure to observe the degree of care in running a street car which is required by a valid ordinance imposing a penalty therefor renders the street-car company liable to a person who is injured in consequence, although such degree of care may be higher than that which would

otherwise be required by law. *Fath v. Tower*
Grove & L. R. Co. (Mo.) 74

NOTES AND BRIEFS.

Street railways; effect of municipal ordinance concerning; liability for injury to pedestrians. 74

SUBROGATION. See also **INSURANCE**, 16.

1. Attorneys who have been induced to act for and have taken a mortgage from an incompetent person, because of the latter's false and fraudulent representation that he had been adjudged competent, and in order to protect their mortgage have in good faith paid a judgment which was about to be enforced against the land, are entitled to be subrogated to the lien of the judgment, whether or not the debtor was insolvent. *Spaulding v. Harvey* (Ind.) 619

2. The doctrine of subrogation cannot be invoked for the enforcement of a judgment against the estate of one who agreed to pay it as part of the consideration for property which he bought subject to its lien, in favor of one who afterwards bought the property from him with notice of the judgment, and who was compelled to pay it for his own protection, where there was no privity between him and the one with whom the agreement was made, and the judgment was against the latter and primarily payable out of the property purchased. *McClure v. Melton* (S. C.) 728

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Subrogation; defined; doctrine of; nature and scope. 619

SUBSCRIPTION.

Subscribers of money and land to induce a third person to establish a manufactory in a certain community, the entire cost of which is nearly four times the value of the subscriptions, cannot, in the absence of a stipulation as to the time the business shall be continued, maintain an action to recover back their subscriptions or to enjoin a removal of the machinery, if, after an honest and faithful attempt for two and a half years to render the business a success, it proves a losing venture. *Ayres v. Dutton* (Mich.) 698

SUNDAY. See **INSURANCE**, 6.

SUPPORT. See **MORTGAGE**, 1.

TAXES. See also **DOWER**; **INDIANS**, 2; **OFFICERS**, 2.

1. A city cannot exempt a waterworks company from taxation, or relinquish its taxes in consideration of its furnishing water to the city at a reduced rate. *Algelt v. San Antonio* (Tex.) 383

2. The constitutional requirement that taxation must be equal and uniform is not infringed by erecting the land bordering on the principal harbor of a State into a special taxing district and levying taxes on the inhabitants thereof, for the purpose of maintaining the harbor, although the remainder of the State is benefited by such taxation in some degree, if the exist-

ence of the cities and towns upon the harbor depends upon its maintenance. *Cook v. Port of Portland* (Or.) 533

3. A Baptist orphans' home is a charity, and as such renders a public service for which it may be lawfully exempted from taxation by the Legislature. *Zabel v. Louisville Bapt. Orphans Home* (Ky.) 688

4. The owner of national bank stock is not entitled, for the purposes of taxation, to deduct his bona fide indebtedness from the value of his shares, under U. S. Rev. Stat. § 5219, providing that taxation thereon shall not be at a greater rate than is assessed upon other moneyed capital in the State, when the owners of shares in state banks are not entitled to such deduction, although such indebtedness is allowed to be deducted from a small proportion of the moneyed capital in the State which does not come into competition with the national banks. *Bresler v. Wayne County* (Neb.) 614

5. Taxation of the excess in value of the capital stock of a corporation over that of its tangible property subject to taxation is not prohibited by a statutory provision that when the tangible property of a corporation is, its shares of capital stock shall not be, listed and assessed for taxation. *Hyland v. Central Iron & S. Co.* (Ind.) 515

6. A foreign country is "another State," within the meaning of Vt. Rev. Laws, § 270, exempting stockholders in Vermont from a tax on their shares in a foreign corporation if the stock is taxed where the corporation is situated. *Poster v. Stevens* (Vt.) 106

7. A corporation of another State "is taxed by such State for all its stock," within the meaning of Vt. Rev. Laws, § 270, so as to relieve stockholders in Vermont from a tax on their shares, when it is subject to an annual tax assessed according to the amount of its paid-up capital. *Id.*

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Exemption of Indians from. 513

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On capital stock of corporation. 515

TAXPAYERS. See **INJUNCTION**, 6; **MUNICIPAL CORPORATIONS**, 4.

TELEGRAPHS. See also **DAMAGES**, 1.

1. Legislative authority to a telegraph company to construct its lines along and upon any public roads and highways grants to it no interest in the streets of the city, but must be construed as conferring a license which, although acted on, may be revoked by the Legislature whenever the public interest requires, or as an exercise of the police power, and therefore not beyond the control of future legislation. *American Rapid Teleg. Co. v. Hess* (N. Y.) 454

2. Granting a telegraph company a fran-

chise to construct its line along and upon city streets will not be construed as an abdication of the police power over such streets; but if the poles and wires become a serious obstruction or nuisance therein, provisions may be made for their removal; and for that purpose the company may lawfully be directed to place its wires under ground, commissioners may be appointed to see that the work is done, and a contract made for the construction of conduits in which the wires can be placed, and, if after due notice they are not removed, they may be cut down. *Id.*

3. That under the Acts of Congress telegraph companies have the right to erect and maintain their lines along and upon the public streets of a city will not prevent the State in which such city is located from requiring the wires to be placed under ground. *Id.*

4. A stipulation in a telegraph blank exempting the company from liability for mistakes and delays in the transmission of un-repeated messages will not prevent recovery of the full damages occasioned by a mistake resulting from the negligence of the company's servants. *Wertz v. Western U. Teleg. Co. (Utah)* 510

NOTES AND BRIEFS.

Telegraphs; subject to police power. 454
Stipulations against liability in respect to. 510

TIME. See also VOTERS AND ELECTIONS, 14.

Intervening Sundays cannot be excluded from the twenty days limited for an election contest, where the rule for computation of time is fixed by a statute requiring the first day to be excluded and the last included, unless it is Sunday. *English v. Dickey (Ind.)* 40

TOLLS. See NAVIGATION, 2.

TOWN. See WATERS, 12.

TRADE-MARK.

1. No trade-mark can be claimed in the shape of a bottle in which extracts are put up for sale. *Hoyt v. Hoyt (Pa.)* 343

2. No exclusive right can be acquired by adoption in a cap label for a bottle, which was originated by a third person and has been used by him for years. *Id.*

3. Neither the shape of a box in which bottles of extracts are packed for purposes of trade, nor the mechanical arrangement of the bottles therein, is subject to appropriation as a trade-mark. *Id.*

4. Combining a label and a bottle cannot infringe a trade-mark, if the separate use of each would not have that effect. *Id.*

5. The International Cigar-Makers' Union, the object of which is "to promote the mental, moral, and physical welfare of its members," is neither a manufacturer, dealer, nor trader, so as to be entitled to protection in the use of a trade-mark. *McVey v. Brendel (Pa.)* 377

6. Equity will not protect a labor union in the use of a non-trademark label which it

distributes to all its members to be placed upon their work, the object of which is to discriminate between union and non-union labor, and to coerce the latter into joining the union, by recommending to the public the goods on which such labels appear because made by union labor, and denouncing all other goods as the product of "inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship." *Id.*

7. The goodwill and all trade-marks not personal in their character, of an insolvent manufacturing company, will pass to a purchaser at a sale of the plant by the assignee for benefit of creditors, under an assignment transferring all the property of whatever kind owned by the insolvent, and an advertisement of sale describing the property as "old, established, and valuable cotton-duck mills." *Wilmer v. Thomas (Md.)* 380

NOTES AND BRIEFS.

Trade-mark; rights in and protection of. 377
Infringement of. 343

TRESPASS. See ACTION OR SUIT, 3.

TRIAL. See also RECEIVERS.

1. A verdict need not specify whether it is for actual or exemplary damages, where the issues of actual and exemplary damages are not separately submitted to the jury. *Heiligmann v. Rose (Tex.)* 272

2. The jury are final judges of the law as well as of the facts in a prosecution for criminal libel, under Mo. Const. art. 2, § 14, although the judge should assist and inform them what the law is. *State v. Armstrong (Mo.)* 419

3. The attention of the jurors should not be drawn to the price for which they would be willing to suffer the injury for which they are to assess damages, in laying down the rules which are to guide them in making such assessment. *Kehler v. Schwenk (Pa.)* 374

4. A signature to a receipt by one receiving payment of a savings bank deposit, which does not seem exactly right to the bank officials, is sufficient to make a question for the jury as to negligence in paying over the money to him,—especially where the genuine and forged signatures are both in evidence. *Kummel v. Germania Sav. Bank (N. Y.)* 786

5. Whether or not a policy of insurance taken out by a creditor on the life of his debtor, to secure his debt, is so excessive as to be a wager policy, is a question for the court where the facts are not in dispute. *Ulrich v. Reinsch (Pa.)* 483

6. Evidence tending to show the organization of a bank under a legal charter, the holding of stock in it, and the receipt of dividends thereon, is sufficient to make a question for the jury whether the bank was not a corporation rather than a partnership concern. *Hallstead v. Curtis (Pa.)* 370

7. A nonsuit is properly refused in an action to recover damages for personal injuries, where the evidence shows that plaintiff was a weaver having charge of looms in defendant's mill; that a shuttle could not fly out of a loom unless

the machinery was defective or out of repair; that plaintiff had no knowledge of and was not permitted to meddle with the machinery, but in case it appeared out of repair must inform a person employed for the purpose of repairing looms; that on the day of the accident one of the looms did not work right, the shuttle flying out and sticking; that the loom-fixer was called three times to repair the loom, and after making what repairs he thought necessary each time again set the loom running; that plaintiff watched the loom more closely than the others because afraid of its action, and that shortly after it was fixed the last time a shuttle flew out, inflicting the injury complained of. *Jacques v. Great Falls Mfg. Co. (N. H.)* 824

NOTES AND BRIEFS.

Trial; question for jury as to negligence. 728

Nature and scope of judge's charge; instructions upon hypothetical state of facts; requests to charge. 272

TROVER.

A stockbroker who receives stock from one who has stolen it, sells the same, and pays over the proceeds to his principal, is liable to the true owner for its value, although he has acted in good faith, without notice, and in reliance on the thief's representations of ownership. *Swim v. Wilson (Cal.)* 605

TRUSTS. See also **CONTRACTS**, 9; **DESCENT AND DISTRIBUTION**, 1; **OFFICERS**, 7.

1. A gift by a will of the use of the profits of a plantation to a person, "under his superintendence," but not to be "bound for his past debts, or for future debts and liabilities other than decent and comfortable support," does not give him any absolute property in the profits, but he holds them as trustee for the remaindermen, except as to what he needs for "decent and comfortable support." Therefore such profits cannot be reached by his creditors. *Day v. Slaughter (Va.)* 212

2. A valid trust for the support of a person may be created which shall be free from his debts and liabilities. *Id.*

3. Municipal officers to whom, as such, money has been given in trust under authority of a statute, have no vested right therein which prevents the Legislature from transferring the trust to other officers; and this rule is not changed by the fact that the trust is private in its nature, and not one recognized as charitable. *Smith v. Wescott (R. I.)* 217

NOTES AND BRIEFS.

Trusts; in case of confidential relations; purchase of trust property by trustee; relief from. 490

For spendthrifts; validity of; discretion of trustee. 212

UNION DEPOT COMPANY.

1. Railroad companies entering the city of St. Paul since the organization of the St. Paul Union Depot Company are entitled, for the purpose of becoming members of the corporation. 18 L. R. A.

tion and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value. *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co. (Minn.)* 415

2. If necessary for this purpose, and for a proper apportionment of the stock, the existing members may be required to surrender or sell a part of the stock held by them. *Id.*

NOTES AND BRIEFS.

Union depots; formation of. 415

UNSOUND MIND. See **INSANE PERSONS**, **NOTES AND BRIEFS**.

USURY.

NOTES AND BRIEFS.

What law governs. 299

VACCINATION. See **ASSAULT AND BATTERY**.

VENDOR AND PURCHASER. See also **ATTACHMENT**; **INJUNCTION**, 2.

1. A purchaser of lots according to a plat showing them bounded by a definite line at a specified distance from the front boundary acquires no riparian rights in lands covered by tidewater, at the rear of such lots. *Kenyon v. Knipe (Wash.)* 142

2. The grantee in a quitclaim deed without warranty, who takes the property with notice that it is subject to a judgment lien, cannot, upon paying the judgment for his own protection, maintain an action against his grantor to recover the amount paid; and it is immaterial that the latter may have assumed payment of the lien by contract with a third person. *McClure v. Melton (S. C.)* 723

3. One who was fully put on inquiry as to the facts regarding a dedication of property as a park, and who has made a laborious investigation, is not a bona fide purchaser without notice because he came to the erroneous conclusion that there was no dedication. *Attorney-General v. Abbott (Mass.)* 251

4. A vendor has a lien on land sold by contract, as security for a purchase-money note. *Gessner v. Palmater (Cal.)* 187

NOTES AND BRIEFS.

Vendor and purchaser; right to vendors' lien; waiver and assignment of. 187

Remedies of purchaser for continuing trespasses. 401

Right of vendee to remove buildings before conveyance. 680

VENUE. See **OATH**.

VOLUNTARY CONVEYANCE. See **DEED**, **NOTES AND BRIEFS**.

VOTERS AND ELECTIONS. See also **OFFICERS**, 6.

1. Registering a qualified voter without his appearing in person as required by law, when

done without fraudulent intent, is not punishable as a felony under the Kansas statute, which declares that a violation of the statute shall be a felony. *State v. Bush* (Kan.) 607

2. An Act requiring a voter to place a mark opposite the name of each candidate voted for by him does not conflict with Tenn. Const. art. 4, § 1, as imposing the requirement of education on the part of the voter in addition to the constitutional requirements. *Cook v. State* (Tenn.) 188

3. A ballot having on its back an "offset," or faint impression of the printing on a similar ticket, will not be rejected under Cal. Pol. Code, § 1206, as bearing any device, etc., designed to distinguish it, without proof that the impression was the result of design. *Rutledge v. Crawford* (Cal.) 761

4. The presumption is that an "offset," or faint impression of printing, on the back of a ballot, or a grease stain or small piece of sealing wax thereon, was the result of accident. *Id.*

5. A small piece of sealing wax or a small grease stain on the back of a ballot will not prevent counting it, unless it is shown not to be accidental. *Id.*

6. A ticket having the names of two candidates for judge and one for senator arranged and numbered in consecutive order cannot be counted for another candidate for judge whose name is written on the line for and in the place of the name of the senatorial candidate, which is erased. *Id.*

7. The use of an indelible pencil in erasing and substituting the name of a candidate on a ballot is within the spirit of, and a substantial compliance with, a statute which requires it to be done with "a lead pencil or common writing ink" in order to permit the ballot to be counted. *Id.*

8. Red ink is common writing ink within the meaning of such a statute. *Id.*

9. Erasing the name of a candidate will not prevent counting a ballot for him, under the California statute, unless another is substituted, or the words "no vote" written thereon after his name. *Id.*

10. The failure of a contestant to file a statement sufficient to show his own eligibility to a disputed office will not prevent relief to the extent of annulling the certificate of election of the opposing candidate, who has been illegally declared elected. *Id.*

11. An amendment of the statement of a contestant of an election may be made to show his eligibility, after the cause has been remanded from an appellate court. *Id.*

12. The name of the political party sufficiently appears at the head of a ballot, where it is combined in a vignette, without repeating the name in a separate heading. *Shields v. Jacob* (Mich.) 760

13. The regularity of either of the tickets nominated by the separate divisions of a split convention cannot be determined by election commissioners in preparing ballots, but they must print thereon the names of both sets of candidates, and give for each set the party name as certified by the committee presenting

it, without addition or distinctive designation. *Id.*

14. The twenty days' limitation of the time "to adjourn or continue the trial" of an election contest under Ind. Rev. Stat. 1881, § 4761, begins when the board has first convened and organized to enter upon the investigation, although the trial does not begin at that time. *English v. Dickey* (Ind.) 40

15. The adjournment of an election contest at the request of the contestor, to a day beyond the time limited by statute for the investigation, absolutely discontinues the proceeding, and even the consent of the parties cannot keep it alive longer. *Id.*

NOTES AND BRIEFS.

Voters and elections; practice on election contests. 40

Marks or devices to distinguish ballot. 761

WARRANTY.

The vendee of a chattel purchased by negotiable note which has been transferred to a third party may recover on the vendor's warranty, though the note has gone to judgment at law, upon which an execution has been returned unsatisfied. *Volland v. Baker* (Neb.) 140

WATERS. See also EMINENT DOMAIN, 1, 2, 5; EQUITY; HARBORS, 1; INJUNCTION, 3; RAILROADS, 1.

1. Riparian rights of the owner of lands upon the shore of navigable waters, to reclaim and occupy land under shallow water, may be dissociated from the upland by the owner, so that conveyance of the upland will not include such rights. *Gilbert v. Eldridge* (Minn.) 411

2. An owner of upland on the shore of navigable waters, who plats the same and the land under water into blocks and streets, dissociates his riparian rights from the upland, so that they do not pass by the conveyance of upland lots. *Id.*

3. An inland block purchased according to a map showing blocks and streets between it and navigable waters and under shallow water does not acquire as an incident riparian rights to reclaim and improve the lands under water opposite it, by the gradual wearing away of the shore until the shore line reaches it. *Id.*

4. The right of a riparian owner to construct dams and divert for manufacturing purposes the water of a stream which is used by the public for floating logs is limited by the extent to which it can be done without interfering with the public rights, which are measured by the capacity of the stream in its natural condition. *Connecticut River Lumber Co. v. Olcott Falls Co.* (N. H.) 826

5. The right of the public to float logs on a stream will not be presumed to have been relinquished by the grant of a charter to a manufacturing corporation giving power to purchase and hold real estate on the stream, improve the water-power, and make and maintain on or across the stream the works necessary to accomplish the corporate objects, unless such relinquishment is absolutely

necessary to the exercise of the corporate franchises. *Connecticut River Lumber Co. v. Olcott Falls Co.* (N. H.) 826

6. Legislative authority to a manufacturing company to purchase, hold, and enjoy the powers and privileges of a corporation which had been organized to construct a canal around the falls in a stream used by the public for floating logs, subject to the duties and liabilities binding on said "rights, powers, and privileges," will subject the manufacturing corporation to a limitation which had been imposed upon the company not to interfere with the free passage of lumber down the stream. *Id.*

7. The abandonment by the State of the public right to float logs down a stream when it grants a manufacturing corporation the right to make use of the water-power thereon will not be inferred from the fact that the manufacturing business may be more important than the lumber business. *Id.*

8. The mere conveyance by the State of the bed of a stream which has been used by the public for floating logs will not operate as a relinquishment of the public right. To have that effect the intention must be distinctly expressed. *Id.*

9. If a judicial location of a log-way over a dam which has been erected for manufacturing purposes becomes necessary, the convenience of the millowners will be consulted so far as it reasonably may be without a violation of the public rights. *Id.*

10. The right of the owner of land bordering on a stream to use it as a pasture in a reasonable way is not affected by the fact that the waters are thereby made unfit for use, although the waterworks of an incorporated company have been established lower down, to supply the public with water from that stream. *Helfrich v. Catonsville Water Co.* (Md.) 117

11. The title to great ponds passed under deeds from Plymouth Colony, which plainly intended to convey them, although the intention appears only from the habendum clauses of the deeds, no mention of them being found in the granting clauses. *Watuppa Reservoir Co. v. Fall River* (Mass.) 235

12. The fact that a town was incorporated two years after the Colonial Ordinance of 1647, declaring the public rights in great ponds, became law, with boundaries nearly coincident with those of a prior private land grant, will not cause the territory embraced thereby to be treated as town property, in determining the application of the ordinance to ponds situated therein, where the town is not shown to have ever assumed proprietorship over the land or ponds, and they appear to have been always dealt with as private property. *Id.*

13. The rights in a great pond which had been appropriated to private persons, and was held by them as private property at the time the Colony Ordinance of 1647, declaring the public rights in great ponds, became operative, were not affected by that ordinance. *Id.*

14. Where a colony conveyed a portion of a great pond to private owners prior to the taking effect of the Ordinance of 1647, which de-

clared the public rights in great ponds, neither it nor its subsequent grantee of the remaining portion could, as owner and apart from the exercise of sovereign powers, draw off the water of the pond to the detriment of the prior grantees. *Id.*

15. Although the Ordinance of 1647, declaring the public rights in great ponds, became applicable in Plymouth Colony as part of the common law, the fiction that the common law has existed immemorially does not require its application to transactions which arose prior to the Province charter which made such law applicable therein. *Id.*

NOTES AND BRIEFS.

See also NAVIGATION.

Waters; rights as to floatage of logs; what streams navigable.	826
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WATER SUPPLY. See MUNICIPAL CORPORATIONS, 3.

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WILLS.

1. A direction by a testator in his will, that his wife "shall have and hold the property" where he resides, will carry to her the fee. *Snider v. Baer* (Pa.) 359

2. A fee which has been given by a will cannot be cut down to a life estate by a subsequent clause directing that the legatee shall have "the sole control of the property" during his lifetime. *Id.*

3. A direction in a will that testator's real estate shall be sold whenever his widow shall direct, and the proceeds paid over to her, and that she "shall have power to dispose of the same by bequeath or as she directs,"—is an absolute gift of the money to her. *Id.*

4. No obligatory trust is created by a will giving all of testator's estate to his wife, with a request that, if she does not require the whole of it as a support, she will, at her death, will the remainder to certain other persons named. *Bryan v. Milby* (Del. Ch.) 563

5. He who accepts a benefit under a will must adopt the whole contents of the instrument, renouncing every right inconsistent with it. *Schley v. Collis* (C. S. D. Ga.) F 1

6. The respective legacies vest at the death of the testator, under a will converting the estate into money, and directing the distribution of one third of it in equal shares among children of testator's son, and in case of death of any child before the payment to of his share, such share to be divided bet the survivors; and no share is divested at death of a legatee before actually received. *Wengert's Appeal* (Pa.)

NOTES AND BRIEFS.

See also TRUSTS.

Effect of precatory words.	563
Construction of devise as life estate or fee.	359
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WITNESSES.

1. Plaintiff's deposition taken in a suit at law during the lifetime of the original defendant cannot, under Miss. Code 1880, § 1602, forbidding any person to testify to establish his claim against the estate of a deceased person originating in the latter's lifetime, be received in evidence against the estate of the original defendant after his death and a revivor of the cause, although his deposition might have been taken at the same time as plaintiff's. *Hewlett v. George* (Miss.) 683

2. One interested in the result of a suit which is in effect between the estates of two deceased persons, although brought against an executor individually, because of a right to share in the estate of one of the deceased persons, is excluded by Mich. Pub. Acts 1885, pp. 156, 157, as "an opposite party," from testifying to facts equally within the knowledge of the other deceased person, although the witness is not a party on the record. *Penny v. Oroul* (Mich.) 88

8. "The opposite party" whose testimony is excluded by Mich. Pub. Acts 1885, pp. 156, 157, is not a party on the record. *Penny v. Oroul* (Mich.) 88

157, as to matters equally within the knowledge of a deceased person, in a suit by the heirs, assigns, devisees, legatees, or personal representatives of the latter, means the opposite party in interest, and does not include an executor who has no personal interest in the controversy, which is simply one between the estates of two deceased persons. *Id.*

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WOMEN. See ATTORNEYS, 1, 2, NOTES AND BRIEFS; DEPUIES.

WRIT AND PROCESS. See also JUDGMENT, 4.

Process cannot be served in Iowa by leaving a copy with a member of his family at his alleged usual place of residence, upon one who has gone to another State with the intention of taking up his residence there, and has there engaged in business, voted, sat upon juries, and discharged other duties of a citizen, but has not for several years removed his family there, and has at intervals visited them in Iowa, where he has had from the first an intention ultimately to remove them to such other State, and has never relinquished or altered it. *Schlawig v. De Peyster* (Iowa) 785

E. L. B.

